The evolution of labour law in the EU-12

(1995-2005)

Volume 3

European Commission

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Directorate-General for Employment, Social Affairs and Equal Opportunities
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The evolution of labour law in Bulgaria

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List of Abbreviations

EPL	—	Employment Promotion Law
EU	—	European Union
ILO	—	International Labour Organisation
LC	—	Labour Code
LSCLD	—	Law on Settling Collective Labour Disputes
SIC	—	Social Insurance Code
OJ	—	Official Journal in Bulgaria

Executive summary

Chapter I: Introduction

The evolution of labour law in the period 1995–2006 is a continuation of the changes in its development which took place in the year 1992 under the conditions of Bulgarian society's profound changes following the collapse of the totalitarian regime in late 1989. This process took place under the European Agreement on the association of Bulgaria to the European Union, which was operative in 1995–2005. Its main content was the approximation of the existing and future legislation of the country, including its labour law, to the Community law (Articles 69–71 of the quoted Agreement).

Chapter II: National constitution traditions

Labour law in Bulgaria emerged at the beginning of the 20th century. Its development and the directions it followed are contained, directly or indirectly, in the provisions and spirit of the four **Constitutions** of Bulgaria that have been operative since then: those of the years 1879, 1947, 1971 and 1991.

The 1879 Constitution was the first one to be adopted after the liberation of Bulgaria in 1878 from the five-century long Ottoman yoke. It preceded the creation of labour law and does not contain an explicit renvoi thereto. However, its democratic provisions on the rights and freedoms of citizens, protection of private property and entrepreneurship, freedom of meetings and association, etc. created a favourable environment and promoted the emergence and development of labour law. The two Constitutions (years 1947 and 1971) of the socialist epoch in our country's development after the end of the Second World War contained explicit provisions on the citizens' fundamental labour rights (protection of labour, right to work, rest and leave, right to healthy and safe working conditions, etc.), which ensured the rapid development of labour law. They also had their serious shortcomings, conditioned by the totalitarian regime, and did not provide sufficient freedom for the implementation of certain fundamental rights and their democratic development (right to a free choice of one's job, right to free pluralistic trade union association, etc.), and these shortcomings held back the democratic development of labour law.

Chapter III: Constitutional developments

The new Constitution adopted in 1991 had a favourable impact on the development of labour law. It contains a 'Constitutional block' of provisions, which **constitutionalize** labour law, i.e. they permeate its content and determine its development. This 'Constitutional block' is expressed in the following: a) building up the social state (paragraph 5 of the Preamble of the

Constitution); b) protection of labour (Article 16); c) the incorporation of the most important labour rights into the Constitutional rights of citizens — the right to work and its free exercise, the right to fair labour remuneration, free trade union and employers' association, the right to strike, etc. (Articles 48, 49, 50, etc.); d) the activity of the Constitutional Court and its jurisprudence in interpreting the Constitution and exercising supervision on the constitutionality of laws and their compliance with the ratified international treaties (Article 149, paragraph 1, items 1, 2 and 4).

Chapter IV: The impact of the European employment strategy on national labour law

Under the conditions of transition to market economy and the high unemployment rate at the beginning of this transition, employment matters had an **important place in labour law**. They form the subject of explicit legal regulation in the Law on Protection in Unemployment and Employment Promotion (1997, am.) and the Employment Promotion Law (2001), which is still in force.

The operative legal regulation puts the accent on the so-called **active measures** in employment policy, i.e. on ensuring employment for the unemployed and their professional training and retraining. On the grounds of the EPL, since 2001 each year the Council of Ministers has been adopting a National Plan for Employment financed by the state budget. In performance of this plan, in the past two years subsidised employment has been provided to about 110 thousand unemployed, and vocational training to about 50–60 thousand unemployed. As a result of adopting the new policy of the European Union on synchronisation of the active employment policy with the economic policy, the number of unemployed in our country has dropped sharply. From 21–22 % of the active population in March 2001, their number dropped to 8.38 % in April 2007.

Chapter V: Evolution and the autonomy of labour law

Labour law in Bulgaria has established itself as an **independent legal branch** and an obligatory discipline in the Departments of Law in Bulgaria. However, in recent years it had to cope with certain encroachments upon its autonomy and social usefulness. In the period 1995–2006 the evolution of labour law had to get through two new phenomena: first, related to the newly occurring tendency of 'avoiding' labour law and concluding freelance contracts instead of labour contracts in order to evade the protection offered by labour law and obligatory social insurance. Labour law has reacted to this tendency by way of the Labour Inspectorate's declaring the freelance contracts concluded in such cases as being labour contracts (Article 1, paragraph 2 and Article 405a of the LC); second, concerning the restricting of the conclusion of a chain of

fixed-term labour contracts of definite duration and admitting them only **by way of exception**, i.e. where objective economic reasons necessitate it (Article 68, paragraps 4–5 and section 1, item 8 of the Supplemental Provisions of the LC).

Along with the restoration of private property and free economic initiative, the number of the self-employed sharply increased and keeps increasing. At the end of 2006 they constitute about 10 % of the people working under labour relationships in our country.

Chapter VI: Areas of evolution, with adjustments towards flexibility

In the period under consideration the tendency to more **flexibility** is combined with **security** of labour relationships. It can be illustrated by the evolution of two institutes of labour law:

a) fixed-term labour contracts. Their excessive development in the mid-1990s and their unrestricted renewal used to create considerable insecurity for people working under labour relationships. In 2001 this necessitated that a legal restriction be imposed on the conclusion of fixed-term labour contracts of definite duration. They were allowed in the presence of objective economic reasons and could be renewed only once (Article 68, paragraphs s 4–5 of the LC);

b) Working time. Its flexibility is fulfilled through the implementation of increased working time and part-time work in the presence of economic reasons (Articles. 136a and 138a of the LC).

The new legal regulation of these two institutes ensues from the EC Directives (D. 94/45/EC, D. 1999/70/EC, D. 94/45/EEC, D. 98/59/EEC, D. 2002/14/EC, etc.).

Chapter VII. The evolving relationship between law and collective agreements

In the period 1995–2006 collective labour agreements **considerably extended** their field of application as a result of the changes in their legal regulation in the Labour Code which were effected in 2001 and 2002.

Collective labour agreements are concluded at the level of the enterprise, sector, branch or municipality on those matters of labour and insurance relationships which are not regulated by the operative legislation through imperative legal norms, or are not settled at all therein (Articles 51–51c of the LC). The collective labour agreement in the enterprise can be concluded by any trade union organisation, while at the level of a branch, sector and municipality it can be concluded only by trade union organisations which are recognised as representative ones. At the suggestion of the trade union and employers' organisations, the Minister of Labour and Social Policy is entitled to extend the effect of branch and sector collective labour agreements over all the enterprises and organisations of the respective branch or sector (Article 51b of the LC).

Chapter VIII. Changes in regulatory techniques

In the period under consideration, the **new regulative mechanisms** in labour law kept consolidating and extending. They are built upon the basis of social dialogue, which was explicitly recognised as one of the main principles of Labour Law and was regulated in the Labour Code in the years 2001, 2004 and 2006. Social dialogue is conducted through the collective agreement (see above Chapter VII), tripartite cooperation and consultation, and voluntary settlement of collective labour disputes.

The tripartite cooperation and consultation between the state and the representative trade union and employers' organisations at the national, sector, branch and municipal level on the matters of labour and insurance relationships and standard of living is thoroughly regulated through the amendments to the Labour Code in the years 2001 and 2002 (Articles 3–3e).

Voluntary settlement of collective labour disputes was extended by way of setting up the National Institute for Reconciliation and Arbitration under the Law on Settling Collective Labour Disputes in the year 2001.

Besides, important steps were taken in the contractualisation of labour law through the changes to the Labour Code effected in 2001, 2004 and 2006. A number of imperative legal norms in the field of working time, leaves and labour remuneration were transformed into dispositive ones.

There was an extension of the application of important non-state sources of labour law, such as: the rules on internal labour order, the internal rules on salary, the specific rules on healthy and safe working conditions, the decisions of the general assembly of the employees, etc.

Chapter IX: Impact of EU law

During the last decade the impact of EU law **has grown rapidly**, as pointed out in the preceding comments (see Chapters V-VIII). The amendments to the Labour Code in the years 2004 and 2006 were inspired by the approximation of Bulgarian labour law to the EU law, that being one of the main prerequisites for Bulgaria's admission as a full member of the Community.

Important complexes of contemporary Bulgarian labour law have been entirely created or amended with solutions borrowed from the EU law: protection against discrimination under the 2003 Law of the same title (Directive 2000/78/EC, Directive 2002/73/EC, etc.); preservation of labour relationships in the cases of transfer of the enterprise or a part thereof under Articles 123 and 123a of the LC (Directive 2001/23/EC); the employer's obligation to acquaint the employee with the obligations under the labour contract under Article 66, paragraph 1 of the LC (Directive 91/533/EC); restrictions on the conclusion of fixed-term labour contracts of limited duration under Article 68, paragraphs 4 and 5 of the LC (Directive 1999/70/EC); collective dismissals under section 1, item 9 of the Supplemental Provisions of the LC and Articles 24 and 25 of the

EPL (Directive 98/59/EC); informing and consulting the employees under Articles 7–7d, 130–130d, 136a, 138a, 139a of the LC, etc. (Directive 94/45/EC); protection of the claims of the employees in the event of the insolvency of their employer under the 2004 Law of the same title (Directive 80/987/EC, Directive 2002/74/EC, etc.).

Chapter X: Concluding remarks

Historically, Bulgarian labour law emerged as law grounded on the state's regulation of labour relationships in state sources — primarily labour laws on protection of employed labour. It has been closely connected with Bulgaria's operative Constitutions in the period since 1878 and has been under their influence. In the last decade this influence was clearly manifested in the constitutionalizing of labour law.

The basic content of the evolution of labour law in 1995–2006 is the process of its Europeanisation under the influence of the EU law, which resulted in the admission of our country as a full member of the Community from 1 January 2007. It has **changed its countenance**: new legal institutes were incorporated therein — collective labour agreements, tripartite cooperation, informing and consulting the employees, etc. This process will also continue in **its future development and application**, the further adoption of *acquis communautaire* in the field of labour relationships and the complete integration of our country in the community of the developed European States.

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Chapter I: Introduction

The period 1995–2006 marks the stage of the richest and most dynamic development of Bulgarian labour law in its 100-year history (see below Nos 3–4). However, this stage did not appear out of the blue — it is a result of 'accumulations' and a continuation of its preceding development. That is why, in order to obtain a clear idea of where the development of Bulgarian labour law starts from in 1995 and where it ends in late 2006, and in order to grasp and correctly realise its evolution in the period under consideration, it is both necessary and useful to cast a quick glance at its development in the time prior to the year 1995 (see below). Moreover, that seems even more useful as Bulgaria is not presented in the study of labour law evolution in the period 1992–2003 because at the time it was conducted Bulgaria was not a member of the European Union.

The historical development of Bulgarian labour law in the time preceding the period 1995–2006 can be divided into **three** stages: 1. from the beginning of the 20th century until the end of the Second World War; 2. from the end of the Second World War until the beginning of the democratic changes in the country in late 1989 (10 November 1989); 3. from the beginning of the democratic changes in the country (late 1989) until the end of the year 1994.

After the liberation of Bulgaria from the five-century long Ottoman yoke (year 1878) the country restored its statehood as a parliamentary monarchy and embarked on the road to accelerated economic development — mainly industrial — on the European model with a fast growing number of employees. The Constitution adopted on 16 April 1879 (also known as the 'Tarnovo Constitution' after the name of the town in which it was adopted — Veliko Tarnovo — the capital of the restored Bulgarian state at that time) reflects the experience of the European constitutionalism of that time, primarily through the experience of the Kingdom of Belgium, and recognises a wide scope of democratic rights and freedoms of the citizens (see below) ([1]).

Under the pressure of the struggles of the employees organised in the trade union organisations set up at the end of the 19th and the beginning of the 20th centuries, the state started its intensive interference aimed at limiting the severe exploitation of factory employees by way of adopting a number of protective labour laws (see below, Chapter II). On 6 December 1920 Bulgaria was admitted as a member of the International Labour Organisation (ILO), which was created in 1919, and since then has continued to be a member of it. Becoming a member of the ILO, our country starts ratifying its conventions of the 1920s and 1930s. Thus, on the eve of the Second World War Bulgaria turns out to be a country with a relatively well developed labour legislation on protection of employed labour ([2]).

The Second World War (1939–1945) interrupted the peaceful European development of Bulgaria and its labour law. After the end of the war, when the great power-winners in the war (the Soviet Union, USA, and Great Britain) divided Europe into 'zones of influence', Bulgaria fell within the 'Soviet zone of influence'. This determined its development in the period after the war (1945–1989). The monarchy was abolished through a referendum (1946) and a republican form of state government established. Nationalisation of private banks and industrial enterprises took place (1947) and the political power of people's democracy under the leadership of

([1]) **M. Manolova**, Creation of Tarnovo Constitution, Sofia, 1980, pp. 158–159, 164, 169–170; **D. Tokushev**, History of the New Bulgarian State and Law 1878–1944, Sofia, 2001, pp. 54–55, 81–86; **S. Nacheva**, Constitutional Civilisation and Bulgarian Constitutionalism, Part One, Sofia, 2004, pp. 214–232.

([2]) **R. Oshanov**, Legal Protection of Labour in Bulgaria, Sofia, 1943, pp. 11–31; **L. Radoilski**, Labour Law, Historical Development, Sofia, 1957, pp. 188–200; **V. Mrachkov**, Labour Law, General Part, Sofia, 1996, pp. 67–77; **K. Sredkova**, Bulgarian Labour Legislation — 100 Years and Afterwards, Labour and Law, 2005, No 12, Supplement No 5, pp. 3–17.

Bulgarian Communist Party on the Soviet model was established, a new Constitution adopted (4 December 1947), the introduction of a centralised planned economy and the beginning of the period of totalitarian socialism following the Soviet model. On this basis a new legal regulation of labour relationships was created, with the **first Labour Code** of 1951 as its focus laying down the state's centralised and fixed regulation of labour relationships and extending over civil servants as well.

In March 1986 **the second Labour Code** in the history of Bulgarian labour law was adopted. Preserving the domination of state-owned property and centralised planned economy, and the leading role of the Communist Party, it affirmed the state's fixed regulation of labour relationships. Along with that, in certain limits, the contractual principle started gaining ground in individual labour relationships, as well as collective bargaining and participation of employees in the management of the enterprise through the economic councils elected by them, and composed of enterprise's employees, direct election of directors of enterprises, election of line managers — foremen, heads of workshops and workshifts — by the general meetings of labour collectives, etc. These new solutions created expectations and hope for more democracy, bargaining and flexibility in the regulation of individual and collective labour relationships. However, these expectations did not come true. Soon after the Labour Code entered into force (1 January 1987), when the employees in the enterprises started electing the managers they had nominated, the State and Party authorities became alarmed by the spontaneous outburst of democracy. And instead of regarding it as a normal implementation of the new Labour Code, they suspended the application of this part of the code. Thus, the totalitarian regime turned out to be unable to bear labour democracy, and unprepared to accept its application, without daring to change the law until late 1989. In this unlawful way, the 1986 attempt at democratisation of labour relationships was not realised, or more precisely, its application was suspended. Later on (in November 1992) these provisions of the Labour Code were repealed (see below).

In the period 1945–1989 the totalitarian government detained the democratic development of the country and, ultimately, on 10 November 1989 it was overthrown. What we are interested in here is the development of labour law over the course of this 45-year period. This development has its deep internal controversy and comprises two opposite lines which dwelt in it together.

On the one hand, the development of individual labour law was primarily ensured, this law providing state protection of employees' labour: full employment of all the employable population was ensured, five-day working week was introduced with 42-hour duration of the weekly working time, certainty and stability of employment, regular annual paid leave (from 14 to 18 working days) and a number of additional annual leaves were provided (for harmful, severe and hazardous working conditions, for working day of non-fixed duration), leaves for studies to those employees who work and study, protection against wrongful dismissal, including reinstatement in the previous job where the dismissal is recognised as a wrongful one, etc. All this created a standard which was not high as per the European requirements, and yet, it satisfied the vital needs and provided certainty to the employees in their labour relationships, and greatly furthered the development of labour law. These legislative solutions and their application reflected a positive aspect of the development of labour law during this period.

However, there were also serious shortcomings, which represent its negative aspect: there were cases of obligatory appointment to a job (of young specialists — graduates of higher and secondary specialised schools), legal restrictions and obstacles were introduced preventing the free termination of labour contracts on the part of employees by way of notification, etc. That did

not make employment freely chosen. Neither was its effectiveness and high productivity as per European and world standards ensured, nor the material interest therein — it rather had the nature of social employment. There was no free and pluralistic trade union association of employees and employers, neither was there free collective bargaining of working conditions, nor was the right to strike recognised and regulated, etc. The centralism in the regulation of labour relationships paralysed their operation and disallowed the development of collective labour law. This gave rise to the employees' dissatisfaction, which intensified in the late 1980s and was one of the profound reasons that brought about the political changes of November 1989.

The period 1989–1994 is the closest in time and immediately precedes the period 1995–2006 under consideration. It explains to the largest degree the development of labour law in the period this study deals with. And that is due not only to its being closest in time, but also to the fact that the two periods (1989–1994 and 1995–2006) form two consecutive temporal parts of the same historical epoch in the development of labour law, having the same overall objectives and directions in the evolution of the country's labour law. Moreover, the period 1989–1994 **set the beginning** of the deep changes in labour law, while the period 1995–2006 **continued their development** in time. Owing thereto, the period 1989–1994 deserves being considered in more detail than the preceding two stages (see above), as an introduction to the forthcoming study (see below).

The period **1989–1994** starts on 10 November 1989, when Todor Jivkov was discharged from the position of Secretary General of the Central Committee of the Bulgarian Communist Party and President of the State Council of the People's Republic of Bulgaria.

This political act marked the start of deep changes in Bulgaria. As early as January-April 1990 certain urgent changes were made in the 1971 Constitution: the constitutional provisions characteristic of the totalitarian state were repealed — those of the leading role of the Communist Party in the state and society; the belongingness of Bulgaria to the socialist community; the dissolution of the State Council; the restoration of the right to private property and its protection on an equal footing with the other forms of public property; adoption of the principles of free economic initiative and competition, etc. In May 1990 the first free, democratic and fair extraordinary parliamentary elections for the Grand National Assembly were held, and later on the regular parliamentary ones (1991, 1994) and the Presidential ones (1991, 1996) followed. The new Constitution was adopted (12 July 1991). The privatisation of state-owned and municipal property was launched, and so was the transition from centralised planned to market economy, etc. In May 1992 Bulgaria was admitted as a member of the Council of Europe and ratified the European Convention on Human Rights and Fundamental Freedoms. On 8 March 1993 the Europe Agreement Establishing an Association between the European Communities and Their Member States, of the one part, and the Republic of Bulgaria, of the other part, was signed and opened for ratification. This agreement entered into force two years later (see below) and officially stated the orientation of the foreign policy of the country towards membership in the Euro-atlantic structures, which enjoyed the general support of the Parliament and the largest part of society. In other words, in this period the countenance of the country was radically changed and the European road of its democratic development was definitely taken, market economy was launched and European values were adopted.

However, on the other hand, in the transition period there was a slump in the general standard of living and drastic impoverishment took place of large strata of the population. The feeling of uncertainty became stronger both in labour relationships and in everyday life.

The radical changes which set in after 10 November 1989 and the transition to a market economy provoked profound changes in labour legislation. They can be illustrated by **two** main manifestations: a) Settlement of collective labour disputes; b) Amendments to the 1986 Labour Code.

In early 1990, on 6 March, under pressure from the political upheavals and a rapidly growing massive strike movement, a new Law on Settlement of Collective Labour Disputes was adopted (OJ, No 21 of 13 March 1990, as amended in OJ, No 27 of 5 April 1991, OJ, No 27 of 16 March 2001, OJ, No 87 of 27 October 2006). For the first time in the history of Bulgarian labour legislation, the right to strike was expressly recognised and both the procedure for peaceful settlement of collective labour disputes and the exercise of the right to strike were established. Despite some deficiencies which plague this law, it marks a significant step forward of the national legislation in recognising and regulating this fundamental right of employees within the framework of the ongoing process of democratisation in our country. Furthermore (in 1991) it was accepted by Article 50 of the new Constitution (see below, Chapter III).

The most important developments in labour legislation in this period were the amendments to the Labour Code adopted in November 1992 (OJ, No 100 of 1992), effective date 1 January 1993. The amendments made to the Labour Code were large in number and essential in substance. They involved the repeal of some 130 articles and a change in almost 240 out of the total of 416 articles of the 1986 edition of the Labour Code. Taking a closer look at these quantitative data is of interest because, no matter how expressive they may appear, no clear idea can be obtained from them concerning the scale of changes which were effectuated.

The rescinded texts comprise provisions which most openly expressed centralised regulation, totalitarian government, and the politicised and ideological orientation of the legal regulation of labour relationships. The most 'extensively' repealed texts were those on the self-management of labour collectives of workforce; also repealed were certain grounds for the establishment of labour relationships (such as appointment to a job by order of the head of the local Labour Office; by court decision; appointment of young graduate specialists; membership in a productive cooperative). Also dropped were certain trade union prerogatives regarding participation in enterprise management; provisions which centrally and rigidly fixed wages and salaries also had to go. The system of settling individual labour disputes was profoundly changed and the new regime provided for individual labour disputes to be settled and referred to the common courts under civil procedure, which meant an end to the labour dispute commissions, etc ([3]).

The brief review made so far (see above) gives grounds for the **conclusion** that the changes in Bulgarian labour law started **immediately** after the beginning of the democratic changes in the country of late 1989. The first steps were taken in 1990–1994. They determined the European orientation in the development of Bulgarian labour law. In the period 1995–2006 this main direction in its evolution was continued and enlarged in scope and intensity.

The period 1995–2006 in the development of Bulgarian labour law is characterised by intensive adoption and introduction of the international standards in its operative regulation. Taking account of the social and economic conditions in our country and the national traditions, the international standards introduced in domestic labour law were drawn from four main sources: two universal and two regional ones.

([3]) For more details see V. Mrachkov, Recent Changes in the Labour Code and the Transition of Bulgaria's Experience in Central and Eastern Europe (from planned to market economy), Bulletin of Comparative Employment Relationships 31–1996, Kluwer Law International, 1996, No 2, pp. 7–16.

The **universal sources** were the Universal Declaration of Human Rights of the United Nations Organisation, 1948, the International Covenant on Economic, Social and Cultural Rights of the United Nations Organisation, 1966, and the new and modern Conventions of the ILO adopted in the preceding decades. These sources 'flow into' Bulgarian labour law through their ratification and primarily through their gradual and ever more complete practical application ([4]).

As for the **regional sources**, they are European ones: the European Social Charter of the Council of Europe, 1961, in its 1996 version, ratified by Bulgaria in 2000 and effective for Bulgaria since 1 August 2000 (OJ, No 30 of 2000, No 43 of 2001) as well as the primary and especially the secondary legislation of the European Union, and its directives, most of all.

During the last decade (1995–2006) the adoption of the EU directives and their introduction in the country's domestic labour law was most intensive. The reason for that was Bulgaria's preparation for being admitted as a full member of the European Union. One of the major requirements for it was the approximation of Bulgarian legislation to the requirements of the European Union, specified in its primary and secondary legislation as *acquis communautaire* of the European Union, including the compliance of Bulgarian labour legislation with the requirements of the relevant directives of the European Union. It can be said without exaggeration that it is the approximation to primary and secondary EU legislation that constitutes the basic motive power in the dynamic development of Bulgarian labour law in the preceding decade. Here I am just mentioning it, while the forthcoming exposition will refer to it a lot of times (see below, Chapters IV-IX).

On the other hand, the approximation of Bulgarian labour law to the requirements of ***acquis communautaire*** of the European union was well organised and was concurrent with the operation of the European Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, ratified by way of a law adopted by the 36th National Assembly on 15 April 1993 (OJ, No 33 of 1993), effective date 1 February 1995. Article 69 of the quoted agreement provides that 'an important condition for Bulgaria's economic integration into the Community is the approximation of Bulgaria's existing and future legislation to that of the Community. Bulgaria shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community'.

'The protection of employees at the workplace' (Article 70 of the quoted agreement) was explicitly specified among the areas in which approximation of legislation was forthcoming. 'The protection of employees at the workplace' mostly concerns the area of labour law. Thus, labour law has been included in the main branches of the operative domestic law of the country, and its approximation with the Community law was raised as 'an important condition' for the admission of Bulgaria as a full member of the European Union. On the one hand, this gave more prestige and importance to labour law in the legal system of the country, and on the other hand, it determined its approximation to the European Union Law as the main direction in its development.

The ten-year period of operation of the agreement was over on 1 February 2005. In the spring of the same year the European Commission reported its being successfully performed, and

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([4]) The International Covenant on Economic, Social and Cultural Rights was ratified by Bulgaria in 1970 (OJ, No 60 of 1970). In the period 1995–2005 Bulgaria ratified 15 ILO Conventions, among them being such important ones as: Convention No 105 on Abolition of Forced Labour, 1957; Convention No 144 on Tripartite Consultation (International Labour Standards), 1976; Convention No 156 on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981; Convention No 173 on Protection of Workers' Claims in the Event of the Insolvency of Their Employer, 1982; Convention No 180 on Seafarers' Hours of Work and the Manning of Ships Convention, 1996; Convention No 181 on Private Employment Agencies, 1997; Convention No 182 on the Worst Forms of Child Labour, 1999; Convention No 183 on Maternity Protection, 2000, etc.

as a result thereof, on 25 April 2005 Bulgaria's EU Accession Treaty was signed, the date provided for the accession being 1 January 2007. On that date Bulgaria was admitted as a full member of the European Union. The approximation of Bulgarian labour law to the Community law in the period 1995–2006 has its contribution thereto, and will be reviewed in the subsequent exposition.

Chapter II: National constitution traditions

In the preceding 100 years labour law in Bulgaria has had its deep foundations in the Constitutions of the Bulgarian State. That is to say, its development and the directions thereof have been contained, directly or indirectly, implicitly or explicitly, in the separate provisions, and as a whole — in the spirit of the Constitutions operative during that time. Four Constitutions have been adopted in Bulgaria since the end of the 19th century: in 1879, 1947, 1971 and 1991, when the currently operative Constitution was adopted. Their succession and continuity outline the ascending development and assertion of the national Constitutional traditions in the development of labour law. Besides, the Constitutions tend to determine the directions of development of labour law ever more clearly and categorically.

The first Constitution of the modern Bulgarian State — **Tarnovo Constitution of the year 1879** (see above Chapter I) — made no explicit renvoi to labour law. However, with its democratic spirit and general provisions on citizens' rights, it created favourable conditions, stimulating its coming into being, and promoting its development in the early 20th century.

The Tarnovo Constitution called into being labour legislation with its provisions on citizens' fundamental democratic rights and freedoms, such as: equality of citizens before the laws (Article 57); right to private property and its inviolability (Articles 67–68); freedom of press (Articles 79–81); freedom of meetings and associations (Article 83), etc.

And the results of it did not take long. At the beginning of the 20th century the first protective labour laws were adopted in Bulgaria: the Law on women's and children's labour in industrial establishments (1905), the Labour Inspection Law (1907), the Labour Hygiene Law (1917), the introduction of the eight-hour working day (1919), the Labour Contract Law (1936), the Law on Collective Labour Contracts and Settling Labour Disputes (1936), etc. This development of labour legislation in the early 20th century delineated the outlines of Bulgarian labour law and laid its foundations ([5]).

The second Bulgarian Constitution was adopted on **4 December 1947** and reflects the basic views of the Communist Party on state government and the period of consolidation of totalitarian socialism in the country. The development of labour law in the period during which this Constitution was operative (years 1947–1971) and its contradictory development (see above, Chapter I) is determined by two groups of Constitutional provisions: those on the role of labour in society and those on citizens' fundamental labour rights recognised by the Constitution.

According to Article 14 of the Constitution: 'Labour is recognised as a basic socioeconomic factor and the state takes **all-round care** of it'. This Constitutional provision determines the important place of labour in society (as 'a **basic** socioeconomic factor'), i.e. as a factor determining the development of society. On the other hand, the state has the function of promoting the provision of labour (by way of taking 'all-round care of it'), i.e. of labour. 'To take all-round care of labour' means that the state should protect labour, and support the provision thereof. And to protect and support labour means to protect and support people who provide it. This message of the Constitution is directly addressed to the development of labour law, which regulates the relationships between employees and employers in the course of provision of labour.

([5]) **R. Oshanov**, Legal Protection of Labour in Bulgaria, Sofia, 1943, pp. 11–31; **L. Radoilski**, Labour Law, Historical Development, Sofia, 1957, pp. 188–200; **V. Mrachkov**, Labour Law, General Part, Sofia, 1996, pp. 67–77; **K. Sredkova**, Bulgarian Labour Legislation — 100 Years and Afterwards, Labour and Law, 2005, No 12, Supplement 5, pp. 3–17.

The other group of Constitutional provisions are those laying down the fundamental labour rights of citizens as employees: equality of citizens before the law, and particularly, equality of the rights of men and women, including the rights in the field of labour (Articles 71–72), citizens' right to work and remuneration for it in accordance with the quantity and quality of the work done (Article 73, paras 1 and 2), the obligation of citizens to do work for the public benefit (Article 73, paragraph 3), right to rest, right to a limited working day, right to a paid annual leave, etc. (Article 74). These are fundamental labour rights which used to determine the legal regulation of labour relationships while the 1951 Labour Code and the subordinate legislation instruments issued for its application were operative. In this period, on the grounds of the operative 1947 Constitution (1947–1971), the labour relationships and the country's labour law realised both their achievements and their defects (see above, Chapter I).

The 1971 Constitution preserved the positions of the preceding Constitution on a number of matters within the field of labour relationships. However, it also introduced new points, which determined the further development of labour law. On the one hand, the 1971 Constitution affirmed the view of labour as being a basic socioeconomic factor as well as the state's care of its provision (see above). However, along with that, it also added two new points: a) the state's care regarding the improvement of citisen's professional qualification and experience, i.e. including that of employees (Article 32, paragraph 3, sentence 1). This also meant greater requirements and care regarding the improvement of employees' professional qualification; b) the protection of labour was explicitly proclaimed in law (Article 32, paragraph 3, sentence 2). On the grounds of the 1971 Constitution, on the one hand, the legal regulation of labour relationships was implemented primarily in law and not in subordinate legislation instruments, and on the other hand, the main line in this regulation was the protection of labour. This determined the main direction in the development of labour law — the protection of labour, which meant the creation of favourable solutions for the employees working under labour relationships.

The 1971 Constitution regulated a number of fundamental labour rights, extending their scope in comparison with the 1947 Constitution. Affirming the recognition of the right to employment (Article 40, paragraph 1), the remuneration for labour in accordance with its quantity and quality (Article 41, paragraph 1), the right to rest (Article 42, paragraph 1), and the right to professional association (Article 52, paragraph 1), it also added new labour rights: the right of each citisen to freely choose his/her profession (Article 40, paragraph 2), the right to healthy and safe working conditions by way of introducing the achievements of science and technology (Article 41, paragraph 2), the right to shortened working time without decreasing the labour remuneration or injuring any other labour rights, etc ([6]). Some of these fundamental rights remained unrealised or incompletely realised (the right to free choice of a job, the right to free trade union and pluralistic association, etc.). However, though unrealised, these Constitutional provisions, by the very fact of their existence, have played an important role in the formation of Constitutional traditions in the development of labour law. On the other hand, these rights have underlain the 1986 Labour Code. Alarge part thereof are contained in the currently operative labour law (see below, Chapter III).

([6]) **B. Spasov**, Problems of the New Constitution, Sofia, 1974, pp. 122–139.

Chapter III. Constitutional developments: the 1991 Constitution and its impact upon contemporary labour law

Following the profound changes in our country, the **new Constitution, adopted on 12 July 1991**, had a considerable impact upon the development of contemporary Bulgarian labour law. This impact is expressed in the **constitutionalizing** of labour law, i.e. in the ever deeper infiltration and penetration of the Constitution impositions into the provisions of the laws regulating labour relationships, and the compliance with these impositions. That is not a single act, but rather a constant process, which concerns the development of labour law in its entirety.

For this purpose, the operative Constitution provides for 'a **Constitutional block**', the application of which ensures the **constitutionalizing** of labour law. This block consists of **two** parts: a) application of Constitutional provisions which directly relate to labour relationships as being the subject of regulation of labour law; b) exercising control of the constitutionality of the adopted laws by the Constitutional Court set up under the Constitution (Articles 147–152).

If compared with the preceding Constitutions of the years 1879, 1947 and 1971, the currently operative Constitution contains more numerous provisions directly related to labour law. Such are the provisions on building up the social state (paragraph 5 of the Preamble of the Constitution), the security and protection of labour in law (Article 16), as well as the provisions regarding the fundamental labour rights of citizens (Articles 48, 49, 50, 51, etc.).

Labour law has an important share in the building up of **the social state** through creating favourable working conditions, promoting employment and economic upsurge in the country for creating new jobs, so that unemployment drops further, increasing labour remuneration, effectiveness and productivity of labour, and on the basis thereof, improving the standard of living of people who work under labour relationships.

The provision of Article 16 of the Constitution comprises **two** main points.

First, the certainty and protection of labour. This means support, promotion, encouragement, and in general, it means establishment of favourable conditions for the employees' labour through the labour relationships' legal regulation contained in labour law. That Constitutional imposition forms profound grounds for the protective function of labour law, and Article 1, paragraph 3 of the LC provides that the performance of this function is the main function of labour law.

Second, the legal regulation of labour relationships according to the Constitution is implemented in law. Such laws regulating labour relationships are for instance: the Labour Code, the Law on Settling Collective Labour Disputes, etc.

The next and most important group of Constitutional provisions oriented to labour law are found in Chapter II 'Citizens' Fundamental Rights and Obligations' — Articles 48, 49 and 50 of the Constitution.

Part of the provisions of Article 48 concern all citizens who exercise labour activity, regardless of the type of legal relationship under which labour is provided. These provisions are contained in paragraphs 1–4 of Article 48 and relate to the recognition of the right to work, the right to work of persons with physical and mental impairments, the free choice of profession and place of work, as well as the abolition of forced labour. They also apply to employees under a labour relationship. In spite of the verbal closeness of some of these provisions with the 1971 Constitution, they contain certain new points and nuances necessitated by the new socioeconomic conditions in our country, which deserve being specially accentuated.

The new points not only give these provisions, from a quantitative point of view, a larger number of texts in the new Constitution (see above), this being essential per se to the **constitutionalizing** of labour law, but also give them new quality and greater juridical value, expressed in the direct commitment of legislative power with their current legal regulation, and also with their practical application and implementation.

As for the recognition of the citizens' right to work under Article 48, paragraph 1, sentence 2 of the Constitution, the obligation of the State to 'take care of the implementation of this right' is of key legal importance. Its close reading and its systematic interpretation in connection with Article 48, paragraph 1, sentence 1, according to which 'Citizens have the right to work' brings about the conclusion that the Constitution recognises the right to work, but does not raise it to being a subjective right to obtaining a job. It does not include a legal obligation on the part of the state as public authority to create new jobs and to offer them to job seekers. Under the conditions of market economy new jobs are created by employers. But the State has the general and very important obligation to take care of it by creating favourable conditions for the employers to do it, using its tax policy and investment promotion, and the employers are those who create new jobs when being sufficiently motivated to do so. And that is the meaning of the Constitutional requirement of' 'taking care on the part of the state'. State's care in the above meaning is provided for in the 2001 Employment Promotion Law, the 1997 Investments Promotion Law, the 2004 Law on Integration of People with Impairments, etc.

As for Article 48, paragraphs 2–4 of the Constitution regarding the free choice of profession, place of work and abolition of forced labour within the meaning of Article 2 of ILO Convention No 29 of the year 1930 and ILO Convention No 105 of the year 1957, Bulgaria being a signatory thereto, their parts concerning people working under labour relationships are implemented in the legal regulation of the occurrence and termination of labour relationships contained in the Labour Code.

The other part of the Constitutional provisions of this group relate directly to labour relationships.

a) The provision of Article 48, paragraph 5 of the Constitution, which regards the employees' rights to healthy and safe working conditions, labour remuneration, rest and leave are developed in the regulation of these matters contained in the Labour Code. These are Constitutional subjective labour rights;

b) As for the freedom of association on the part of employees and employers under Article 49 of the Constitution, it should be borne in mind that the Constitutional provision not only establishes this right, raising it to the rank of a basic one and giving it the respective Constitutional protection, but also determines the purpose of its exercise both on the part of employees — protection of their interests in the field of labour and social insurance, and on the part of employers — protection of their interests. The content of these rights is specified in Articles 4, 5, 33–49 of the Labour Code in accordance with ILO Conventions Nos 87 and 98, Bulgaria being a signatory thereto.

c) As for the recognition of the employees' right to strike under Article 50 of the Constitution, although in this respect the Constitution came later than the Law on Settling Collective Labour Disputes, which was adopted on 6 May 1990 (see above, Chapter I), it introduced **three** essential points in its regulation. **First**, it raised the juridical rank of this right, turning it from a right under the law into a right under the Constitution, with all the favourable consequences for its juridical protection ensuing from that: irrevocability by way of a law, compliance of the law with it, etc. (Article 57 of the Constitution). **Second**, this determined its

social purpose as being a right for the protection of the collective economic and social rights and interests of employees. Thus a gap was filled in the legal regulation of the right to strike and, in view of its nature, it was appropriate for this gap to be filled by the Fundamental Law. **Third**, the Constitutional provision has laid down that the conditions and procedure for the exercise of the right to strike is determined in a separate law. Such is the 1990 Law on Settling Collective Labour Disputes and its subsequent amendments and supplements.

Another component of the Constitutionality block and an important factor in the constitutionalizing of labour law is the **jurisprudence of the Constitutional Court**, which has been operating since 1 October 1991. The Constitutional Court performs its function through the decisions it renders in exercising its powers of giving obligatory interpretations of the Constitution (Article 149, paragraph 1, item 1 of the Constitution) and in ruling upon claims for establishing the unconstitutionality of laws (Article 149, paragraph 1, item 2 of the Constitution). Compared to the previous one, this part is scantier because of the smaller number of decisions of the Constitutional Court in the recent 16 years. However, in spite of being few in number, their contribution to the constitutionalizing of labour law is important.

In one of its first decisions — No 14 dated 10 November 1992 on Constitutional case No 14 of 1992 — the Constitutional Court rendered an obligatory interpretation of Article 6 of the Constitution (OJ, No 93 of 1992). In this Decision the Constitutional Court assumes that the list of indicators of discrimination in Article 6, paragraph 2 of the Constitution is exhaustive ([7]). The Court regards the nature of this list as: 'a guarantee against unfounded extension of the grounds for admission of restriction of citizens' rights or privileges'. The exhaustive character of the list in Article 6, paragraph 2 of the Constitution follows from the way in which the Constitutional provision is formulated. However, this solution deserves **two** clarifications. **The first** one is that the violation of the listed 11 anti-discrimination criteria-indicators under Article 6, paragraph 2 of the Constitution in a law make the latter an unconstitutional one because of the violation of this Constitutional provision. **The second** one is that, apart from the list in Article 6, paragraph 2 of the Constitution, each law may provide for other anti-discrimination indicators as well, depending on the specificity of the regulated matters. And that has already become the widespread legislative practice: e.g. see Article 8, paragraph 3 of the LC, which sets out 15 such indicators, including 'new' ones that are not specified in Article 6, paragraph 2 of the Constitution, such as: membership in trade union and other social organisations and movements, physical and mental impairments, difference between the term in the contract and the duration of the working time, etc. Article 4 of the Law on Protection against Discrimination lists 17 anti-discrimination indicators, some of them not being listed in Article 6, paragraph 2 of the Constitution, such as discrimination based on human genome, sexual orientation, etc. As for these 'new' anti-discrimination indicators, an important clarification should be made: their violation is also inadmissible and turns the respective instruments and acts into unlawful, and not unconstitutional ones (see below, Chapter IX).

In its Decision No 12 dated 12 July 1995 on Constitutional case No 15 of 1995 (OJ, No 69 of 1995), the Constitutional Court proclaimed the provision at Article 360, paragraph 2 of the LC (1992 version) to be unconstitutional. That provision enabled labour disputes about the dismissal of civil servants holding positions of trust under a list approved by the Council of Ministers to be excluded from court procedures and to be considered only administratively, i.e.

(7) Article 6, para. 2 of the Constitution reads as follows: 'All citizens shall be equal before the law. There shall be no privileges or restrictions of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status'.

by the superior administrative body. Reasonably, the Constitutional Court deemed this legal provision to be unconstitutional because of its inconsistency with the principle of separation of powers under Article 8 of the Constitution, which does not permit the executive power, personified by the Council of Ministers, to interfere in the judicial power of courts through seizing from it a part of the labour disputes on wrongful dismissal. On the other hand, the challenged legislative solution inadmissibly restricts the citizens' right to protection, which includes their Constitutional right to justiciability (Article 56 and Article 120, paragraph 1 of the Constitution), and that provides more grounds for the unconstitutionality of the challenged legal provision of Article 360, paragraph 2 of the LC (1992 version, repealed).

In its Decision No 14 dated 24 September 1996 on Constitutional case No 15 of 1995 (OJ, No 84 of 1996), the Constitutional Court gave an obligatory interpretation of Article 50 of the Constitution regarding the right to strike. In this Decision the Constitutional Court has reasonably extended the social purpose of the right to strike, pointing out its role of: 'a constitutional guarantee that Bulgaria will develop as a democratic and social state'. Along with that, the Court has admitted 'by way of exception' a restriction of the right to strike in **two** cases: a) for certain civil servants who exercise authoritative powers on behalf of the state and ensure its functioning; b) for employees in certain branches and activities, such as production, distribution and supply of electric power, communications and healthcare. According to the court: 'the suspension of performance on the part of employees in these spheres through an effective strike would endanger the life and health of large parts of the population, which is inadmissible in view of the state protection of the citizens' life and health — Article 4, paragraph 2, Article 28, Article 52, paragraph 3 and Article 57, paragraph 2 of the Constitution'.

The above exposition provides grounds for the conclusion that the constitutionalizing of Bulgarian labour law is undergoing a process of being extended and deepened. It contributes to the affirmation of the protective function of labour law, this being its invariably inherent, immanent main function.

Chapter IV: The impact of the European employment strategy on national labour law

I. Protection in unemployment and employment promotion

One of the most severe consequences which accompanied Bulgaria's transition in 1995–2006 from centralised planned economy, based on state-owned property with steadily full employment provided by the state, to market economy based on private property, was the occurrence of unemployment and its sharp rise, followed by its gradual dropping down.

Actually, two stages are outlined in this decade: a) from 1995 until the middle of 2001, when unemployment kept growing and reached its climax in the spring of 2001 (see below); b) getting control over unemployment and halting the rise therein at the end of 2001, and the beginning of its dropping down in 2002, the latter being established as a permanent tendency in the second half of the decade — in the late 2006 (see below, Subsection II).

During the first stage of the period 1995–2006 there was no clear vision of the policy on employment and its place in the development of labour law. And yet, the first step in clarifying this matter was the adoption of the Law on Protection in Unemployment and Employment Promotion (abbreviation LPUEP, OJ, No 120 of 1997, am.) in the late 1997. The positive aspect of this development is the inclusion of matters of employment and its promotion, in particular, in a legal regulation for the first time. However, they were given little attention — a short chapter, comprising three articles only, entitled, 'Special Programmes for Higher Level of Employment' (Chapter VI, Articles 78–80) in the otherwise voluminous law, which consisted of eight chapters and 115 articles. Besides, the provisions of this chapter were recommendable, and not imperative in nature. The LPUEP was mainly focused on unemployment, i.e. on the **passive consequences** of the lack of employment (Chapters II, III, IV, VI and others), and not on the **active measures** for employment promotion. That was mainly an insurance law on the social risk of unemployment and had the short life of four years only (see below), and not a law on supporting the promotion of real employment and decreasing the unemployment.

The LPUEP lacked conceptual clarity. It contained a mixture of passive measures against unemployment as an insured social risk, regulated through imperative legal provisions it was focused on, and active measures for decreasing the unemployment by way of promoting the creation of new jobs. A further shortcoming was the inclusion of social insurance aspects of the passive measures and the payment of unemployment benefits at the centre of the legal regulation, while the active measures — those of decreasing unemployment by way of promoting the creation of new jobs — were left on the periphery of the law. In other words: neither the proper systematic place was found nor the proper relation was determined between these two important aspects of the legal regulation of employment and unemployment.

The conceptual unclarity of the LPUEP was also expressed in the provisions regarding the financing of its implementation. Under this law, a general Fund of Vocational Training and Unemployment was created, which was to finance the expenses on insurance compensations (compensations and benefits) in unemployment as well as the vocational training and retraining of the unemployed, and was also to cover the expenses on developing the programmes for employment promotion. The financial means of the fund were raised from the monthly insurance contributions from employers and employees, as well as from budget amounts allotted for that specific purpose. The larger part of the expenses were made for the payment of unemployment compensations and benefits, vocational training and retraining of the unemployed, and the financial support of the National Employment Office of the Ministry of Labour and Social

Policy, while a considerably smaller part was spent on the so-called employment promotion programmes (Articles 6–15 of the quoted Law). It also regulated certain matters which were of no practical importance and had no practical application in the existing economic and social situation and poverty in the country, e.g. voluntary insurance against unemployment (Articles 25–47 of the quoted law), which had absolutely no practical application and turned out to be a useless legislative ballast.

With its heterogeneous and internally discordant subject of regulation of a primarily insurance law on unemployment, and much less a labour law on employment promotion, this law failed the test of time and, due to that, it was unable to exist for a long time and to serve its purpose. Its provisions in the part regarding employment promotion were repealed by the Employment Promotion Law adopted in late 2001 (see below). At the same time its numerous provisions in the part regarding the insured risk of unemployment, following their respective improvement and focusing on insurance matters were included (at the end of 2001) in the Social Insurance Code (Articles 26a-26b, 54a-54f, etc.). Thus, its matters were distributed and transferred, 'in parts' to their systematic place: the unemployment insurance matters — to the Social Insurance Code, and the employment promotion matters — to the new Employment Promotion Law (OJ, No 112 of 2001, am.), which is operative now. It is this very law that is of special interest for the present study (see below Subsection II) ([8]).

After the parliamentary elections for the 39th National Assembly in June 2001, the new government continued the intensive approximation to the European standards in view of the country's admission as a full member of the European Union in the forthcoming years. The government started following the new course of the Union after Section VIII was included in the Treaty of Amsterdam on close binding of the economic policy with an active policy on employment, as two inseparably connected aspects of the European integration process. The orientation of the policy on employment was **radically changed**. From a passive policy of alleviation of the consequences of the growing unemployment through payment of compensations and benefits for supporting the unemployed, it turned into an active policy of promoting the country's economic upsurge and creating new jobs, and placing unemployed people in these jobs, thus gaining control over unemployment and sharply decreasing it. This new policy on employment has found its expression in the new Employment Promotion Law (EPL) adopted in December 2001. It repealed the provisions of the 1997 Law on Protection in Unemployment and Employment Promotion (see above) in the part regarding employment and came into force on 1 January 2002 (OJ, No 112 of 29 December 2001, am.).

II. Employment promotion

The Employment Promotion Law sets up a specialised body which discreetly manages the fluctuations of labour market. This body is the **Employment Agency** under the Minister of Labour and Social Policy and it has its territorial bodies in the regions and municipalities.

The Employment Agency performs **three** main functions:

a) **Informational** one. It consists of collecting data regarding the announced job vacancies and registered unemployed job seekers, and submitting this information both to the unemployed and to the employers. For this purpose, under Article 22 of the quoted Law, the employers are entitled to announce in the subdivisions of the Employment Agency the job

([8]) **K. Sredkova**, Labour and Insurance Rights of the Unemployed, Sofia, 1995, pp. 15–25, 69–116; **V. Mrachkov**, Comment on the Law on Protection in Unemployment and Employment Promotion, in the 'Labour Relationships — 1998' Yearbook, Sofia, 1998, pp. 727–751.

vacancies, the needs for vocational training and retraining of the employed, as well as their own capacity to organise and conduct such activities. Along with that, the employers are obliged to inform within seven days the subdivisions of the Employment Agency about the liquidated jobs which were announced vacant, the persons newly appointed through the Employment Agency, the unemployed refusing to take an appropriate job offered, etc.

b) **Intermediary** one. It consists in rendering assistance and support to the job seekers and the employers seeking a workforce by way of organising and facilitating the contacts and meetings between them. The employers themselves may make a selection from among the job seekers recommended by the subdivision of the Employment Agency, or may require that the Employment Agency make the selection, on the grounds of an order placed in advance, from among people designated by the employers.

c) Promotion of employment of the unemployed by way of **an active policy on employment** (see below).

The active policy on employment is financed in **two** ways: a) with funds from the state budget (see below); b) by encouraging the employers to create new jobs (see below).

The financing of the active policy on employment from the State Budget is regulated in Articles 14–16 of the EPL. According to it, each year the State Budget Law should provide funds for financing those measures and programmes of the active policy on employment which were approved by the Council of Ministers. These funds are spent on: programmes and measures for vocational training, motivation training and literacy courses for both the employed and the unemployed; programmes and measures for preserving and promoting employment; measures for encouraging the self-employment of the unemployed; development of national, branch and regional programmes for employment and vocational training; realisation of projects for social integration of risk groups into the labour market; financing the activities of vocational training centres set up by virtue of intergovernmental agreements; expenses on transport, lodging and scholarships for the period of training of the unemployed, etc.

It is on the grounds of the EPL that each year the Council of Ministers approves a National Plan for Employment and determines its financing with funds from the state budget ([9]). The activities of the unemployed and their training in courses and schools for vocational training are financed in performance of this plan. Under this plan, BGN 204 million (about EUR 102 million) were provided in 2005 for financing the employment and were spent on financing the employment of 110 thousand unemployed and on the vocational training of 56 thousand unemployed ([10]). The National Action Plan for Employment satisfies the requirements of the Lisbon strategy for higher employment. BGN 220 million (about EUR 110 million) were used for financing it. In fulfilment of the plan, in the year 2006 the unemployment dropped to below 10 %, subsidised employment was ensured to 109 413 people, and training to 40 790 people ([11]).

The active policy on employment is expressed in supporting the employers in creating new jobs as well as in filling the job vacancies with unemployed belonging to the 'disadvantaged groups'. These are people of lower capacity of competitiveness on the labour market, such as: young people of durable incapacity for work, people of long continued unemployment, unemployed women over the age of 50 and unemployed men over the age of 55, etc. Those employers who employ people belonging to the disadvantaged groups are granted funds from the

([9]) **E. Dimitrova**, National Plan for Employment, Labour Information Bulletin, 2005, No 3, pp. 16–23.
([10]) Labour and Law, Monthly Digest, 2005, No 2, p. 88.
([11]) **E. Dimitrova**, National Action Plan for Employment, Labour and Law Monthly Digest, 2006, No 2, pp. 44–50.

state budget for paying the labour remuneration of such people, which may not exceed 12 months (Articles 30a-40 of the EPL).

Taking after the new policy of the European Union on synchronisation with the economic policy, and in performance of the EPL, the active policy on employment in 2002–2006 gave encouraging positive results. In March 2001 the number of unemployed reached the menacing number of 725 thousand people, which represented 21.2 % of the active population of the country. As a result of the economic upsurge, a favourable tendency towards a decrease of unemployment has been present since the second half of the year 2002. According to the official data for December 2006, unemployment has dropped to 350 thousand people, which represents 9.20 % of the active population of the country ([12]).

([12]) The data are taken from the 2005 Statistical Reference Book, issued by the National Statistical Institute, Sofia, 2006, pp. 54–71.

Chapter V: Evolution and the' 'autonomy' of labour law

I. General remarks

The evolution of labour law in the 1995–2006 decade affirmed its autonomy and identity. Although labour law in Bulgaria has been definitively separated from civil and administrative law since the end of the Second World War, in the period under consideration its evolution was accompanied by its subsequent differentiation from these two branches of law, with which it is 'genetically' and historically connected in its national development in the country. The main direction of this development is the focusing of labour law on its major subject of regulation: protection of the employed labour of employees, i.e. those persons who work under labour relationships.

The specific manifestations of that development are different and lie on two different planes: on the one hand, safeguarding legal law against' 'seizures' of real labour relationships from its sphere, and on the other hand, separating it and 'cleaning' it from relationships which are not employment ones, and their transfer to other branches of law. Actually, these two directions are subject to one general idea. It is: focusing labour law on its real and everlasting subject of regulation — the employ of the workforce of employees. This affirms the identity of labour law.

II. Concealing real labour relationships by freelance ones

Since the early 1990s, along with the intensification of the process of privatisation and consolidation of the place of private employers and the freedom of contracting under market conditions (Article 9 of the Law on Obligations and Contracts), in practice there have been frequent cases in which the employers avoided concluding labour contracts with the employees and preferred to conclude with them so-called 'freelance contracts' — mostly contracts for manufacture or just 'freelance contracts' for the performance of the main subject of their activity. At first sight the relationships between the parties under the so-called 'freelance contracts' do not change in comparison with those under the labour contracts. Just like before, these are relationships under which the employee leases out his/her workforce, i.e. grants it for use on the part of the employer, and in the process of its use he/she is subordinate to and under the control of the employer; works for some time in advance with the employer and for the employer, in observance of the order and discipline the latter has imposed. However, in these cases, at the employer's urging and under the pressure he exercises, the contract is called 'a contract for manufacture' or just' 'a freelance contract' and the consequences of these contracts considerably change.

The consequences of that change were substantial: in favour of the employer and to the detriment of the employees. The employers did not have the obligation to comply with the labour law requirements regarding labour protection: limiting the working time, granting a paid annual leave, and did not have the obligation to insure these employees in the state social security, neither did they have to pay insurance contributions for them. Besides, the employers were free to terminate unilaterally the contractual relationships with a prior notification or without it, without observing the requirements of the Labour Code, etc. Due to the tolerance to this phenomenon, it extended and at the beginning of the 1990s became a large-scale issue. The erosion of labour law and the danger of its being absorbed by civil and commercial law was

obvious. Along with that, the dissatisfaction and social tension of employees and society as a whole kept growing.

In this new social situation and growing social dissatisfaction, in December 1995, though with some delay, **two** supplements to the Labour Code were adopted, and they took effect at the beginning of 1996 (OJ, No 2 of 5 January 1996).

The first one is the new paragraph 2 in Article 1 of the LC, which reads: ‘Where workforce is provided the relationships are regulated as labour ones’.

The key term in the novelty of paragraph 2 in Article 1 of the LC is ‘the provision of workforce’ as a subject of labour relationships. Even before that time this term was present in the Labour Code (Article 66, paragraph 2), however, it was used rather casually and in a way which implied knowledge of its content, without explaining it. And now the intention of the legislator was to have it explicitly regulated in law and to accord it a major role by specifying it as early as the initial provision, thus determining its fundamental importance to the whole subsequent regulation of labour relationships in the Labour Code. It is this term that the other provisions of the Labour Code ensue from and the one they invoke, especially the second new provision introduced through the same supplements — Article 405a of the LC (see below).

First of all, ‘the provision of workforce’ was introduced in order to differentiate labour relationships from the others (freelance ones, commercial ones) where the content of these relationships includes the use of human labour (a contract for manufacture, an order contract, a contract for consultancy services, a contract for management or an untitled freelance contract). By the way, the phrase ‘provision of workforce’ has been explicitly established as a normative distinctive indicator between labour relationships and others, the latter comprising in their content the use of human labour in any form.

‘The provision of workforce’ constitutes its leasing out on the part of its bearer — a natural person who personifies it — the employee and forms an inseparable part thereof, to another person — the employer, in order to be at his/her disposal and to be made use of. This leasing out is always temporary, regardless of its specific duration and regardless to whether and how that temporary duration has been determined, etc. ‘The provision of workforce’ means its provision for being available to the employer, i.e. its ‘use’ in his/her favour. ‘Using the workforce’ means using the physical and intellectual power and capacity it contains. And it contains individually unique and often unsuspected great capabilities, the presence of which may preliminarily be only expected and supposed, however, due to the biological nature of the workforce, it cannot be precisely ‘measured’. That is possible only in the process of using it, i.e. directly in the work process.

On the other hand, as it has already been pointed out above, workforce is a value (wealth), which is contained in the personality of its physical bearer and is inseparable from it. Owing thereto, its provision to another person is possible only by placing the personality of its bearer in dependence on the will of the one it is provided to. The dependence is not complete and absolute, it has its limits laid down in law, and yet, it is inevitable. The nature of this dependence is both economical — because the employee receives labour remuneration for having his/her workforce used — and juridical — because in the course of work the employee is obliged to obey the orders of the employer and to abide by them, to bear his/her supervision over the work assigned to him/her, etc.

According to paragraph 2 of Article 1 of the LC the provision of workforce is regulated only as a labour relationship, and that suggests two juridical points.

First, that labour relationship is the specific relationship where workforce is provided. Furthermore, it is the only relationship which can objectify the provision of workforce. The law plainly accentuates this idea by way of setting out that the provision of labour force can be conducted only in the juridical form of labour relationship, and not in the form of any other relationship, although the latter might be provided for in another law. Thus, without explicitly saying it, the law categorically excludes (forbids) the use of freelance and commercial deals and relationships as juridically intermediating the provision and use of workforce.

Second, the aim is to ensure better protection and legal security. As for labour relationships, that is of major importance, as due to the nature of the engaged wealth (the workforce contained in the personality of the employee), the protection of labour always means protection of the human personality of the employee it is contained in. And that refers not only to the employee's rights and legal interests, but also to his/her physical, intellectual and emotional integrity and dignity. Labour relationship paves the way to applying the entire labour legislation to the provision of workforce: determining the duration of the working time, right to a leave of absence, labour remuneration, healthy and safe working conditions, recognition of the time as length of service, obligatory insurance in the state social security, etc.

'The provision of workforce' which is not legally expressed as a labour relationship means evading the law and avoiding the protection granted to employees by labour law. It favours the employer and substantially injures the employees' rights and interests. And that is the reason for its being forbidden by law. That is the social meaning of the provision of Article 1, paragraph 2 of the LC.

Of course, this does not mean that Article 1, paragraph 2 of the LC excludes the resort to freelance contracts. Not at all. Freelance contracts are and continue to be generally allowed, as long as the use of the mental and physical power and capacities of the person does not actually constitute concealment of the provision of the employee's workforce to the employer, which, as it has already been pointed out (see above), is solely and exclusively preserved for the labour relationship. However, where the use of workforce is aimed at achieving a certain result, for instance the performance of a specific task, e.g. mounting of an installation, giving oral or written consultation, drafting a conclusion or an opinion and the like, the freelance contract is the appropriate form for the performance of the respective task. Therefore, in the new legal situation after the adoption of Article 1, paragraph 2 of the LC, it is inadmissible to use freelance contracts only where they conceal workforce provision covering a labour relationship. In these cases, even where the parties have named the relationship 'a freelance contract', it is a labour relationship and the parties have just concealed it deliberately (wilfully) as a freelance one, mostly for avoiding the labour law protection to the employees. These transactions are seeming (simulative) ones. They are regulated in civil legislation and are forbidden by it (Articles 17 and 26, paragraph 2 of the Law on Obligations and Contracts) ([13]). What is new in labour law is only that, setting out the provision of Article 1, paragraph 2 of the LC, the legislator has created prerequisites for regulating the consequences thereof in labour law (see below) ([14]).

Jurisprudence and administrative practice were well oriented in these matters even prior to the introduction of the novelty of Article 1, paragraph 2 of the LC. In Decision No 1849–93-III of the Civil Division of the Supreme Court of Cassation it is assumed that, for the enterprise's accounting purposes, the engagement of workforce is agreed, as well as the specific place and

([13]) **L. Vasilev**, Civil Law, General Part, 3rd ed., Sofia, 1956, pp. 445–450; **V. Tadjer**, Civil Law, General Part, Section 2, Sofia, 1973, pp. 261–269; **M. Pavlova**, Civil Law, General Part, vol. 2, Sofia, 1996, pp. 155–166.

([14]) **A. Vasilev**, Labour Law, Sofia, 1997, pp. 133–144; **V. Mrachkov**, Labour Law, 5th ed., Sofia, 2006, pp. 144–155.

nature of work, and the respective labour remuneration. It is of no importance that the parties have entitled their contract a 'freelance' one. The relationship established between them is a labour relationship. The practice of the Ministry of Labour and Social Policy is to that effect as well. It assumes that the contract for the position of 'night guard' should be a labour contract, and not a freelance one (see Letter No 94–03–42 dated 14 December 1998 of the Ministry of Labour and Social Policy, Labour Information Bulletin, 1999, No 12, p. 24) ([15]).

The second addition is the newly adopted Article 405a of the LC. It is a continuation of Article 1, paragraph 2 of the LC (see above). It regulates the specific juridical counteraction to the breach of Article 1, paragraph 2 of the LC and applies to those cases in which, in spite of the prohibition it sets out, certain employers continue concluding civil and commercial contracts for using other people's workforce, thus concealing real labour relationships and maintaining the black market of labour and the shadow economy.

In the lines below I will invoke Article 405a of the LC a lot of times, so it is appropriate to reproduce the whole text of it. Its title is: 'Declaring the Existence of a Labour Relationship'. The text is as follows:

'(1) The Labour Inspectorate is entitled to declare the existence of a labour relationship wherever it establishes that workforce is provided in breach of Article 1, paragraph 2. This declaring is made by way of an ordinance of the Labour Inspectorate, which is delivered to the parties to the labour relationship.

(2) In the cases under paragraph 1 the Labour Inspectorate issues a warrant to the employer to offer the employee the conclusion of a labour contract.

(3) Until the issue of the warrant under paragraph 2 the relationship between the parties is settled as under a valid labour contract, if the employee has acted in good faith. If the parties to the labour relationship fail to agree the conditions thereof in writing, the ordinance under paragraph 1 replaces the labour contract, and the latter is regarded as being concluded for indefinite time under the conditions of a five-day working week and an eight-hour working day.

(4) The employer is entitled to appeal against the warrant to the regional court ([16]) by the employer's seat or residence, within seven days following the delivery thereof. The appeal does not suspend the implementation of the labour relationship.

(5) If the court reverses the warrant of the Labour Inspection, the employer is entitled to terminate the labour contract unilaterally without giving prior notice.'

The legislator's counteraction to the violations of Article 1, paragraph 2 of the LC involves the delegation of authoritative powers to two state bodies: the first one is a body of the executive personified in the Labour Inspection with the Ministry of Labour and Social Policy, while the other is a body of the judiciary personified in the administrative courts. Each one of them intervenes at different stages, using different means for elimination and disruption of violations of Article 1, paragraph 2 of the LC.

Paragraph 1 of Article 405a of the LC gives the Labour Inspection a specific power: wherever it finds a concluded freelance or commercial contract which conceals the existence of a labour relationship, it is entitled to declare the said contract void as contravening the imperative provision of Article 1, paragraph 2 of the LC. The relationship is declared a labour one by way of a written ordinance of the Labour Inspection, which is delivered to both parties: to the employer

([15]) Critical Review of the Jurisprudence of the Supreme Court of Cassation in Labour Disputes in 2004, Juridical World Journal, 2005, No 2, pp. 117–119.

([16]) As for this legislative solution see below.

and to the person working under a freelance contract. They are obliged to obey the ordinance of the Labour Inspection and to carry it into effect.

This legal situation is very close to the hypothesis regulated by Article 17 of the Law on Obligations and Contracts: the relationship is grounded on the consent of the parties concealing another existing relationship. The 'concealing' relationship is a freelance one. And the 'concealed' relationship is a labour one, as its subject is the engagement of workforce. These are the so-called simulative (seeming) transactions known in civil law. They are undesired and intolerable by law order, because in these cases the relationships between the parties are not settled in a manner corresponding to their content. Owing thereto, the Law on Obligations and Contracts lays down two ways of counteracting them. The first one is as follows: if grounds for the validity of the concealed relationship are present, the rules on it apply to the relationship between the parties (Article 17, paragraph 1 of the quoted law). The second one is: the simulative legal transaction is declared void (Article 26, paragraph 2 of the quoted law). By the way, the provision of Article 405a, paragraph 1 of the LC proceeds from these civil law solutions regarding simulative legal transactions. Such a seeming legal transaction is the freelance or commercial contract concealing a labour relationship.

Along with the ordinance declaring the relationship a labour one (see above), the Labour Inspectorate issues a warrant to the employer, obliging him to offer the employee the conclusion of a labour contract for the work the person has been performing under the relationship prior to its being declared a labour one (Article 405a, paragraph 2 of the LC). The employer is obliged to obey this warrant and to make a proposal to that effect to the employee. Thus the employee is given the opportunity of expressing freely his/her will as to whether in the new situation he/she is willing to continue working under a labour contract, and the parties can stipulate the conditions of their labour contract for the future. If the parties fail to reach an agreement regarding the future conditions of their labour contract, the ordinance of the Labour Inspectorate under Article 405a, paragraph 1 of the LC (see above) replaces the labour contract. In that case the labour contract is regarded as one of indefinite duration (an open-ended contract) under the conditions of a five-day working week and an eight-hour working day (Article 405a, paragraph 3 of the LC).

However, as for the relationships between the parties until the time the Labour Inspectorate issues the warrant under Article 405a, paragraph 1 of the LC (see above No 65), they are settled as under a valid labour contract if the employee has acted in good faith (Article 405a, paragraph 3 of the LC).

The warrant of the Labour Inspectorate under Article 405a, paragraph 1 of the LC (see above No 65) is an individual administrative act, which is subject to being appealed against by the employer to the administrative court ([17]) by the employer's seat or residence (Article 405a,

([17]) The legislative solution under Art. 405a, para. 4 of the LC regarding the appeal against the warrant of the Labour Inspectorate to the 'regional court' dates back to the year 1996. It seems to me that it has already been overtaken by the subsequent development of the legislation. According to the Constitution (Art. 119, para. 1) and Art. 52, para. 1 of the Law on the Judiciary (OJ, No 56 of 1994, am.), 'the regional court' is a basic first-instance court which has jurisdiction over all cases except those which are under the jurisdiction of another court. The disputes 'under the jurisdiction of another court' are those which relate to the lawfulness of individual administrative acts, and the acts imposing compulsory administrative measures belong thereto. The 'warrant' under 405 a, para. 2 of the LC is a compulsory administrative measure, which is imposed through an individual administrative act within the meaning of Art. 21 of the Administrative Procedure Code (OJ, No 30 of 1 April 2006), effective date 12 July 2006. The disputes regarding their lawfulness are considered by the administrative courts that have been newly established under the quoted Code (Art. 145–178 of the quoted Code). In 2006, when changing Art. 405 of the LC and providing for the appeal to the administrative courts against the individual administrative acts imposing compulsory administrative measures, the legislator has omitted to replace explicitly the words' 'to the regional court' in Art. 405a, para. 4 of the LC by the words' 'to the administrative court', though the general idea is that all the individual administrative acts imposing compulsory administrative measures are to be appealed against to the newly established administrative courts. And yet, for the sake of avoiding any doubts or hesitations in jurisprudence, it is necessary that such a change be made de lege ferenda.

paragraph 4 of the LC). The appeal should be brought within seven days following the delivery of the warrant to the employer. In the course of the administrative court proceedings the lawfulness of the warrant is examined. The appeal does not suspend the implementation of the labour relationship. On the grounds of the ordinance of the Labour Inspectorate under Article 405a, paragraph 1 of the LC, the relationship continues existing and functioning as a labour relationship. If the court finds that the warrant of the Labour Inspection is lawful, i.e. that the freelance contract was concluded in breach of Article 1, paragraph 2 of the LC, the court confirms the warrant and the relationships between the parties are settled under Article 405a, paragraph 3 of the LC (see above).

However, if the court finds that the warrant has been issued without any breach of Article 1, paragraph 2 of the LC being present, i.e. if the court assumes that in this case the conclusion of a freelance or commercial contract was lawful, the court reverses the warrant (Article 405a, paragraph 5 of the LC). These are cases in which the Labour Inspectorate has wrongfully assumed that the freelance contract was concluded in breach of Article 1, paragraph 2 of the LC and, on the grounds thereof, has declared the existing relationship a labour one. In this new legal situation the labour relationship which the Labour Inspectorate has declared existing and valid turns out to be an unlawful one. Owing thereto, the legislator gives the employer the right to terminate the labour relationship with the employee without a prior notice, i.e. immediately, with no delay. And if the employer is still determined to keep the employee, the employer is not barred from concluding a new labour contract with him/her.

As a whole, the provisions of Article 1, paragraph 2 and Article 405a of the LC have contributed to the disruption of the cases of concluding freelance contracts for the purpose of avoiding the application of labour law. These provisions have been operative for more than ten years now and have been exercising a positive preventing effect, which makes the employers refrain from concluding freelance or commercial contracts in breach of Article 1, paragraph 2 of the LC. That did not result in complete elimination of the black market of labour and the shadow economy, but has subsided the erosion of labour law and has shrunk the black market of labour. And, finally, this helped the consolidation of labour law.

III. The self-employed

The restoration of private property and citizens' free business initiative after the end of the year 1989 resulted in a sharp rise in the number of the self-employed, and this number keeps increasing. At the end of 2006 they came to 260 thousand, while the total number of the employed was 2 980 thousand ([18]).

The self-employed are those persons who work as freelance practitioners, craftsmen, sole proprietors and the like. They do independent work and, because of that, they do not come within the field of application of labour law, the latter regulating the labour of those who do dependent work. Their legal status is regulated by the insurance law, as they are obligatorily insured at their own account in the state social security against certain insured social risks (sickness, old age and death) ([19]), and by tax law because of the taxes they owe on the labour incomes they receive from their labour activity, as well as by civil and commercial laws ([20]).

([18]) Statistical Reference Book, National Statistical Institute, Sofia, 2007, p. 69.
([19]) **V. Mrachkov**, Insurance Law, 4th ed., Sofia, 2006, pp. 117–119; **K. Sredkova**, Insurance Law, 2nd ed., Sofia, pp. 194–196.
([20]) **V. Mrachkov**, Insurance Law, op.cit., p. 118.

The operative legislation does not contain a legal definition of 'self-employed', neither does it set forth any general legal regulation of their labour provision. The special laws (insurance ones, tax ones, etc.) contain a definition of certain common categories of the self-employed.

a) There was such a definition of freelance practitioners in section 1, item 6 of the Additional Provisions to the Law on Taxation of the Individuals' Incomes (OJ, No 118 of 1997) which was operative in the period under consideration. It read: 'Freelance practitioners are: expert accountants; tax consultants; auditors; attorneys-at-law; notaries; private executive magistrates and other juridical consultants; industrial property representatives; assessors of movable and immovable property and assessors of whole enterprises; translators; engineers and technical supervisors; architects; workers of culture, science and arts, including inventors, professional experts and **other persons performing professional activity at their own account**'. Actually, the term elements of 'freelance practice' are contained at the end of the quoted legal provision. And they are two:

1- performance of professional activity, i.e. labour activity that requires the respective professional training — education, talent, experience, skills, and the like;

2- performance of this activity at one's own account, i.e. at one's own risk of the expected and possible benefits and losses resulting from it and the economic insecurity accompanying any independent activity of a self-employed person.

b) persons exercising 'craftsman's activity'. These are persons practising a craft. 'A craft' is a system of practical knowledge, habits, dexterity, experience, skills and the like. Such craftsmen are: a tailor, a shoemaker, a blacksmith, etc.

c) sole proprietors, proprietors of commercial companies and partners in such companies. These are owners and partners in personal commercial companies (limited and unlimited partnerships), as it is only in these companies and not in the capital commercial companies (limited liability companies, shareholding companies and limited shareholding companies) that the partners carry out personal labour activity within the company, this constituting grounds for regarding these people as self-employed;

d) registered agricultural producers. These are persons who produce vegetable and animal products for the market and are registered in accordance with the respective procedure;

e) tobacco producers. These are persons who produce tobacco for the market;

f) persons providing labour without a labour relationship. These are persons who perform an obligation contract, e.g. a contract for manufacture, an order contract, etc.

The persons performing labour activity as self-employed should be registered in accordance with the due procedure and should have obtained permission for carrying out the respective labour activity.

Chapter VI: Areas of evolution, with adjustments towards flexibility

I. General remarks

The changes in Bulgarian labour law in the period 1995–2006 are characterised by the legislator's efforts to combine two basic, yet opposite, tendencies in its development: on the one hand, the tendency to greater flexibility and establishing rules on dispositive regulation of labour relationships the employer aims at, and on the other hand, the tendency to the employee's job security in his/her labour relations. Although not always being consistent and successful, the legislator's efforts in the recent decade have constantly been searching for the optimum combination of these two tendencies on 'Bulgarian ground' through **flexible security (flexicurity)** and adaptation of labour law to the dynamically changing conditions of the labour market, and particularly in the painful period of transition and economic crisis.

Most often the subject of these legislative changes consists in the legal regulation of fixed-term contracts and the working time duration through introducing increased and decreased working time.

II. Fixed-term contracts

The fixed-term contracts have long been known in Bulgarian labour law: in the Labour Contract Law of the year 1936 (Article 14), in the Labour Code of the year 1951 (Article 27), and in the Labour Code (Article 68). The two classical types of fixed-term labour contracts have been known in our national labour law for decades — the fixed-term contract, not exceeding three years, and the contract for doing specified work.

What is new in this traditional development in recent years is the increase in the variety of fixed-term contracts (see below) and the extremely wide spread of fixed-term contracts in the 1990s accompanied with a perversion thereof (see below).

Along with the traditionally known contracts of definite duration — the fixed-term contracts and the contracts for doing specified work (see above), in recent years the operative Bulgarian law has created three new types of contracts of definite duration: a contract for substitution for an absent employee for the time he/she is absent (Article 68, paragraph 1, item 3 of the LC); a contract for the time of the procedure for holding a competition for filling a position (Article 68, paragraph 1, item 4 of the LC); and a contract for a position rendering assistance to the exercise of a mandate position for the duration of the mandate (Article 68, paragraph 1, item 5 of the LC) ([21]).

As for the labour contracts of definite duration, the fixed-term ones are most commonly spread and have the greatest practical importance. The duration of these contracts may not exceed three years (Article 68, paragraph 1, item 1 of the LC).

The widespread use of these type of labour contracts of definite duration started in the mid 1990s. They were concluded for the performance of the basic and permanent activity of the employer. Their duration was comparatively short — three to six months — and they could be renewed an unlimited number of times. This brought about the conclusion of 'chain fixed-term labour contracts', i.e. to the conclusion of recurrently renewed fixed-term labour contracts. Of course, the employer used each expiration of the term of the labour contracts in order to terminate some of them quickly and easily, without any other motives. The conclusion of these

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([21]) **V. Mrachkov**, Labour Law, op.cit., pp. 216–228.

fixed-term labour contracts and the renewal thereof has always been accompanied by promises and assurances (oral ones, of course) on the part of the employers that after the expiry of the respective term they will be renewed and thus the employee's status allegedly is not at all compromised. However, the employers did not always keep their promises.

On the other hand, the transfer to working under a fixed-term employment contract of a comparatively short duration was used not only in the initial conclusion of labour contracts and taking a job with the respective employer, but also in the transformation of labour contracts of indefinite duration, which have already been operative for a long time as open-ended contracts, this transformation being done by way of signing a bilateral written agreement under Article 119 of the LC. That agreement is attached as an 'annex' to the open-ended contract and provides that the latter turns into a fixed-term contract of definite duration, and specifies the duration.

The excessive spread of fixed-term contracts of definite duration was due to the pressure exerted by the employer on the employees' will through an overt threat on his part. Most often it took place in private. The employer's benefit from the conclusion of fixed-term contracts of definite duration, or the transformation of an open-ended contract into a fixed-term one of definite duration by way of a written agreement under Article 119 of the LC (see above) consisted in the ease with which these contracts were terminated: upon expiry of the term fixed therein, without a prior notice and without any other legal grounds being present. This created widespread job insecurity and destabilised the employment of hundreds of thousands of employees.

Attempts were taken by the affected employees at invoking the invalidity of the fixed-term clause in the fixed-term contracts as an arrangement which was reached in vitiating the freedom of the employees' will due to an error, fraud and threat and should therefore be declared invalid (Articles 27 and 30 of the Law on Obligations and Contracts). Unfortunately, in spite of the witnesses' testimony furnished mainly by other employees, this testimony was not assessed as sufficient by the courts, including the Supreme Court of Cassation. In their jurisprudence the courts regarded the employee's signing of the agreement as a sufficient and irrefutable fact and did not go into a detailed investigation of the situation in which this fact took place, neither did they accept the witnesses' testimony and other evidence that would give rise to serious doubts about the 'freely' expressed will of the employee ([22]). This created tension and social dissatisfaction, which resulted in a legislative change in the regulation of fixed-term contracts of definite duration.

The legislative change was carried out in March 2001 through creating the new paragraphs 3–5 of Article 68 and paragraph 3 of Article 67 of the LC, which came into force on 31 March 2001 (OJ, No 25 of 16 March 2001). Thus, legislative restrictions were introduced into the excessive conclusion and use of fixed-term contracts of definite duration. It is worth reminding that the said restrictions do not concern the other four types of fixed-term employment contracts under Article 68, paragraph 1 of the LC (see above), which, just like before, can be concluded without any restrictions if such is the parties' will.

So, according to the new regulation applied since 31 March 2001, fixed-term labour contracts of definite time may be concluded in **two** main groups of cases.

The first group consists of cases in which fixed-term labour contracts of definite duration can be concluded without restrictions in the future. They cover **two** different hypotheses.

([22]) As for criticism of the jurisprudence in these matters see Critical Review of the Jurisprudence of the Supreme Court of Cassation in Labour Disputes in 1999, Juridical World Journal, 2000, No 2, pp. 193–194; same author: Critical Review of the Jurisprudence of the Supreme Court of Cassation in Labour Disputes in 2000, Juridical World Journal, 2001, No 2, p. 180.

One of them comprises cases in which the type of work and activities performed are ones of definite short duration. Three types of work and activities are included: temporary, seasonal and short-term ones. What is common to them is that, due to their objective nature, the time needed for performing them is relatively short. So, their nature conditions the conclusion of fixed-term employment contracts of definite duration for their performance. In all the three cases the short duration of the negotiated work should be in existence at the time the fixed-term employment contract of definite duration is concluded. The short duration is determined by the nature of the work negotiated for being performed. The type of the work should be explicitly stated in the fixed-term employment contract of definite duration.

The other hypothesis refers to those employees who are new entrants for the employer. 'New entrants' are those employees who are appointed for the first time by this specific employer, regardless of the length of time they have worked before that, the employers they have worked with, etc. And these are not just new entrants for any employer, but only for employers that are in an extremely critical state. These are employers that have been declared insolvent or in liquidation (Articles 266–274, 607–760 of the Commercial Law). That is the period of time during which, after the employer-debtor has been declared insolvent or the enterprise has been declared in liquidation, activities of encashment of movable and immovable property are performed for the extinguishment of the debts of the debtor that has been declared insolvent or in liquidation, safeguarding of this property, etc. These are relatively short and diminishing activities — 'fading' over time. However, the performance thereof is absolutely necessary (Decision No 775–99-III Civil Division, Decision No 1333–99-III Civil Division, etc.) ([23]). And it is for these urgent activities that employees can be employed under fixed-term labour contracts of definite duration. For example, such is the work and activities of security guards, assessors, accountants, treasurers and the like — activities which are specific to the final stage at which the employer's suspended activity is as a result of his being declared bankrupt by the court.

The second group comprises the cases in which the employer's activity continues being performed, unlike the cases of his being declared insolvent, in which the activity of the enterprise is suspended and the consequences of this suspension are settled (see above). These are cases of work and activities of permanent nature which concern the main scope of activity of the enterprise, and not activities of temporary, seasonal or short-term nature (see above). In this group of cases the conclusion of fixed-term labour contracts of definite duration is allowed '**by way of exception**' (Article 68, paragraph 4 of the LC).

For the purpose of avoiding any arbitrary interpretation and application of the presence of an 'exception' within the meaning of Article 68, paragraph 4 of the LC, the 'exception' has its legal definition in section 1, item 8 of the Supplemental Provisions of the LC. The definition reads as follows: 'An exception within the meaning of Article 68, paragraph 4 is present in specific economic, technological, financial, market and other objective reasons of similar nature, which exist at the time the contract is concluded and condition the term thereof'. This definition of the 'exception' makes it clear that there should be important **objective reasons** connected with the performance of the employer's constant activity, which justify and necessitate the resort to having new employees for the performance of the activity under labour contracts of definite duration. Such cases exist in the everyday practice of employers: receiving large orders due to an unexpected favourable situation in the market, negotiating the delivery of products after a

([23]) **A. Katsarski, V. Popova**, in: The New Points in Commercial Law, Sofia, 2000, pp. 167–171, 183–203, 312–318; **V. Mrachkov**, Critical Review of the Jurisprudence of the Supreme Court of Cassation in Labour Disputes in 1999, Juridical World Journal, 2000, No 2, pp. 200–201.

relatively short period of time in which the enterprise's staff is unable to produce them without having its number increased for some time, etc. These cases come under the 'exception' of Article 68, paragraph 4 of the LC and section 1, item 8 of the Supplemental Provisions of the LC.

The presence of the 'exception' should be explicitly stated in the fixed-term labour contract, i.e. it should be described therein in order to motivate and allow the conclusion of the contract as a fixed-term labour contract of definite duration. In these cases the term of the labour contract should correspond and be proportionate to the period of time for which the respective objective reasons exist in the specific case and necessitate the conclusion of fixed-term labour contracts of definite duration, however, the term may not exceed three years.

In the presence of the above objective reasons, relating to production, within the meaning of Article 68, paragraph 4 of the LC and in connection with section 1, item 8 of the Supplemental Provisions of the LC, the legal regulation introduces **new restrictions**. This time they concern the length of the term of fixed-term labour contracts of definite duration. It has **two** fixed degrees.

The first degree concerns the conclusion of fixed-term labour contracts of definite duration for a term of at least one year. The idea is that these labour contracts should be concluded for work of relatively long-term nature.

The second degree of restriction concerns the conclusion of fixed-term labour contracts of definite duration for less than one year. This is admissible only if so requested by the employee. The request should be explicitly made in writing and should express the employee's willingness to conclude a fixed-term labour contract for a period shorter than one year.

In those cases where the conclusion of a fixed-term labour contract is admissible by way of exception under Article 68, paragraph 4 of the LC, the concluded fixed-term labour contract of definite duration may be renewed only once. And the renewal may not concern a period shorter than 1 year (Article 68, paragraph 4 of the LC). This provision is aimed at ensuring a relatively longer period of employment (at least one year) in order for it to be certain that the need for a fixed-term labour contract is real, objective with regard to the employer's interests, and within this activity the employee's interests are protected for a relatively longer period of time. The period of the fixed-term labour contract which has been repeatedly concluded may not exceed three years: that is the total maximum length of the term of a labour contract of definite duration, which also applies to a fixed-term labour contract of definite duration which has been repeatedly concluded.

In 2001 the changes in Article 68 of the LC regulated the consequences of a breach of the restrictions regarding the conclusion of fixed-term labour contracts (Article 68, paragraph 5 of the LC). A 'breach' is present where fixed-term labour contracts of definite duration are concluded for work and activities which are not temporary, or seasonal, or short-term ones as provided in paragraph 3 of Article 68 of the LC; where fixed-term labour contracts are concluded for a term shorter than one year without the employee's explicit request for it being present as provided in paragraph 4 of Article 68 of the LC; or where the term of a repeatedly concluded fixed-term labour contract is shorter than one year, this being contrary to the requirement under Article 68, paragraph 4 of the LC. It does not matter which party has committed the breach, it might as well have been committed by both of them. The law is not interested in that. Neither is it interested in the subjective aspect — whether the conduct of the party or parties is culpable or not. This legislative regulation aims at limiting the conclusion of fixed-term labour contracts and at admitting them only where the prerequisites provided for in the Labour Code are present. If

these prerequisites are absent and the restrictions set forth in law are not observed, the law rules that the concluded fixed-term labour contract of definite duration is one of indefinite duration. That is a legal fiction, which regulates imperatively the consequences of the breach of law. The provision of Article 68, paragraph 5 of the LC is aimed at motivating and disciplining the parties in strict observation of the legal restrictions regarding the conclusion of fixed-term labour contracts of definite duration.

The legislative changes of the year 2001 provided for restrictions on the widespread transformation of open-ended labour contracts into fixed-term labour contracts of definite duration by way of signing written agreements under Article 119 of the LC (see above). They are contained in the new paragraph 3 of Article 67 of the LC, which reads as follows: 'A labour contract of indefinite duration may not be transformed into a labour contract of definite duration except where the employee expresses in writing his/her explicit willingness thereof'. The idea of the law is to admit that transformation if the employee wishes so, i.e. where such is the employee's freely expressed will, and not the will stated under the influence or suggestion of the employer. Owing thereto, it should be explicit, i.e. it should show clearly and unambiguously the employee's will. Besides, it is necessary that the employee's will be expressed in writing. Here the written form is the form of validity (ad solemnitatem) of the expression of will. The oral expression of will is invalid.

The employee's expression of will under Article 67, paragraph 3 of the LC should be an express one and should not form part of the agreement under Article 119 of the LC, and may not be derived from it. It should be made separately and should precede the conclusion of the agreement under Article 119 of the LC. If these requirements regarding the employee's expression of will are not observed, the open-ended labour contract may not be transformed into a fixed-term labour contract of definite duration. The latest jurisprudence of the Supreme Court of Cassation is to that effect as well (Decision No 1070–04-III Civil Division, Decision No 1087–04-III Civil Division, etc.) ([24]). Only then can there be certainty in its being voluntarily expressed, and being a manifestation of the employee's free will and genuine desire, and not a result of the employer's unauthorised influence. The operative legal provision of Article 67, paragraph 3 of the LC imposes considerable legal restrictions on the extension of the application of fixed-term labour contracts of definite duration. However, in order for this regulation to be effective, the respective conduct is needed on the part of the employees. They have to resist the employer's discreet or overt attempts and suggestions, which push them and induce them to request the transformation of the open-ended labour contract into one of definite duration.

The changes in the Labour Code effected in June 2006 introduced new points in the legal regulation of fixed-term labour contracts (Article 68, paras 2, 6 and 7 of the LC, 2006 version), implementing the recommendations in the field of labour law contained in the 2005 Monitoring Report of the European Commission in connection with Bulgaria's EU Accession Treaty signed on 25 April 2005 and the alignment of the operative labour legislation with Directive 1999/70/EC of 28 June 1999 regarding the framework agreement on fixed-term work concluded by ETUC ([25]), UNICE ([26]) and CEEP ([27]). These changes are aimed at consolidating the position of fixed-time labour contracts and equalising, as fully as possible, the rights and obligations of employees working under fixed-term labour contracts with the rights and obligations of employees working under open-ended labour contracts. That is expressed twice in Article 68,

([24]) **V. Mrachkov**, Labour Law, op. cit., p. 220.
([25]) European Trade Union Confederation.
([26]) The Confederation of European Business.
([27]) European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest.

paragraph 2 of the LC: first, by providing that the employees under fixed-term labour contracts have the same rights and obligations under their labour relationships as those of the employees under labour contracts of indefinite duration, and second, by laying down that, only because of the fixed-term nature of their labour relationships, they may not be placed in a less favourable position in comparison with the employees working under a labour contract of indefinite duration, if the work they perform is the same or similar in its nature, unless the differences are due to different qualification and skills. By the way, this idea is contained even in Article 8, paragraph 3 of the LC in its version of June 2004. In principle, the idea is to rule out any thought of fixed-term contracts being 'secondary' labour contracts, ones of lower legal importance and minor role in the realisation of the subject of the employer's activity. They are labour contracts on general grounds, just like the open-ended ones, for the time of operation specified in the term clauses thereof.

Wherever possible, the employer is obliged to facilitate the access of employers working under fixed-term contracts to professional training and career advancement, to increase their chances of transfer to another job, including a job under a labour contract of indefinite duration, which undoubtedly gives greater stability and consistency in their labour relationships, and is usually more desirable for them.

The new provisions regarding fixed-term labour contracts are not a revision on the part of the legislator of his attitude of restricting their conclusion, this attitude being implemented through the amendments of March 2001 (see above). Now it is contained in Article 68 of the LC and the legislator does not depart from it. The purpose of the new provisions (Article 68, paras 2, 6 and 7 of the LC) is to better protect the rights and interests of the employees working under fixed-term contracts for the time their labour relationships exist.

III. Flexible legal regulation of working time

A. General remarks

Working time in Bulgarian labour law in the period 1995–2006 is one of the most widely used areas for experiments in which the flexibility of legal regulation of labour relationships is most often introduced and applied, thus showing its possibilities, and proving both its advantages and the problems it gives rise to. This 'susceptibility' of working time to the introduction of flexibility is due to the nature of working time as being live labour, i.e. as juridical space in which live labour exists, manifests itself and fully displays its specificity as a subject of legal regulation.

What is specific to Bulgarian experience in the application of flexible working time is the employer's focusing on the use of working time and its adaptation to the needs of the production process. Depending on the dynamics of labour process, this use is realised in two opposite directions — part-time work and increased working time, proceeding respectively from Directive 97/81/EC of 15 September 1997 on part-time work and Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

B. Part-time work

Depending on the way of establishing it, and the source of the will for its introduction, in Bulgarian labour law there are **two** types of part-time work: a) part-time work under a contract; b) part-time work introduced unilaterally by the employer.

The part-time work under a contract is regulated in Article 138, paragraph 1 of the LC, 2001 version. It is grounded on the common consent of the parties. They determine its duration as part of the duration established in law. The parties are free to agree its distribution, for example: 2-, 3-, 4-hours work every day, or every other day of the week; working every day or every other day or only certain days of the week — Monday, Wednesday, Friday, etc. The part-time work that is most commonly agreed by the parties is the half-day work, i.e. 4-hours work on working days of the week — from Monday through Friday. This form of part-time work is often used by mothers of little children — aged below eight — or of pupils of the first years in primary school, who want to be together with their children in the out-of-school time, etc. Once the reasons for part-time work cease to exist, the parties may agree a transfer to full-time work (eight hours a day).

The part-time work introduced by the employer unilaterally poses more problems. It is a novelty in Bulgarian labour law and was introduced in accordance with Directive 97/81 EC in 2001 through the additions to Article 138, paras 2 and 3 of the LC (Article 138a of the LC, 2006 version).

The law permits an employer's unilateral introduction of part-time work on the grounds that there has been a 'decrease of the amount of work'. That means a shrinking of the production programme, e.g. the quantity of the manufactured products, the services provided, as well as fewer clients and the like. In an employer's judgement, this state may be temporary and surmountable in the near future, and accordingly part-time work can be introduced by the employer as a means of having the employees' share the burden of the unfavourable current situation, which has befallen the employer, while waiting for the situation to recover through a return to the normal rhythm and full-time work.

A judgement about the introduction of part-time work is made by the employer following consultations with representatives of the employees.

Depending on the extent of the decreased amount of labour (see above), the transition to part-time work might concern either all employees or only those of a specific unit — a workshop, a department, or an office. This possibility is explicitly provided for and is reasonable. What matters here is that the transition to part-time work should extend over those employees who deal with activities and work the amount of which has decreased.

Part-time work is introduced for a period of time not exceeding three months in a year. Here 'three months' denotes three astronomic months, e.g. from 10 June until 10 September, and not three calendar months, e.g. from 1 June until 31 August. Part-time work may be introduced for a shorter period several times in a calendar year, the total duration thereof not exceeding three months. And the period of '1 year' within which part-time work for a maximum of three months can be introduced is one calendar year, i.e. from 1 January until 31 December.

The law sets a lower limit of decreasing the length of part-time work. According to Article 138a, paragraph 2 of the LC, this length 'may not be less than one half of the length of the working time laid down in law for that period'. Two conclusions may be drawn from that, these conclusions outlining the broad field of application of the transition to part-time work: a) it applies both to normal working time (eight hours a day — Article 136 of the LC) and to

decreased working time in productions and activities of harmful, severe and specific working conditions (seven and six hours a day — Article 137 of the LC); b) part-time work applies both to daily and cumulative calculation of working time — daily and monthly, for up to six months (Article 142, paragraph 1 of the LC).

In compliance with the requirements of D. 97/81/EC, Article 138 and Article 138a have regulated two new common matters of part-time work:

a) Article 138, paragraph 3 of the LC explicitly provides that part-time work employees may not be placed in a more unfavourable position in comparison with full-time employees only because their working time is shorter. They enjoy equal rights, except for the cases where the enjoyment of certain rights depends upon the length of the working time — labour remuneration, paid annual leaves of absence, etc.

b) The procedure of transition from part-time work to full-time work by the employer's order was developed (Article 138a, paragraph 3 of the LC). In these cases the employer informs in advance the representatives of the employees and those of the trade-union organisations in the enterprise, as well as the employees, that the grounds for the part-time work he has unilaterally introduced are no more present, and that he restores full-time work. The employer also takes account of the personal willingness of the employees for their individual transition from full-time to part-time work and vice versa, and, where possible, satisfies it by taking measures for facilitating their access to work of the newly introduced length of the working time.

The rights and obligations of the parties in the cases of part-time work are in direct proportion to the length of the part-time work. This applies both to those working part-time under a contract (see above, No 99) and to those working part-time that has been unilaterally introduced by the employer (see above). This universal legislative solution is necessitated by the identical legal nature of part-time work, which does not depend on whether it was introduced by the parties' common consent or unilaterally by the employer.

C. Increased working time

The amendments to the Labour Code of March 2001 and June 2006 introduced the so-called **increased working time**.

This is working time of longer duration compared to the normal duration of the working day. It may be longer by no more than two hours a day.

Increased working time is admissible as a temporary measure — for a period of up to 60 working days in a calendar year (from 1 January to 31 December of the respective year), the number of consecutive working days not exceeding 20. By the way, 'the maximum legal norm' of 60 working days in a calendar year may be 'used' several times, depending on the employer's needs, for no more than 20 consecutive working days each time, and the total number of the days of increased working time should not exceed 60 in a calendar year.

Increased working time is introduced at the discretion of the employer in the presence of **economic reasons**. The law does not provide a legal definition of this term. These are circumstances related to the activity of the employer. In practice, such reasons are: a large number of orders that have to be performed within a short time, an uncommonly ample harvest, intensive seasonal work, and the like.

Prior to introducing the increased working time, the employer is obliged to inform and consult the representatives of the employees and the trade-union organisations in the enterprise. In the course of the consultations the employer acquaints the representatives with the specific

reasons which necessitate the introduction of increased working time and its length in the specific case, and hears out their opinions, proposals, etc. Besides, the employer is obliged to inform the respective Regional Labour Inspectorate about the introduction of increased working time, specifying its length, the number of employees who will work under increased working time, etc.

Increased working time is compensated for by introducing working time that is respectively decreased. When increased working time is introduced, it is the employer who determines the working days thereof, and the employees who will work under it, and the number of hours, and similarly, when it comes to compensating for it, it is again the employer who should determine the working days, and the number of hours of decreased working time for the same employees, i.e. this shorter working time compensates for the longer working time they have been under.

The compensation for increased working time by decreased working time is carried out within four months following the work under increased working time. The length of each day of decreased working time is lessened by a number of hours which is equal to the number of hours by which the length of normal daily working time was increased in the period of increased working time, in order for the increased working time to be fully compensated for by the decreased working time. Where the labour relationship is terminated prior to the full compensation for the increased time by the decreased time, the non-compensated part of the time is paid for to the employees as overtime work.

Chapter VII. The evolving relationship between law and collective agreements

I. General remarks

The general legal regulation of collective labour agreements are contained in Chapter IV of the Labour Code entitled 'Collective Labour Agreement', Articles 50–60. It was developed after the beginning of the 1989 democratic changes in our country, at the time of the radical changes in the Labour Code of November 1992 (see above, Chapter I). Since then this regulation has undergone two considerable changes (in May 2001 and December 2002 — see below).

Along with its subsequent amendments and supplements, the operative legal regulation of collective labour agreements of the year 1992 has given them the nature of a regulatory agreement. They may only provide more favourable working conditions compared to those in law, and not more unfavourable ones (Article 50, paragraph 2 of the LC).

Apart from the general legal regulation of collective labour agreements in Articles 50–60 of the LC (see above No 106), the possibilities of using collective labour agreements for stipulating more favourable working conditions for the employees interweave the whole Labour Code and are scattered throughout its parts — working time, leaves of absence, labour remuneration, healthy and safe working conditions, and throughout the subordinate legislation instruments issued for the application thereof. That is the new legal space that was freed upon the state's withdrawal from the centralistic and fixed regulation of labour relationships. Thus the state has granted the functions of self-regulation of labour relationships to the trade-union organisations and the employers and their organisations, as being closer to the dynamic development of the specific labour relationships and to the interests they contain. In this way the collective labour agreements turn into a continuation of the state's regulation and **a bridge** between the latter and the legal regulation created through them by private law subjects, this legal regulation enriching the labour law system.

II. Scope of collective labour agreements and its extension

The scope of collective labour agreements is determined by the range of matters that can form the subject of collective bargaining and collective labour agreements. This scope is determined in Article 50, paragraph 1 of the LC, which reads: 'The collective labour agreement regulates those matters of the labour and insurance relationships which are not regulated by the imperative provisions of law'. From here two basic criteria are drawn. They outline the scope of collective labour agreements under Bulgarian labour law:

a) The content of the matters which can be regulated by collective labour agreements (see below);

b) The presence of dispositive legal regulation of these maters or the absence of any regulation thereof (see below).

A collective labour agreement may regulate only labour and insurance relationships.

a) Labour relationships are the ones of provision of workforce and employed labour under a labour relationship of employees, on the one part, and employers, on the other part. These are the matters of labour remuneration, working time, rests (daily, day-to-day and weekly ones), leaves, healthy and safe working conditions, etc. They also comprise the matters of social and community services, cultural services, employees' vocational training and retraining, etc., which are directly related to labour relationships (Article 1, paras 1 and 2 of the LC). A large part

of these matters are regulated in the Labour Code, the Employment Promotion Law, etc. and the subordinate legislation instruments issued for their application;

b) Insurance relationships are those related to social insurance — both short-term and long-term (pension): the matters of categorisation of employees upon retirement depending on the working conditions under which they have been working, the insurance contributions due, the insured social risks, the insurance benefits, etc. They are regulated in the Social Insurance Code of the year 1999 (OJ, No 110 of 1999, am.). Within the meaning of Article 50, paragraph 1 of the LC, the range of insurance relationships also comprises the matters of health insurance and the procedure for its implementation under the 1998 Health Insurance Law (OJ, No 70 of 1998, am.), which are insurance ones within the meaning of Article 50, paragraph 1 of the LC.

The collective labour agreements' subject of regulation may only be those labour and insurance relationships which are regulated by dispositive provisions, and not by imperative ones. 'Imperative' provisions are those which precisely and exhaustively determine the volume and content of the respective rights and obligations of the parties to labour relationships, and order that the parties should observe them strictly. The parties are not allowed to derogate from them. Such are the provisions regarding the employees' disciplinary responsibility (Articles 188–199 of the LC), the termination of labour relationships (Articles 325–330 of the LC), the preliminary protection in dismissal (Article 333 of the LC), justiciability against wrongful dismissal (Articles 344–345 of the LC) and the like. 'Dispositive', and not 'imperative' are those provisions regulating labour and insurance relationships which lay down only the minimum standard ('lower threshold') of the rights and obligations of the parties to labour and insurance relationships, where the legal regulation gives the opportunity for more favourable solutions to be agreed. This type of regulation is more common to labour relationships. It is rarely used in the field of insurance relationships, mainly in the field of additional pension insurance. Owing thereto, collective agreements apply to this field of social security as well (Article 232 of the Social Insurance Code).

The subject of collective labour agreements also comprises matters of labour and insurance relationships which have never been a subject of legal regulation. Their identification is connected with discovering the incompleteness of the legal regulation, which might either be due to the legislator's deliberate refraining from regulating certain matters, leaving their future regulation to the parties to labour relationships, or be due to a legislative omission. In these cases collective agreements are the way of settling these matters and filling the gaps in legislation. Such matters in the field of labour relationships are those of vocational training, social and community services, cultural services to the employees, and in the field of insurance relationships — the amount of insurance contributions for additional pension insurance, the covered social risks in additional voluntary pension insurance, etc.

In the recent years there has been a clear tendency to **extension of the scope** of collective agreements. They cover not only the matters of labour remuneration, which are historically connected with the legal regulation of collective agreements in Bulgaria in the 1930s (see above Chapter II), but also a number of other matters regarding working conditions, the content of labour relationships: length of working time, use of the flexible forms of working time (part-time, increased, decreased working time, etc.), determining the length of the paid annual leave of absence above the minimum of 20 working days set forth in law (Article 155, paragraph 4 of the LC), determining the length of various types of additional paid annual leaves of absence (for a working day of unfixed duration, and for specific working conditions and risks for the employees' life and health which cannot be eliminated in spite of the measures taken), settling

the matters regarding the healthy and safe working conditions in the enterprise, preserving the employees' jobs in cases of economic difficulties for the enterprise, matters of vocational training and retraining when new technology and equipment is introduced, settling certain matters related to the preliminary protection in dismissal of employees, etc.

The legal grounds for this tendency consist of two groups of provisions contained in positive labour law. On the one hand, the broad legal wording used in Article 50, paragraph 1 of the LC, according to which the subject of collective labour agreements is 'the labour and insurance relationships' (see above). This wording creates a legal opportunity for the collective labour agreements to contain a large scope of matters of labour and insurance relationships. On the other hand, these are **specific legal provisions** which regulate certain matters of labour and insurance relationships. Such matters and provisions are: Article 156a of the LC on additional paid leaves of absence; Article 296, paragraph 1, Article 297, paragraph 2 and Article 299, paragraph 3 of the LC on social and community services, and cultural services to the employees using the so-called social funds of the enterprise; Article 3, paragraph 2, Articles 5, 6, 12, paragraph 7, etc. of the Ordinance on the Structure and Organisation of the Salary regarding various types of additional labour remuneration; Article 232 of the Social Insurance Code on the additional pension insurance implemented by the employer or under professional schemes, etc. Therefore, the operative legislation explicitly and constantly encourages the extension of the field of application of collective labour agreements and the self-regulation of labour and insurance relationships through the mechanism of collective labour agreements. From here onwards it is a matter of initiative, persistence, resourcefulness of the trade union organisations and the employer in making complete use of the 'niches' in collective labour agreements.

III. Levels of collective bargaining

According to Article 51 of the LC, it is possible for the collective labour agreements to be concluded by enterprises, branches, sectors or municipalities. Although Article 51 of the LC does not explicitly provide it, on general grounds, national collective labour agreements can be concluded as well. The conclusion of national collective labour agreements is deduced not only from the freedom of collective bargaining, but also from the provision of Article 53, paragraph 3 of the LC, which envisages the entry of 'a collective labour agreement of national importance'. And 'a collective labour agreement of national importance' is the national collective labour agreements. This opportunity has not been used so far, because no such need has occurred.

The various types of collective labour agreements, which can be concluded under Article 51, paragraph 1 of the LC, determine various levels at which they can apply and be operative. And that determines their **territorial scope**. The collective labour agreements at the enterprise level apply to the respective enterprise; the collective labour agreements at the branch level to the respective branch; the collective labour agreements at the sector level to the respective sector; the national collective labour agreement — to the whole country, to all sectors and activities; and the collective labour agreement at the municipality level applies to the respective municipality.

Article 51, paragraph 2 provides for the conclusion of only one collective labour agreement at the level of an enterprise, branch and sector. The purpose of this legislative solution, which was adopted in 1992, is to stimulate the trade union organisations to seek mutual consent, to come to agreements complying with the interests of the employees of the respective enterprise, branch, or sector, to put forward joint proposals in collective bargaining for the conclusion of one collective labour agreement with the respective employer, or with the branch

or sector employers' organisations in the sector or branch. This restriction does not concern collective labour agreements by municipalities, which, due to their nature, may extend to various categories of employees in the enterprises and organisations they work in (see below Articles 138–140).

Collective labour agreement in an enterprise (Article 51a of the LC). The largest number of collective labour agreements are concluded at the level of an enterprise, because the number of enterprises as local units in which joint labour under labour relationships is provided is the largest. The meaning of' 'an enterprise' under Article 51a of the LC is defined in section 1, item 2 of the Supplemental Provisions of the LC. It is 'any place — an enterprise, an institution, or an organisation, a site and the like where employed labour is provided', someone else's workforce is used and production, economic or business activity is carried out. Within the meaning of Article 51a of the LC, 'an enterprise' is not only an economic enterprise (public, private, mixed one) where activity connected with creating and exchanging consumer goods is performed (industry, construction, transport, trade and the like), and revenues and profit are realised. It is also a place where managerial, social, cultural, educational and other similar activities are performed.

The collective labour agreement in the enterprise is concluded between the **employer and the trade union organisation**.

The '**employer**' is the individual or the legal entity in the respective enterprise which employs the employees for the realisation of the subject of the activity. However, according to section 1, item 1 of the Supplemental Provisions of the LC, an 'employer' is not only the legal entity, but also a subdivision thereof which is not a legal entity, but is independent organisationally and economically and employs, on its own, employees under a labour relationship. The legal capacity of the subdivision to conclude collective labour agreements ensues from its quality of an employer and its employer's legal capacity, the legal capacity of concluding collective labour agreements being part thereof.

The definition of the **trade union organisation** as a party to the collective labour agreement **in the enterprise** poses a number of interesting questions. It might be any trade-union organisation in the enterprise — a representative or a non-representative one. Besides, it is not necessary for the trade union organisation participating in the collective bargaining and concluding the collective labour agreement in the enterprise to be a legal entity. That requirement is not laid down in law, and therefore it does not exist.

In the existing trade union pluralism in our country, a lot of enterprises usually have two or more different trade union organisations. Of course, where there is only one trade-union organisation in the enterprise, the project for the collective labour agreement is made by it and is submitted to the employer, and then the collective bargaining on it starts. In the presence of more than one trade union organisation, **two** hypotheses are possible. **The first** one is to have the trade union organisations reach consent and work out a joint project for a collective labour agreement and start bargaining on it with the employer. That solution is normal and desirable in law. Besides, it is in the best interests of all the employees in the enterprise. However, where such consent is not reached — and that happens in practice — then comes **the second** hypothesis provided for in law. According to it, each trade union organisation works out its own project for a collective labour agreement. The projects are subject to discussion and adoption by the general meeting of the employees. In order for a project to be adopted, it should receive a majority vote of more than one half of all the employees (Article 51a, paragraph 3 of the LC). This project is

submitted to the employer for discussion and collective bargaining and conclusion of a collective labour agreement.

In those cases where there is no trade union organisation in the enterprise — considering the decreasing number of employees who are members of trade unions in our country (about 20–25 %), that happens — no collective labour agreement with the employer can be concluded by another body, e.g. the general meeting of employees, or a body it has elected. That is so because in Bulgarian labour law the collective bargaining and the conclusion of collective labour agreements is 'a reserved territory' and a prerogative of the trade union organisations and their activity. The way out of this situation is either to have the employees set up a trade union organisation as a subject holding legal capacity for collective bargaining, or to have the collective bargaining matters agreed through the individual labour contracts in the course of the negotiations between the employees and the employer for the conclusion thereof. The individual bargaining is a more difficult way, it just shows the employees the difficulties where there is no general defender of their interests personified in the trade union organisation.

Collective labour agreements at a sector and branch level (Article 51b of the LC). Under Bulgarian labour law, depending on their subject and scope, the sections of activities are divided into branches and sectors. They express the division of labour and the grouping of similar production, services and activities on the basis of their similarity regarding the substance of the goods produced and the services provided, their consumer qualities, production technology and the raw stuff and material used. They form the subject of express legal regulation, classification and order. It is contained in the National Classification of Economic Activities, year 2003 (OJ, No 1 of 2003).

In spite of its being entitled 'Economic Activities', the National Classification of Economic Activities includes not only the sectors of national economy giving out products or providing services (agriculture, ferrous and non-ferrous metallurgy, construction, etc.), but also the sociocultural activities and social management in the spiritual sphere, such as state government, education, healthcare, science, culture, art, etc. In spite of their semantic closeness, 'sector' and 'branch' have different meanings under the operative Bulgarian law. The 'sector' denotes the basic subdivision, which is broader in scope, while the 'branch' is narrower in scope and denotes a separate part of the sector (such as a 'subsector'), in which there is closer grouping and greater similarity in the production and business activity, etc. According to the operative National Classification of Economic Activities there are 17 sectors in national economy (agriculture, forestry, game husbandry, extraction industry, construction, etc.) and 63 subsectors or branches.

The collective labour agreements at a branch and sector level have different scopes and fields of application. In principle, branch collective labour agreements apply to and are operative in the respective branch of national economy, while the sector ones apply to and are operative in the respective sector of national economy (see above).

However, apart from this, these collective labour agreements have several more common features which make them different both from the collective labour agreements in the enterprise (see above) and from the collective labour agreements in the municipality (see below Nos 138–140). These features are:

a) the legal subjects that are parties to the branch and sector collective labour agreements are different (see below);

b) a framework agreement should be present on the grounds of which they are concluded (see below);

c) there should be a joint project for a branch or sector collective labour agreement (see below);

d) the field of application of branch and sector collective labour agreements is elastic (see below).

The branch and sector collective labour agreements can be concluded only between trade union and employers' organisations that are representative at the national level (Article 51b, paragraph 1 of the LC) ([28]).

The legislator has left over the conclusion of branch and sector collective labour agreements only to the representative trade-union and employers' organisations, because collective bargaining at these higher levels is called upon to settle these higher levels of common interests of a great number of employees — those working in the respective branch or sector. These are tens of thousands of employees. And the representation and assertion of the common interests of large groups of employees can successfully be made by trade-union and employers' organisations which have their well-established and recognised national importance and prestige, such as the representative trade-union and employers' organisations and their sector and branch divisions.

In the late 2006 there were 3 trade-union organisations recognised as representative ones at national level in accordance with the procedure set forth in the Labour Code: 1. The Confederation of Independent Trade Unions in Bulgaria; 2. The Confederation of Labour' 'Podkrepa' ('Support'); 3. Association of Trade Unions' 'Promiana' ('Change'). Six employers' organisations are recognised as representative ones: 1. The Bulgarian Chamber of Commerce and Trade; 2. The Bulgarian Economic Chamber; 3. The Bulgarian Union of Private Producers' 'Vazrajdane' ('Revival'); 4. The Economic Initiative Union; 5. The Union of Employers in Bulgaria; 7. The Association of Industrial Capital in Bulgaria.

Branch and sector collective labour agreements are concluded between representative trade-union and employers' organisations on the grounds of an' 'agreement between their national organisations fixing the general points of the scope and procedural framework of sector and branch labour agreements' (Article 51b, paragraph 1 of the LC). This is a framework agreement. It covers **two** groups of general points.

The first group specifies, by way of example, the main points on which collective bargaining can be conducted and collective labour agreements can be concluded, including those at the sector level. Along with them, depending on the specificity of the respective branch or sector, the branch and sector trade-union and employers' organisations may include other points as well.

([28]) According to Article 34 of the LC (2001 version) the trade union organisations recognised as representative ones at the national level are those which meet the following legal requirements: a) a minimum number of 50 000 members; b) a minimum number of 50 organisations, at least five members each, in more than one half of those sectors which are specified by the Council of Ministers in the National Classification of Economic Activities (see above); c) local bodies in more than one half of all the municipalities (the total number thereof in the late 2006 is 263) and a national governing body; d) having the capacity of a legal person acquired by way of their being entered in the register of the respective district court.

And according to Article 35 of the LC (2001 version) the employers' organisations recognised as representative ones are those which meet the following legal requirements: a) a minimum number of 500 members, at least 20 employees each; b) organisations, at least 10 members each, in more than one fifth of those sectors which are specified by the Council of Ministers in the National Classification of Economic Activities (see above No 127); c) local bodies in more than one fifth of all the municipalities within the country and a national governing body; d) having the capacity of a legal person acquired by way of their being entered in the register of the respective district court.

The representative quality of trade union and employers' organisations is recognised for a period of three years, after which a check is made of the presence of the legal requirements regarding the acquisition thereof. If these requirements continue existing, that quality is granted for a new period. If they have ceased to exist, the granting of that quality is refused.

As for the representative trade union and employers' organisations and the procedure for the recognition of that quality see **V. Mrachkov**, Labour Law, 5th ed., Sofia, 2006, pp. 732–742, 748–753.

The second group concerns the determination of the so-called' 'procedural framework'. It determines the procedure and succession in which collective bargaining takes place, the preparation of the projects for collective labour agreements, the collection of the preliminary information required for concluding the agreements, taking efforts for reaching consent among all or a possibly large number of trade-union and employers' organisations in the course of collective bargaining, etc. The main purpose of these agreements is to support and facilitate the trade union and employers' organisations when holding the collective bargaining and to introduce good order and organisation, and not to impose restrictions on the conduct thereof.

The scope of branch and sector collective labour agreements is defined flexibly. It may include 'one or more activities specified in the National Classification of Economic Activities' (Article 51b, paragraph 2 of the LC). These might be either all the activities of a branch or a sector, or only separate activities having the same subject. The idea is to achieve greater economic and social homogeneity in the working conditions and community of interests of the employees working therein, which makes it possible to have these interests settled in one sector or branch collective labour agreement. Thus, the collective labour agreement of each sector or branch has its flexibility and elasticity.

The parties to these agreements may only be the representative trade union and employers' branch and sector organisations. They are the ones that know best the specific working conditions in the respective branch and sector and they are supposed to be able to settle them in the best way through the respective collective labour agreement.

The project for a branch or sector collective labour agreement is made by the respective representative branch or sector trade union organisations. They prepare a joint project. The efforts of the representative trade union organisations should be targeted at achieving common consent regarding the content of the project. If there is only one representative organisation in the respective branch or sector, it is this organisation that will prepare the collective labour agreement and will conclude it with the representative branch or sector employers' organisations. However, if the respective branch or sector has more than one representative trade union sector or branch organisation, they have to submit a joint project for a collective labour agreement to the respective representative sector or branch employers' organisations. If any of them refuses to participate in the conclusion of the branch or sector collective labour agreement, such an agreement may not be concluded 'separately', i.e. by one of these organisations, or without one of them. This conclusion follows from the explicit text of Article 51b, paragraph 3 of the LC, which requires that a joint project of all the representative trade union organisations in the respective branch or sector be submitted.

The additions to the Labour Code of December 2002 marked one more important step to greater flexibility and elasticity in determining the field of application of branch and sector collective labour agreements (Article 51b, paragraph 4 of the LC). This step consists in the opportunity for extension of the effect of the concluded branch or sector collective labour agreement to other enterprises as well, apart from those envisaged at the time the agreement was concluded. This is the 'extension of the effect of the collective labour agreement' known in the European legislation ([29]). The currently operative legal regulation provides for **two** prerequisites in the presence of which this extension takes place under Bulgarian law:

a) the branch or sector collective labour agreement should have been concluded among all the representative trade union and employers' organisations within the respective branch or

([29]) **Lyon-Caen, G.**, **J. Pélissier**, **A. Supiot**, Droit du travail, 19 ed., Paris, Dalloz, 1998, pp. 824–835.

sector (see above No 131). This shows that the respective collective labour agreement has obtained consent and has a relatively large field of application;

b) the parties to the branch or sector collective labour agreement should have made a request for having its field of application extended over all the enterprises in the respective branch or sector. That means extending the effect of the collective labour agreement to the enterprises of the sector or branch to which the collective labour agreement does not apply because they have no representative trade union organisation, or no trade union organisation at all.

In the presence of these prerequisites, it is the Minister of Labour and Social Policy who extends the effect of the respective branch or sector collective labour agreement. The minister is not bound by the proposal made by the trade union and employers' organisations that are parties to the agreement, and extends the effect at his/her own discretion. This conclusion follows from the wording of the provision: '**the minister is free to extend** the application of the agreement'. The extension may concern either the whole collective labour agreement, or certain provisions thereof.

The 'extension' takes place through an act of the Minister of Labour and Social Policy: an Ordinance or a Ruling. The latter specifies the date from which the effect of the collective labour agreement is extended. The 'extension' of the effect of the collective labour agreement means that the favourable solutions provided therein start being applied to the individual labour relationships of the employees in the respective enterprises, and the employers in these enterprises are obliged to implement them. The 'extension' concerns all the employees, regardless of whether they are members of trade union organisations or not.

Collective labour agreements by municipalities (Article 51c of the LC). These collective labour agreements may be concluded for activities which are financed by the state or municipal budgets. They cover activities such as: healthcare, education, culture, public utilities, etc. They are heterogeneous by nature, but they are all aimed at satisfying the needs of local people within the municipality.

These collective labour agreements are concluded between the representative trade union and employers' organisations within the municipality. These collective labour agreements have a limited territorial field of application. They extend to the trade union and employers' organisations and the employees of the respective municipality carrying out the respective municipal activities.

The projects for these collective labour agreements are made by the municipal divisions of the respective representative trade-union organisations, in accordance with the activities they concern: doctors, dentists and other medical specialists, teachers, etc. The projects thus developed are submitted to the respective representative employers' organisations and negotiations are held on the basis thereof for the conclusion of collective labour agreements.

More than one collective labour agreement may be concluded within a municipality: their number may reach the number of activities financed by the state or municipal budgets. For instance, such separate collective labour agreements by municipalities may be concluded for those working in the field of healthcare, or education, or culture, or tourism, etc. And that is something logical. It corresponds to the variety of activities financed by the respective budgets and developed on the territory of the respective municipality for the employees performing the said activities.

IV. Operation of collective labour agreements

The operation of collective labour agreements is expressed in creating rights and obligations under them connected with the labour and insurance relationships they regulate. The operation is characterised by: a) the period of time they are operative for; b) the legal subjects to which they are valid, i.e. with regard to which rights and obligations are created; c) the legal nature of collective labour agreements.

The collective labour agreements are concluded for a term of one year. However, they may also stipulate another term. It may be either shorter or longer than one year. A shorter term may be stipulated for the time of effect of either the whole collective labour agreement or certain parts thereof (e.g. on the matters of labour remuneration, etc.). Where a term longer than the one-year term of operation of collective labour agreement is agreed, this term may not exceed two years. This relatively short duration of the collective labour agreement is conditioned by the dynamics in the development of working conditions, which, on its part, requires frequent updating of the agreed conditions so that the latter present the changes that have taken place in labour and insurance relationships within the enterprise, sector, branch or municipality.

The collective labour agreements give rise to rights and obligations for the employers (both for the individual employers and the employers' organisations) and for the trade union organisations which are parties thereto, and for the separate employees, depending on the level at which the respective collective labour agreement is concluded.

The collective labour agreement at the enterprise level creates obligations for the employer in the enterprise. And the collective labour agreements at the level of a sector, a branch or a municipality create obligations for the employers that are members of the respective employers' organisation which is a party to the agreement. The effect of a sector, branch or municipal collective labour agreement is not terminated with respect to an employer because of his having terminated his membership in the respective employers' organisation after the collective labour agreement is concluded, and prior to the expiry of the term for which the collective labour agreement is concluded and remains in force (Article 55, paragraph 1 of the LC). That creates certainty both in the effect of these collective labour agreements and in the performance of the employers' obligations under them.

As for the trade union organisation, which is a party to the collective labour agreement, the latter creates rights in those cases where they are explicitly agreed in favour of the trade union organisation: setting up of the material conditions required for the activity of the trade union organisation; rendering support in the performance of the functions on the part of the trade unions, and the like (Article 46, paragraph 1 of the LC).

The effect of collective labour agreements with regard to the employees poses the largest number of questions. Although the employees are not a party thereto, they are beneficiaries under these agreements, as the working conditions, the settlement of which is the main purpose and content of the collective labour agreements at all levels, concern the employees and their labour relationships.

According to Article 50, paragraph 2 of the LC, 'the collective labour agreement may not contain clauses which are more unfavourable than those laid down either in law or in a collective labour agreement which is binding on the employer'. That is a basic rule established in law. Although it is expressed with two negations (the collective labour agreement '**may not**' contain clauses which are '**more unfavourable**' to the employees than those laid down either in law or in a collective labour agreement which is binding on the employer), its actual content expressed

positively is as follows: in principle, the collective labour agreement may contain clauses which are more favourable than those laid down either in law or in a collective labour agreement which is binding on the employer. This conclusion follows from the linguistic and logical interpretation of Article 50, paragraph 2 of the LC due to the following considerations: a) Article 50, paragraph 2 of the LC explicitly sets forth that the collective labour agreement may not provide working conditions which are more unfavourable than those established either in law or in a collective labour agreement which is binding on the employer. This categorical imperative rules that it is inadmissible and wrongful for a collective labour agreement to come below the level of the legal protection of labour established either in law or in a collective labour agreement which is binding on the employer; b) the collective labour agreement would have been pointless if it contains only clauses that are at the level established in law or in other collective labour agreements which are binding on the employer, because it will only repeat them and double them, this having no legal or social sense; c) the only social and legal sense is found in concluding the collective labour agreement at the respective level, if and where it contains more favourable clauses, i.e. if it establishes a higher level of working conditions compared to those established either in law or in collective labour agreements which are binding on the employer. That is the only case justifying the conclusion of a new collective labour agreement. And that is the practice in our country.

Depending on the level at which it was concluded, the collective labour agreement containing more favourable working conditions which are binding on the employer (see above Nos 118–140) apply to the employees working in the enterprise, sector, branch or the respective activities of the municipality, dividing them in two groups: a) employees who are members of the trade union organisation which is a party to the collective labour agreement (see below, Article 145); b) employees who are not members of the trade union organisation which is a party to the collective labour agreement (see below, Article 146).

As for the employees who are members of the trade union organisation which is a party to the collective labour agreement, the agreement applies on the grounds of their membership in this organisation at the time the agreement came into force (Article 57, paragraph 1 of the LC). This easy and fast way of application of the collective labour agreement to this category of employees is an expression of their advantage in being members of the trade union organisation which is a party to the agreement. And the representation and protection of the interests, this being a main function of the trade union organisation (Article 4 of the LC), mainly concerns its members. It does not matter how long these employees have been members thereof. It is sufficient that the entry into force of the collective labour agreement finds them members of the respective trade union organisation. Where the collective labour agreement has been concluded at the level of an enterprise, a party to the collective labour agreement may be a representative or a non-representative trade union organisation established under Article 33 of the LC. And where the collective labour agreement has been concluded at a sector, or branch, or municipal level, that should only be a representative trade union organisation under Articles 34–36 of the LC (see above, subsections II–III).

An important feature of the effect of the collective labour agreement with regard to that category of employees is that it applies to a number of people who are not specified in person: those who have been or are, or will be members of the respective trade union organisation for the period in which the signed collective labour agreement is valid, and not to employees named in a list. Any subsequent amendments and supplements to the collective labour agreement made in the period of its being effective apply to the said workers.

As for the employees who are not members of the trade union organisation or organisations that are parties to the collective labour agreement, the latter applies in accordance with a specific procedure (Article 57, paragraph 2 of the LC). However, before that, it is necessary to specify the employees covered by this procedure. These are all the remaining employees of the enterprise, regardless of the type of their labour contract (a fixed-term or an open-ended one), the length of the working time (full-time or part-time), etc. These are employees who are not members of any trade union organisation, and those who are members of a trade-union organisation, but the latter is not a party to the collective labour agreement which is operative in the enterprise and which the respective employees want to join.

As for the large group of employees thus outlined, the effect of the collective labour agreement is extended by their **joining** the collective labour agreement to which their employer is a party.

The joining is performed through a personal written expression of will on the part of the employee addressed to the employer or the managerial body of the respective trade union which is a party to the collective labour agreement. Where more than one trade union organisations are parties to the agreement, it is sufficient for the request for joining to be addressed to any of the trade union organisations which are parties to the collective labour agreement.

The conditions and procedure of joining are regulated in the collective labour agreement by the parties to the agreement in a manner not contravening the law, not evading it and not infringing good morals. This joining is a subjective right of each employee. The bodies to which the employee's request is addressed may not refuse the granting thereof. The refusal can be appealed against in court.

The legal nature of the collective labour agreement and the effect thereof are determined by the content and the legal nature of its clauses. And they can be different: regulatory and obligation ones.

The regulatory clauses of the collective labour agreements form the predominant part of their content. By virtue of legal delegation, they either lay down more favourable conditions than the minimum ones provided for in law, or create the primary regulation on matters which are not settled in law at all. It is Article 50 of the LC that forms the grounds thereof. These clauses have a regulatory effect and apply to an indefinite extent of employees who are not designated in advance, and derogate the application of the established minimum legal standards or fill the gaps in the state legal regulation. They are operative for the time the respective collective labour agreement is effective.

The obligation clauses of the collective labour agreement are fewer in number. They apply to the relationships between the parties to the collective labour agreement — the employer (the employers' organisation) and the respective trade union organisation (organisations) that have concluded it. These clauses are grounded on the freedom of contracting under Article 9 of the Law on Obligations and Contracts. They provide for creating the necessary conditions and rendering assistance, granting the free use of movable and immovable property on the part of the employer (the employers' organisation) to the trade union organisation (organisations) in the course of performing their activities. These clauses are implemented through the respective performance, either a single-time or a periodic one, on the part of the employer, to the trade union organisation, in accordance with what is agreed in the collective labour agreement.

Chapter VIII. Changes in regulatory techniques

I. General remarks

In the period 1995–2006 the consolidation of the new regulatory techniques, which began after the profound changes in Bulgaria in late 1989 (see above, Chapter I) continued. These techniques form part of the changes in labour law. The new regulatory techniques are expressed in the use of new methods of regulation of labour relationship, accompanied by changes in the machinery of labour law terms and its specific juridical vocabulary.

Three main directions are outlined in the changes in regulatory techniques of Bulgarian labour law: a) affirming the social dialogue in labour relationships and the effect thereof upon the regulation of labour relationships; b) decrease of the imperative legal norms and contractualisation of labour law; c) activation of the role of non-state sources in the enterprise in the regulation of labour relationships.

The amendments to the Labour Code of March 2001 explicitly included the development of social dialogue in Article 1, paragraph 3 of the LC as one of the main objectives and fundamental principles of labour law.

Within the context of Article 1, paragraph 3 of the LC, social dialogue is actually a technique of holding joint discussions for achieving the possible maximum of complete and balanced recognition of the interests of the participants therein in laying down the legal regulation of labour relationships and the insurance ones, which are directly related thereto. Social dialogue is a manifestation of civil society in labour law, the development of this society being determined by the Constitution as one of the main directions in the development of Bulgarian society (Article 4, paragraph 1 of the Constitution).

II. Social dialogue

The new Article 2 of the Labour Code of March 2001 determined the following: a) the purpose, content and forms of manifestation of social dialogue; b) its field of application; c) the participants in the realisation thereof.

The purpose of social dialogue is to allow the participation of the bearers of different interests in the regulation of labour relationships and the achievement of the best possible balance among them in the regulation thereof, and their adequate reflection and legal form. That ensures greater justice in social relationships in the course of creating the state's legal regulation. Having involved social dialogue in the regulation of labour relationships, the legal regulation is no more performed only and entirely by the state — it is performed after 'consultations and a dialogue in the spirit of cooperation, mutual concessions and respect for the interests of each party'. This part of the legal regulation under Article 2 of the Labour Code sets the time for the social dialogue – 'after consultations and a dialogue…'. This means that the regulation of labour relationships still remains an authoritative function of the competent state bodies, however, it is preceded by 'consultations and a dialogue' with non-state bodies. That is essential to the content of the future legal regulation, as the matters it settles are regulated after their being **clarified in more detail**, and that will be reflected in the content of their final regulation.

Social dialogue has its broad field of application. It covers: labour and insurance relationships, and the standard of living matters. In view of the evolution of labour law that we are interested in here, it is important to stress that it also comprises the matters of labour

relationships as well as those directly related thereto, which means the whole subject of labour law. Thus, the application of social dialogue and its use in the regulation of labour relationships interweaves the entire labour law and infiltrates its development.

Social dialogue involves the state and the social partners personified in the trade union and employers' organisation. And these are the parties which are most interested in the fair settlement of labour relationships. 'The state' — as a representative of society, and the trade union and employers' organisations as representatives of the legal subjects directly participating in labour relationships — the employers, on the one hand, and the employees, on the other hand.

In the period 1995–2006 social dialogue developed and consolidated through several specific forms: a) collective agreements; b) tripartite cooperation; participation of the employees in the management of the enterprise; c) voluntary settlement of collective labour disputes.

Collective labour agreements have already been discussed in the previous chapter, and owing thereto, here they are just mentioned for the sake of systematic integrity. As for the content thereof, we are making a renvoi to the preceding exposition (see above, Chapter VII). In the lines below the attention will be focused on the main points in the other three forms of social dialogue.

Tripartite cooperation, which was explicitly regulated under the Labour Code through its amendments of November 1992, in the period 1995–2006 considerably extended its legal regulation and practical application. The most important additions thereto were made in March 2001 and December 2002 (Article 3–3f of the LC). Here are the main points:

a) A whole system of tripartite cooperation bodies was developed, with the participation of representatives of the state and the representative trade union and employers' organisations in the ratio of 1:1:1. These bodies are:

aa) National Council for Tripartite Cooperation, chaired by the Deputy Prime Minister, comprising two representatives of the government and two representatives of each trade union and employers' organisation recognised as being a representative one;

bb) sector, branch and municipal councils for tripartite cooperation dealing with the specific matters of labour and insurance relationships and the matters of the standard of living in the respective sector, branch and municipality.

The representatives of the Council of Ministers and the other state bodies in the tripartite cooperation bodies under items 'aa' and' 'bb' are designated by the respective state body, while the representatives of the trade union and employers' organisations are designated by the managerial bodies thereof, provided for in their statutes.

b) The functions of the councils for tripartite cooperation were specified. They consist in discussions and consultations on the matters of labour and insurance relationships as well as those of the standard of living, which are regulated in the legislation instruments.

The matters of labour and insurance relationships have the same content as those in determining the scope of collective bargaining (see above Chapter VII, subsection II). And, according to the addition to Article, paragraph 2 of the LC of December 2002 (OJ, No 120 of 2002), the matters of the standard of living are determined by the Council of Ministers. They were determined through the Decision No 860 of the Council of Ministers dated 2 November 2004. They comprise a very large scope of matters, including those related to prices regulated by the Council of Ministers, such as the prices of electric and heat power, the price of natural gas, matters of tax and budget policy, combating poverty, health and education matters, etc.

c) Organisation and activities of the councils for tripartite cooperation: convening and holding the meetings thereof, the procedure for adoption of decisions, etc.

The consultations and cooperation necessarily take place prior to adopting normative instruments — bills, rules, ordinances and decrees of the Council of Ministers on matters regarding labour and insurance relationships as well as those regarding the standard of living (Article 3, paragraph 2 of the LC, 2001 version). Those subdelegated legislation instruments which have been adopted by the Council of Ministers without their projects being discussed in advance by the National Council for Tripartite Cooperation are unlawful. This view has been adopted by the Supreme Administrative Court. The Decision No 9289 dated 4 December 2001 of a panel of five judges of the Supreme Administrative Court repealed items 1 and 2 of Section 1 of Decree No 212 of the Council of Ministers dated 28 September 2001 because of its being contrary to law. That decree provided for increasing the price of electric and heat power, and natural gas, these being matters of the standard of living within the meaning of Article 3, paragraph 1 of the LC (see above No 164, item 'b'), however, no consultations with the social partners in the National Council for Tripartite Cooperation have been held as required under Article 3, paragraph 2 of the LC, and owing thereto, the Supreme Administrative Court overruled this decree of the government as being contrary to law.

As a whole, the bodies of tripartite cooperation function with uneven intensity. Their activity is determined by the government's policy on social dialogue. In any event, since the year 1997 the tripartite cooperation system has been functioning comparatively well. And yet, the National Council for Tripartite Cooperation is more active, while the sector, branch and municipal councils for tripartite cooperation are less active. An important role in activating the bodies of tripartite cooperation is played by the social partners — the representative trade union and employers' organisations — and by the pressure they exert upon the representatives of the state in activating the councils for tripartite cooperation.

The decisions of the tripartite cooperation bodies on the matters discussed are ones of consultative nature. The final and legally binding decisions are taken by the competent State's bodies. They take into account the opinions given by the tripartite cooperation bodies in the course of discussing the matters.

III. Informing and consulting the employees

Following the 1992 changes, the operative legislation has given **inconsiderable functions to the representatives of the employees in the management of the enterprise**. The changes in the Labour Code of the years 2001 and 2004, and especially those of 2006, have given the start of a gradual, still insufficient, extension of the functions of the general assembly of the employees and the participation of the employees' representatives in the management of the enterprise when its social funds are allotted and used (Articles 293–300 of the LC), when choosing employees' representatives for informing and consulting the employees (Articles 7–7d, 130–130d of the LC), the obligation of the state to create conditions for and support the trade union organisations in the performance of their activities (Article 46 of the LC), etc.

The changes made in the Labour Code in June 2006 (Articles 7a-7d, 130–130d, 138a, 139a of the LC, etc.) were important steps in introducing the right to **informing and consulting** the employees on the activity of the enterprise and on solving important matters regarding the enterprise's activity and management. The new regulation of 2006 follows the European solutions on these matters (D. 94/45/EEC, D. 98/59/EEC, D. 2002/14/EC, etc.) and lays down the foundations of a **new institute** of Bulgarian collective labour law — informing and consulting the employees on the part of the employer.

The new regulation creates **three** special bodies for conducting the informing and consulting: 1. representatives of the employees under Article 7, paragraph 2 of the LC; 2. representatives of the employees under Article 7a of the LC; 3. representatives of the trade union organisations. The representatives of the employees are elected by the general meeting of the employees for a term of one to three years. Under the Labour Code, the number of the employees' representatives under its Article 7a is three to nine, depending on the number of the employees working in the enterprise, while the number of the representatives under Article 7, paragraph 2 of the LC is determined by the general meeting of the employees. The representatives of the trade union organisations — both the representative and the non-representative ones — are members of their managerial bodies in the enterprise.

The representatives of the employees under Article 7, paragraph 2 and Article 7a of the LC have different functions assigned thereto.

The representatives under Article 7, paragraph 2 of the LC have the right to receive information and to participate in consultations on matters that are of extreme importance to the existence and activity of the enterprise. These matters are explicitly provided for in the Labour Code: employer's changes under Article 123 and 123a of the LC (merger, takeover, split-up of the enterprise, transfer of the enterprise, its letting out for rent or lease, or under concession), collective dismissals in the enterprise (Section 1, item 9 of the Supplemental Provisions of the LC), introduction of part-time, or increased working time, or working time of non-fixed duration (Article 136a, 138a, 139 of the LC). Unlike them, the representatives under Article 7a of the LC receive information from the employer regarding the current and day-to-day production and business activity of the enterprise (Articles 7c, 130c-130d of the LC, etc.).

Along with the employees' representatives, the trade union organisations also receive information on all matters related to the basic activity of the enterprise and its current activity and state.

The representatives of the employees and the trade union organisations are obliged to acquaint all employees of the enterprise with the information provided to them by the employer, to hear out their opinions and questions, as well as to take account of the latter in the course of the consultations held with the employer (Article 130, paragraph 3 of the LC). However, the adoption of the final decisions connected with the management and activity of the enterprise is within the employer's powers. Thus, a constant social dialogue is maintained between the employer and the personnel, and there is transparency in the activity of the enterprise and the prospects of its development, and the participation of the employees in the management of the enterprise is ensured. This aims at creating a normal working environment and relationships of trust between the managerial staff of the enterprise and its employees, which is in the best interests of the employer and the staff alike.

IV. Settlement of collective labour disputes

In March 2001 important changes were introduced in the 1990 Law on Settling Collective Labour Disputes (abbreviation LSCLD) aimed at providing greater possibility for voluntary settlement of collective labour disputes through mediation and voluntary labour arbitration.

a) Article 4 of the LSCLD provides that where a party to a collective labour agreement refuses to take part in the negotiations for its voluntary settlement, each party is free to seek the

assistance of the National Institute for Reconciliation and Arbitration or the trade union and employers' organisations (see below item 'b');

b) By virtue of Article 4a of the LSCLD the National Institute for Reconciliation and Arbitration with the Minister of Labour and Social Policy was created. It renders assistance in the voluntary settlement of collective labour disputes in those cases where the parties fail to reach an agreement in the direct negotiations for its voluntary settlement. For this purpose in March 2002 there were elected 36 mediators and 36 arbitrators for voluntary settlement of collective labour disputes in those cases where the parties refer the collective labour dispute to the National Institute for Reconciliation and Arbitration.

In October 2006 the LSCLD underwent considerable amendments (OJ, No 87 of 27 October 2006). They abolished the restrictions on the exercise of the right to strike on the part of the employees working in the power sector, healthcare and communications, these restrictions being set forth in Article 16, item 4 of the 1990 LSCLD. These amendments were subject to long discussion in the National Assembly after the Council of Ministers brought in the bill. The discussions were held in the Parliamentary Commission on Labour and Social Policy with the active participation of representatives of the trade union and employers' organisations. As a result of the almost one-year long negotiations and discussions, the repeal of Article 16, item 4 of the LSCLD was commonly agreed. The repeal of the prohibition on the exercise of the right to strike on the part of the said categories of employees has been accompanied by the introduction of additional requirements for determining the minimum activities which will be performed during a strike (Article 14 of the LSCLD) either on the grounds of an agreement between the employer and the employees on strike, or, where no such agreement is reached, on the grounds of the decision of an obligatory labour arbitration. Thus, the amendments to the LSCLD of October 2006 have actually marked the first application to Bulgarian law of the European experience in adopting a negotiated law between the state and the social partners.

V. Contractualisation of labour law

There has been a constant tendency to a decrease of the imperative legal norms in labour laws. This tendency started with the 1992 changes in the Labour Code and has been present since that time. It is conditioned by the abandonment of the centralistic and fixed regulation of labour relationships, which was characteristic of the socialist period in the development of labour law (1944–1989) and the adoption of the course of establishing market economy taken after the changes of the late 1989 started. In 1995–2006 the centralistic and fixed regulation of important institutes of labour law, such as working time, rests, leaves of absence, labour remuneration, etc. was abandoned. Nowadays this regulation is preserved only for those labour law institutes which are connected with labour protection, such as: the minimum age of taking a job, the abolition of children's labour and the protection of young people's labour, the regime of dismissal, and the healthy and safe working conditions. As for the other institutes of labour law, either dispositive regulation of labour relationships is introduced, or regulation through legal norms setting a minimum or a maximum, or a minimum and a maximum. This line of development of labour law results in its contractualisation (see below).

The contractualisation of labour law is expressed in the more active part the collective and individual labour agreement plays in determining the content of the individual labour relationship, i.e. the rights and obligations of the employees and employers. The role of the

collective labour agreement in that aspect has already been examined (see above Chapter VII) and here it is just mentioned for the sake of completeness of the exposition.

As for the role of individual labour contract in the contractualisation of labour law, it is expressed in two directions: a) the occurrence of the individual labour relationship; labour contract is the most common basis for the occurrence of the individual labour relationship; b) labour contract provides the parties with the greatest opportunity for changing its content in accordance with their common will (Article 66 of the LC) ([30]).

In the period 1995–2006 the number of dispositive norms in the Labour Code kept increasing through:

a) introduction of norms with an imperative minimum under which the parties are not allowed to descend when contracting the collective labour agreement or the individual labour contract. Such are the provisions regarding the minimum length of the paid annual leave of absence (20 working days — Article 155, paragraph 4 of the LC, 2001 version), the amount of the additional paid leaves of absence under Article 156 of the LC (for a working day of unfixed duration and for specific working conditions — five working days at least), the amount of the minimum monthly salary within the country, fixed by the Council of Ministers, etc.;

b) setting norms with an imperative maximum, below which the parties are not allowed to contract in the individual and collective labour agreement, and should not exceed it except where the law explicitly provides so. Such are the provisions of Article 136, paragraphs 1 and 4 regarding the length of working time, etc.;

c) setting norms with an imperative minimum and an imperative maximum which give the parties the opportunity for contracting within certain limits ‘from-to’ (Article 326, paragraph 2 of the LC regarding the term of the prior notice in terminating the labour agreement ranging from 30 days to three months, etc.).

VI. Non-state sources of labour law

The extension of the application of **non-state sources** in the regulation of the labour relationships in **the enterprise** also comes within the tendency to creating a more flexible legal regulation of labour relationships, in compliance with the specific particularities of the enterprise. The delegation regarding their adoption, the matters these sources may regulate and the bodies which are competent to adopt them are explicitly specified in law. Such sources are: a) the collective labour agreements in the enterprise (Article 51a of the LC — see above Chapter VII); b) the employer’s rules on internal labour order, which specify the rights and obligations of the employees and the employer under the labour relationship and the organisation of labour in the enterprise in accordance with the specific particularities of its activity (Article 181 of the LC); c) adoption of specific rules on healthy and safe working conditions (Article 277 of the LC); d) decisions of the general meeting of the enterprise’s employees on the distribution and use of its social funds (Articles 293, 299 and 300 of the LC); e) internal rules on salary (Article 22 of the Ordinance on the Structure and Organisation of Salary).

These non-state sources of labour law are issued in the cases explicitly provided for in the respective laws (the Labour Code, etc.). They are domestic legislation instruments which apply to the respective enterprise only. The largest part thereof (see above) are issued by the employer himself, after considering the opinion of the trade union organisations in the enterprise (Article 37 of the LC).

([30]) **V. Mrachkov**, Labour Law, Op. cit., pp. 193–213.

Chapter IX: Impact of EU law

The impact of EU law on Bulgarian labour law in the period 1995–2006 is really considerable. It was exercised within the period in which the Europe Agreement on the association between the European Union and the Republic of Bulgaria was operative, and by virtue of Articles 69–71 of the quoted agreement (see above Chapter I). The intensity of this impact kept growing with the approaching of the end of the 10-year period for which the quoted agreement was operative and the signing of Bulgaria's EU Accession Treaty, which set the accession date — 1 January 2007.

In the 12-year period under consideration (1995–2006) there are three main 'waves' of major amendments and supplements to the Labour Code — in March 2001, June 2004, and June 2006, the impulses for which came entirely or almost entirely from Brussels.

The main areas which illustrate the great impact of EU law on the development of Bulgarian labour law in the period under consideration are the following ones: anti-discrimination legislation; preservation of the labour relationships with the employees in the transfer of an enterprise or a part thereof; the employer's obligation to acquaint the employees with the conditions of the labour agreement; organisation of working time and application of part-time work; fixed-term contracts; the right to informing and consulting the employees; protection of employees' claims in the event of the insolvency of their employer; collective dismissals, etc.

The EC directives which relate to these areas have been introduced in the operative legislation in the process of approximation of Bulgarian labour legislation to the European standards in performance of Articles 69–71 of the Europe Agreement on Association. They are expressed in the changes to the Labour Code and other laws, the adoption of two new laws — the Law on Protection against Discrimination and the Law on Employees' Guaranteed Claims in the Event of the Insolvency of Their Employer, etc. (see below).

Under the influence of the principle of equal payment to people of different sex for equal work (Article 141 of the Treaty on European Union) and a number of directives of the EC on **removal of discrimination** based on differences in sex, ethnic origin, religious beliefs, etc. (Directive 2000/78 of 27 November 2000 on establishing a framework for equal treatment in employment and occupation, Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, amended by Directive 2002/73/EC, Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, etc.), in the period 2001–2004 Bulgarian anti-discrimination legislation was greatly extended and enriched in several directions:

a) In March 2001, during the changes to the Labour Code, Article 8, paragraph 3 of the LC was amended, abolishing explicitly both direct and indirect discrimination. Besides, the 'catalogue' of anti-discrimination indicators was considerably enlarged and new ones were added thereto, taken from the EC directives: colour of the skin, sexual orientation, family status, age, mental and physical impairments, difference between the term of the contract and the duration of working time, etc. This has enriched Bulgarian labour anti-discrimination law and has encompassed as fully as possible the indicators of discrimination in contemporary conditions. Bulgarian labour law has 'gained' from that;

b) The new Article 243 of the LC, 2001 version, explicitly set forth the right to equal labour remuneration for the same or equivalent labour. This principle was also spread over all payments under labour relationships — additional labour remuneration, compensation and gratification payments, compensations in terminating the employment relationship (for unused paid annual leave of absence, for being out of a job and the like);

c) The most comprehensive and exhaustive regulation of the protection against discrimination under the operative legislation is contained in the new Law on Protection against Discrimination of the year 2003 (OJ, No 86 of 2003, am.), effective since 1 January 2004. It also contains a special section (Chapter II, Section I, Articles 12–28) on protection against discrimination in exercising the right to employment:

aa) by way of example, this law (Article 4, paragraph 1) lists a wide range of contemporary anti-discrimination indicators, there being added such forms and distinctions as direct and indirect discrimination, modern contemporary indicators such as 'human genome', as well as any other indicators set forth in law or in an international treaty that the Republic of Bulgaria is a signatory party to, etc.;

bb) a legal definition is presented of direct and indirect discrimination in accordance with the EC directives (Article 4, paras 2 and 3 of the quoted law);

cc) cases which do not constitute discrimination under the EC directives are specified (Article 7 of the quoted law);

dd) a special body is set up for dealing with citizens' and legal entities' complaints against breaches of the Law on Protection against Discrimination — the Commission on Protection against Discrimination. It is composed of nine members (five are elected by the National Assembly and four are appointed by the President of the Republic) for a term of five years. The procedure for considering the complaints is specified, and so are the sanctions (fines) and the compulsory administrative measures imposed if the quoted law is violated. The decisions of the Commission may be appealed against to the Supreme Administrative Court.

d) the Commission on Protection against Discrimination has been functioning for more than two years now and has established itself as an efficient body for protection against manifestations of discrimination of citizens and legal entities within the country.

Preservation of labour in transfer of the enterprise or a part thereof. The substantial changes which Article 123 of the LC underwent in the years 2001, 2004 and 2006 regarding the preservation of labour relationships of employees in the event of changes concerning the employer (merger, takeover, distribution of activity, transfer of ownership of the enterprise or a part thereof, a change in the legal organisational form of the company, letting out for rent or lease, or under concession) had the purpose of reflecting the requirements of Directive 77/187/EEC and the new Directive 2001/23/EC.

The employer's obligation to acquaint the employee with the content of the labour agreement. This obligation, which is provided for in Directive 91/533/EEC was laid down in the addition to Article 66, paragraph 1 of the LC in March 2001. According to the new wording of Article 66, paragraph 1 of the LC, the labour agreement, which is signed by both parties and a copy of which is delivered to the employee, sets forth the basic rights and obligations of the employee (the term the labour agreement is concluded for, the length of working time, the amount of the basic and additional labour remuneration, the length of the basic and additional paid annual leaves of absence, etc.). Thus, signing the labour agreement and receiving a copy thereof, the employee gets acquainted with it and has its content at his/her disposal at any time.

In compliance with the requirements of Directive 2003/88/EC, the changes effected in Article 113, paragraph 2 of the LC in June 2004 and March 2005 provided that the **maximum weekly working time** may exceed 48 hours, but should not be more than 56 hours, and the employee should have given the employer his/her explicit written consent thereof.

Restrictions to the conclusion of fixed-term employment contracts were introduced through the changes in Article 67, paragraph 3 and Article 68 of the LC effected in March 2001. According thereto, fixed-term employment contracts of definite duration are concluded only by way of exception and in the presence of objective production reasons (short-term type of work, large orders received for being performed within a certain time, etc.). These changes have introduced in domestic labour law the requirements of Directive 1999/70/EC regarding the framework agreement on fixed-time work concluded by ETUC, UNICE and CEEP.

The introduction of the employer's obligation and the employee's right regarding informing was a result of the long evolution of introducing in labour law Directive 2002/14/EC on establishing a framework for informing and consulting the employees, Directive 91/533/EC on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. This evolution started in 2001 with the addition of paragraph 2 to Article 7 of the LC and continued with the amendments to the Labour Code of June 2004 and June 2006 creating new legislative provisions in Articles 7–7d, 130–130d of the LC, etc. These amendments to the Labour Code provided for election of employees' representatives by the general meeting of the employees who represent their common interests and whom the employer is obliged to inform and consult on important matters related to the activity and organisation of work in the enterprise, forthcoming changes therein, etc.

The impact of EC directives on Bulgarian labour law regarding the **employees' guaranteed claims in the event of the insolvency of their employer** is indicative. In order to abide by Directive 80/987/EC, in the year 2004 the Law on Employees' Guaranteed Claims in the Event of the Insolvency of Their Employer was adopted. In 2006 this law was amended in order to reflect the changes introduced in Directive 80/987/EC through Directive 2002/74/EC on extending the protection of these claims. These are amendment in two main aspects: a) Article 4 of the quoted Law provides that the protection of these claims extends over the claims of the employees working under fixed-term employment contract and the employees working part-time; b) Article 6 of the quoted law provides that the protection commences on the date on which the court decision on instituting insolvency proceedings is published in the Official Journal.

The EC directives on collective dismissals provide another example of the significant impact of EU measures on Bulgarian labour law i.e. Directive 75/129/EC, Directive 92/56/EC and Directive 98/59/EC which consolidates them. This impact is expressed in two consecutive amendments to Section 1, item 9 of the Supplemental Provisions of the Labour Code of June 2004 and June 2006. These amendments introduced the requirements of the consolidating Directive 98–59-EC, including its requirement that collective dismissals are those performed on one or more grounds, at the discretion of the employer, and for reasons unrelated to the individual employee. Moreover, the new regulation preserved the employer's obligation to inform and consult the employees' representatives in the event of collective dismissals (Article 130a of the LC, 2006 version).

Chapter X: Concluding remarks

The changes in Bulgarian labour law **started immediately** after the beginning of the democratic changes in our country — as early as the period 1989–1994. Since the very beginning the development of these changes took on a European orientation. In the period 1995–2006 this main direction in the evolution of labour law was preserved and continued with a wider scope and greater intensity (see above Chapters I, III-IX).

Historically, Bulgarian labour law emerged at the beginning of the 20th century on the grounds of the **state's protective regulation** of labour relationships and employment, which is expressed in the adopted labour laws (see above Chapter II). This main line in the development of labour law was affirmed in the period 1995–2006, however, it was accompanied by a rapid development of collective labour law, social dialogue, contractualisation of labour law, collective bargaining and the other non-state sources of labour law (see above Chapter VIII).

Bulgarian labour law has been developing as **codified law**. This tendency emerged as early as the 1930s and has been permanently consolidated after the end of the Second World War through the adopted two Labour Codes (years 1951 and 1986). Following a number of amendments since the early 1990s, the latter is still the main source of the operative labour law. Although in the period 1995–2006 some other labour laws on specific matters of labour relationships were adopted (the Law on Healthy and Safe Working Conditions — 1997, the Employment Promotion Law — 2001, the Law on Employees' Guaranteed Claims in the Event of the Insolvency of Their Employer — 2004, etc.), in the period 1995–2006 labour law preserved its codification nature.

In the period 1995–2006 Bulgarian labour law developed in the context of its gradual **approximation to the law of the European Union**. That approximation to Community law is the main dominant factor which is characteristic of all its 12-year long development. This approximation is expressed in the implementation of Articles 69–71 of the European Agreement on Association. In this respect enormous legislative work was done on the part of four legislatures of the National Assembly (the 37th, 38th, 39th and 40th National Assembly), five governments, three Presidents of the Republic, etc. In the field of labour law this work consisted of the 26 amendments and supplements to the Labour Code made in this period, the adoption of a new Employment Promotion Law (2001), other new important laws, such as the Law on Healthy and Safe Working Conditions (1997), the Law on Protection against Discrimination (2003), the Law on Employees' Guaranteed Claims in the Event of the Insolvency of Their Employer (2004), etc.

One of the main features of the evolution of Bulgarian labour law in the period 1995–2006 is the intensive development of **collective labour law** and collective labour relationships as part of its general development. That has found its expression in the consolidation and enhancement of basic instruments of collective labour law, such as the collective labour agreement, tripartite cooperation, informing and consulting the employees on the part of the employer, voluntary settlement of collective labour disputes, the right to strike, etc. Its lagging behind individual labour law at the beginning of the democratic changes was largely overcome in the period 1995–2006. This made it possible for collective labour law to turn into labour law's prospective area of 'legal worth', which, though not having exhausted its potential, has enriched the development of labour law as a whole.

The significant achievements made in the approximation of Bulgarian labour legislation to the European standards made an important contribution to Bulgaria's admission as a full member of the European Union from 1 January 2007.

The evolution of labour law in the period 1995–2006 has changed its countenance, owing to the decisive impact the EU law had on its development.

The adoption of the solutions of the law of the European Union and their introduction in the domestic legislation was carried out voluntarily, with the awareness of this being the road of its good development, without internal resistance, neither open nor tacit. It is even more important to stress it, as in the period under consideration (1995–2006) several parliamentary, presidential and local elections were held and the country was governed by different political parliamentary majorities and governments of left, right and centrist orientation, and since mid-2005, by a widely based tripartite coalition. There was and there still remains a wide consensus, which can be called 'nationwide', and continuity in the European development of Bulgaria. In the last 12 years the accession of Bulgaria to the Community has turned into a national cause. The evolution of labour law forms part thereof.

Throughout the period 1995–2006 there was a continuation and a consolidation of the **constitutionalisation of** Bulgarian labour law, which became more closely interwoven with the democratic requirements of the Constitution of 12 July 1991 regarding the promotion and practical implementation of the basic social rights of citizens (see above Chapter III). In general, it is through social rights that positive labour law enables fundamental human rights and their realisation to be fulfilled: e.g. the right to employment, the right to trade union association and collective bargaining, the right to fair labour remuneration — its regular payment, its protection in critical situations (insolvency of the employer), etc.

A clear manifestation of labour law's constitutionalising in the period under consideration is the strengthening of the 'anti-discrimination direction' of its development, with its detailed specific labour law regulation in the Labour Code (Article 8, paragraph 3, Article 243), in the Employment Promotion Law (Article 2), etc. Along with it, there is also sound special regulation in separate laws (the Law on Protection against Discrimination — its General Part and its Special Section on protection against discrimination in the exercise of the right to employment — Articles 1–11, 12–28). Special jurisdictional protection was created for the application of anti-discrimination legislation — the Commission on Protection against Discrimination, and complete justiciability of that protection is present through the appeal against its decisions to the Supreme Administrative Court (see above No 185). This new direction in the system of Bulgarian law as a whole and the development of labour law as a branch thereof takes place under the direct impact of EU law (Directive 75/117/EEC, Directive 76/207/EEC, Directive 2000/43/EC, Directive 2000/78/EC, etc.).

In the last 12-year period labour law has constituted the subject of **frequent changes** (see above Chapter IX). This mainly concerns the changes in the Labour Code. They had to be prepared, discussed and voted in a short time, in accordance with the schedule of the National Programme for approximation of Bulgarian legislation to the European one. And some of the regulated matters were not easy at all. Part of them were new and unknown to Bulgarian legislative traditions (collective dismissals, informing and consulting the employees on the part of the employer, some of the anti-discrimination indicators — sexual orientation, sexual harassment, etc.), which further increased the difficulties regarding their regulatory form. And not all the bills had the required qualitative, legal and technical level. In this tense situation the fast and frequent changes created legal instability of the operative legislation, the proposed

legislative provisions did not have sufficiently good wording from a legal and technical point of view, or did not go with the other operative laws of the country's general legal system, and internal contradictions were created in the latter, etc.

The approximation of Bulgarian labour law to the EU law in the period 1995–2006 is only the beginning of its European development. From here onwards this process will constantly accompany it and will be the essence of its development, along with the development of the EU law and forming part thereof. This means that in the future the impulses for development of Bulgarian labour law coming from the EU law will be a constant 'domestic source' of its development and improvement as part of the European legal space and the European labour order. By the way, the development of Bulgarian labour law in the coming years in line with EU law becomes part of our country's main obligations as a member of the Community and part of the development of European labour law. This view should be implanted not only in the competent state's institutions, but also in the trade union and employers' organisations, as well as in the scientific studies, and especially in the comparative-law scientific studies in the field of labour law.

As the changes in Bulgarian labour legislation came into force recently, and our country became a member of the EU recently, the European evolution of Bulgarian labour law has yet to be applied in court. This requires knowledge of the new legal provisions and the legal mechanisms for their implementation on the part of employees, trade union and employers' organisations and judicial bodies. Jurisprudence is to be accumulated in the near future. That is a great challenge to the activity of the courts.

The admission of Bulgaria as a full member of the EU from 1 January 2007 is a **historic event** and a **turning point** in the country's latest stage of development.. It determines the prospects of development of Bulgarian labour law in the future.

The admission of Bulgaria as a member of the Community is a single juridical act, which marks the fact of the country's accession to the Community with all the rights and obligations ensuing from it, which are important ones and equal to those of the other Member States and their citizens. The fact of the accession is differentiated from the process of our country's **full integration** in the European Union. The full integration is expressed in the knowledge and real implementation of the rules of the Europeanised Bulgarian labour law in the conduct of the parties to the individual and collective labour relationships, a change in their mentality, an introduction of its rules in everyday life and turning them into a part thereof. This process is already under way and will continue in future incessantly, as part of the development of the country.

Part of the process of Bulgaria's integration in the European Community is the integration of Bulgarian labour law within European labour law and the European labour order. That will be achieved through its **implementation in the realities** of labour relationships, the conduct of the parties to labour relationships and social partners, improvement of the employees' social state, the signals of which will come from the jurisprudence and administrative practice. With the feeling of this enormous challenge that is still to be faced, here ends the study of the evolution of Bulgarian labour law in the period 1995–2006, heading forward to its future.

The evolution of labour law in the Czech Republic and in the Slovak Republic

Kristina Koldinská

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Executive summary

This study is devoted to the evolution of labour law in the Czech Republic and Slovak Republic. Data from the two countries were concentrated into a single study for two main reasons: the countries have experienced a very similar evolution of labour law in the past 10 years and share a common history in the Czechoslovak state through almost the entire 20th century. As Czechoslovakia, the two countries also experienced a period of rule by the communist party. The impact this had on labour was the introduction of a very protective model of labour law, which became a distinct field of mixed public–private law, separate from civil law.

Nevertheless, the last 10 years have been influenced by the fact that the two countries separated with effect from 1 January 1993; since then, the two countries have gone down somewhat different roads, although, particularly at the end of the 1990s, with the same destination, accession to the European Union.

This study deals with the evolution of labour law in the two countries in the last 10 years and examines the present situation in and prospects for labour law in the Czech Republic and Slovakia.

The first part of the study is devoted to the historical development of labour law in the two countries from 1995 to 2005. In view of historical contexts, however, a brief mention is made of the period immediately following the break-up of the Czech and Slovak Federative Republic, i.e. after 1 January 1993. The period under scrutiny was also extended somewhat, so the study also covers 2006 and labour law developments in that year. The principal reason for this is that, particularly in the Czech Republic, 2006 brought relatively important changes in labour law, with the enactment of a new Labour Code.

The second part of the study deals with the current state of labour law and presents a critique of developments to date in this branch of law. The second part of the study contains three chapters, each dealing with certain important trends in labour law from the point of view of the European Union, as defined by the body commissioning the study.

In this section, the study critiques the latest developments in collective bargaining as a new means of legally regulating labour in both countries (collective bargaining effectively did not exist before 1989). Attention is also paid to one of the forms of semi-legal employment and the reasons for this development are sought.

The section on labour protection contains, among other things, considerations on the degree of protection afforded to the existence of employment and the effectiveness of the existing protection against termination of employment. In the context of labour protection the employment policy of the two countries is also mentioned, with the emphasis on their active employment policy.

This chapter also devotes particular attention to the legislation on protection against discrimination and to implementation of the principle of equal treatment in Czech and Slovak labour law.

The final chapter in Part II discusses the issue of employee adaptability in the two countries with regard to labour law, from the point of view of both the evolution of the law and this issue's sociological and political aspects. The policy of transitional measures applied by 'old' EU Member States following 1 May 2004 and their justification in respect of the Czech Republic and Slovakia will also be discussed.

The study ends with a breakdown of the common features and differences in the evolution of Czech and Slovak labour law and a critique of this evolution in the last decade. Certain enduring challenges facing this field of law and its overall future development are also outlined.

Part I. Evolution of labour legislation in the Czech Republic and the Slovak Republic

I.1. From Austro–Hungarian legal dualism to the independent Czech and Slovak codification of labour law

Since the Middle Ages the Czech and Slovak territories have been linked by a common history — first as part of the Habsburgian Monarchy — later the Austro–Hungarian Empire, then, after 1918, in the joint Czechoslovak Republic. However, the legal dualism of the Austro–Hungarian Empire meant that in the 19th century, when the emergence of the first labour legislation can be observed, legislation regulating labour relations in Bohemia, Moravia and Slovakia was contained in various legal acts, albeit adopted in a similar spirit.

At this time the regulation of labour relations concerned the labour contract, or its predecessor, the contract of hiring, which comprised the contract of service and contract for work ([31]). An equivalent of this contract was the contract establishing the employment of state employees, introduced into legislation in 1914. The first modern protective legislation also emerged in the 19th century; this primarily covered working hours for children and also work safety, chiefly in heavy industry. The first enactment of freedom of association and the formation of the first special-interest associations of employers and trade union organisations of employees also date back to the 19th century in both countries.

The period following the establishment of the independent Czechoslovakia in 1918 was largely shaped by the social and political situation that emerged after the First World War, as a result of which greater emphasis was placed on regulation of the terms of service relations and on the enactment of protective standards — the eight-hour working day was enacted in 1918, followed by recuperation leave, unemployment support, etc., defined by separate laws in the 1920s.

Another key milestone in the evolution of the common Czechoslovak labour legislation was the Second World War, with the Czechs being in a Protectorate, while the Slovaks were governed by an independent fascist state. The most important development took place after 1948, when the communist party seized power in Czechoslovakia and both the state establishment and legal order started to be adapted to the Soviet model. During the 1950s, regulations unifying work conditions for all workers in both the countries were adopted. A uniform, yet in substantive terms, markedly incoherent labour law was created.

The Labour Code (Act No 65/1965 Coll.) was enacted in 1965. It was intended to comprise a uniform, comprehensive, cogent and free-standing piece of labour legislation. It was almost the only legal norm in the area of labour law. The civil code ceased to apply to labour relations; the independence of the labour legislation even ruled out subsidiarity of the civil code. The Labour Code did not just cover the private area of labour law, i.e. the establishment, change and termination of employment and other types of contract regulating dependent work. It also contained the fundamental rules governing the status of trade unions, occupational health and safety, special working conditions for certain categories of employees (women and juveniles)

([31]) Both contracts were regulated in the General Civil Code (Algemeines bürgerliches Gesetzbuch — ABGB) of 1811 for Bohemia, in the Law No XVI on Obligations in the Market Relations of 1840.

etc. Collective legal relations were almost entirely unregulated. Employment policy was not applied in social Czechoslovakia, as the system was based on full and compulsory employment.

The Labour Code applied in the then Czechoslovakia up to the break-up of the Czech and Slovak Federative Republic, which took effect from 1 January 1993. However, both newly formed states took on the existing legal order, part of which was the somewhat reformed labour legislation. In 1991, besides an amendment of the Labour Code, Act No 1/1991 Coll., on employment, and Act No 2/1991 Coll., on collective bargaining, had also been passed. Along with the amended Labour Code, these two acts constituted the most important sources of labour law.

For a relatively long time after the break-up of the federation, labour law in the two countries was characterised by merely partial reforms of labour legislation. More pronounced changes in labour law were only effected in connection with both countries' preparations for entry to the European Union and the associated demands for the harmonisation of national labour law with that of the Community.

Another important impulse for more marked changes to labour law consisted in the constantly growing practical need for the adoption of a new, modern piece of legislation regulating labour law, which, led, inter alia, to the adoption of a new Labour Code in both countries: in Slovakia in 2001, and in the Czech Republic in 2006.

I.2. Evolution of labour law in the Czech Republic and Slovakia from 1995 to 2005(6)

It has already been remarked that after the break-up of the joint state the two countries adopted Czechoslovak labour law. Up to the end of the 1990s, the following pieces of legislation remained the legal sources of labour law:

- Act No 65/1965 Coll., Labour Code (applicable in Slovakia until 2001, in the Czech Republic until 2006);
- Act No. 1/1992 Coll., on pay, remuneration for overtime, and average income;
- Act No. 143/1991 Coll., on pay and remuneration for overtime in state and some other organisations and bodies;
- Act No 1/1991 Coll., on employment (applicable in Slovakia until 1996, in the Czech Republic until 2004);
- Act No 9/1991 Coll., on employment and the powers of the authorities of the Czech Republic in the area of employment;
- Act No 2/1991 Coll., on collective bargaining (still applicable in both states);
- Act No 120/1990 Coll., regulating certain relations between trade union organisations and employers.

The Labour Code represents the principal legal norm of private labour law; the act on employment is the principal legal norm in public labour law; and Acts No 2/1991 Coll. and 120/1990 Coll. regulate collective labour law.

It can be seen from the evolution of labour law as a whole in the 1995–2005 period that the first segment to change was public labour law, i.e. employment. The law on employment has changed twice in Slovakia; in the Czech Republic a new act on employment was adopted in 2004. Employment policy thus became increasingly adapted to the employment policy implemented in the European Union: the EU has recently started placing strong emphasis on employment policy. Both states adopted national employment action plans before joining the EU.

Efforts to reform private law in the form of a new Labour Code lasted much longer, but the Labour Codes were harmonised with EU law so that both states fulfilled the conditions for EU accession.

Collective bargaining legislation remained essentially the same, with no major changes. Again owing to the influence of Community law, trade unions were supplemented by works councils and, after 2000, workers' health and safety representatives started to operate.

The evolution of labour law in the Czech Republic and Slovak Republic in the past 10 years contains certain important milestones that divide this period into three basic stages:

1. Evolution of labour law in the first years after the break-up of Czechoslovakia;
2. Preparations for accession to the European Union;
3. First experiences of European Union membership.

The following overview of the evolution of labour law in the past decade in the Czech Republic and Slovakia is structured according to the above stages.

I.2.1. Evolution of labour law after the break-up of Czechoslovakia

In both states this relatively long period was characterised by the adaptation of the legal order to modern developments in society and the presumed accession to the EU. The fundamental changes that had been essential after 1989 had already been made and this was more a period of waiting for the actual harmonisation of the law with EU law in the mid 1990s. The harmonisation of labour law with Community law only got fully underway at the turn of the millennium.

Shortly after the break-up of the joint Czechoslovak state, Act No 74/1994 Coll. brought a more pronounced amendment of the Labour Code in the Czech Republic. This amendment introduced to labour law as a whole a new terminology that corresponds better to the democratic state system in the country. The terms 'employee' and 'employer' replaced the hitherto used 'worker' and 'organisation', which was more in line with the established market economy and the formation of the labour market. Other important changes were a new definition of competence to perform acts in law for parties to labour relations and new rules on election and appointment as other ways in which an employment relation may be established. Act No 74/1994 Coll. introduced severance pay to the Labour Code as an employee's entitlement to financial compensation if his employment is terminated in consequence of 'organisational changes' ([32]).

([32]) Under 'organisational changes' Czech and Slovek labour law understands winding up or relocating of employer, or redundancy of employee due to decision of employer on structural or similar changes.

There was also new regulation of employees' and employers' rights and obligations, again in an endeavour to adapt this legislation to the new social and economic conditions prevailing in the country. This was the most pronounced amendment of the Labour Code and of the private law regulation of labour relations as such in the Czech Republic during the 1990s.

There were similar changes in the Slovak Republic during the 1990s.

I.2.2. Turn of the millennium — preparations for accession to the EU

In the last years of the 1990s both countries were preparing for EU accession, which took place on 1 May 2004. Legislation in both states had to be adapted to the requirements of the *acquis communautaire*. The key areas that needed harmonisation in the area of labour law were:

- Occupational health and safety;
- Collective relations, i.e. introducing works councils and occupational health and safety representatives
- Protection of employees in the event of the employer's insolvency and mass dismissals;
- Working time;
- Anti-discrimination and equal opportunities in labour relations.

In the Czech Republic the relevant European directives covering the above areas were implemented by means of Act No 155/2000 Coll., an extensive amendment of the Labour Code that came to be referred to as the 'harmonisation amendment'.

In the area of occupational health and safety, the framework directive and all 13 individual directives were implemented, not just in the Labour Code but in implementing regulations as well.

New provisions of Sections 24-25l were added to the Labour Code, regulating the establishment of works councils at an employer where there is no trade union organisation and the system of election to works councils. In addition, with effect from the Czech Republic's accession to the EU the Labour Code enabled the existence of European Works Councils in transnational employers.

Employer insolvency and mass dismissals were previously not widely known situations, but labour law was compelled to react to these phenomena, partly owing to the need to adapt internal legislation to Community law. While mass dismissals and the rules governing them were covered by the harmonisation amendment in the provisions of Section 52 of the Labour Code, the protection of employees in the event of an employer's insolvency was regulated in a separate piece of legislation, Act No 118/2000 Coll., on the protection of employees in the event of an employer's insolvency.

The Czech Republic also fulfilled the European Community's requirements for working time and the maximum 40-hour week by amendment of the Labour Code. The previous limit for working time was 42.5 hours a week. However, work breaks, which were usually 30 minutes during each shift, were counted in working hours. The new legislation retained the employer's obligation to

provide work breaks, with the understanding that these were no longer included in working hours. The working week was therefore defined at 40 hours.

The requirements of Community directives concerning equal opportunities in labour relations were incorporated into several pieces of legislation, specifically the Labour Code, the act on employment and wage regulations — the act on pay and the act on wages. All the aforementioned pieces of legislation provided for a ban on discrimination and required employers to ensure that equal opportunities are upheld in the area of working conditions, access to employment, career advancement, remuneration etc. The new employment act and the last applicable wording of the existing Labour Code, Act No 65/1965 Coll., contained definitions of direct and indirect discrimination, listed discriminatory reasons and shifted the onus of proof in the case of legal disputes concerning discrimination in the workplace (at first on gender grounds alone) to the employer.

The turn of the century also marked an important stage in the development of labour law in Slovakia. In this period work on the new Labour Code was finalised; the code was enacted in 2001 under Act No 311/2001 Coll. The code harmonised the Slovak labour law with the EC law in most important aspects (e.g. working time, protection by mass dismissal and insolvency of the employer and further above-mentioned issues). In addition, two other acts governing the legal relations of employees in the service of the state (Act No 212/2001 Coll.) and employees in public service (Act No 213/2001 Coll ([33]).) were passed. These acts, but in particular the Labour Code, were highly criticised, and the Labour Code was amended in March 2002 — by Act No 165/2002 Coll. — before it had even taken effect. The amendment represented something of a compromise solution to various disputes that the new legislation had evoked ([34]). Another important change to the Labour Code came in the form of an extensive amendment, Act No 210/2003 Coll. To some extent this Labour Code amendment adapted Slovak labour law to the requirements of employers. It was made possible due to political change in the Slovak Republic, where right-wing parties strengthened their power in 2002.

Even so, it would be wrong to claim that in this way the Slovak Republic made a profound and effective contribution to labour market flexibility in connection with activational social protection. Rather, ways were put in place to liberalise labour relations and thus reduce the protection of employees ([35]).

The same period also saw the adoption of Act No 95/2000 Coll., on work inspection, which was not enacted in the Czech Republic until 2005. The same applies to what is called the anti-discrimination act, which was passed in Slovakia before the country joined the EU, whereas the Czech Republic still has no such act. ([36])

([33]) This act was superseded by Act No 552/2003 Coll., on the performance of work in the public interest.

([34]) In this context M. Thurzová states in one of her articles: 'Because the legislator's sole priority when creating new legislation cannot be the satisfaction of entrepreneurs and many legitimate interests of employers remained unheard, the enterprise sphere launched a massive media campaign against the new Labour Code just before it took effect. The new Labour Code began to be viewed as a brake on enterprise, because it did not put in place sufficient conditions for the proper working of the market. This process culminated, before the new Labour Code had even taken force, in the adoption of its first amendment, which contained several unavoidable modifications of the new Labour Code designed to boost the flexibility of the market primarily.' — cf. Thurzová, M.: Certain Problems with Applying the New Labour Code in the Conditions of the Republic of Slovakia, in: *Právo a zaměstnání* No 12/2004.

([35]) E.g. protection of employees against dismissal weakened and the possibilities for employers to terminate the employment relationship were extended.

([36]) For more information see below.

Besides harmonisation with Community law, this meant that the endeavour to liberalise the labour market and make it more dynamic, chiefly by adopting a Labour Code more suited to the modern labour market, entered Slovak legislation much earlier than Czech legislation. However, these efforts were not an unqualified success.

Almost on the eve of Slovak accession to the European Union, Slovakia passed a new Act No 5/2004 Coll., on employment services, which superseded the existing act on employment. The new legislation already contained regulation of modern employment policy instruments, and in particular active employment policy instruments. These active labour market policy instruments are then implemented via national projects financed out of the European Social Fund.

I.2.3. First months after EU accession

After accession to the European Union, Czech and Slovak law was de facto harmonised with European Community law and new legislation is currently adopted by the standard means of implementing Community directives.

In recent years both countries experienced political changes that had an impact on the concept of labour law. While the Czech Republic still essentially abides by the existing concept of the Labour Code, which was retained almost without change in a special part of this new, highly debated piece of legislation, the Slovak Republic went down the road of liberalising the labour market, with the related reduction in the protection of employees, which also drew criticism.

A new Labour Code was enacted in 2006 in the Czech Republic — it came in for strong criticism in expert circles (lawers, academics, employers, even some jurists), which drew attention to the outdatedness of the concept and the difficulty of applying the new code. Despite numerous protests, enough political will was ultimately found: the Labour Code was pushed through and approved and attempts to defer its effect failed.

It turned out to be a big political and also legislative mistake. In October and November 2007, two proposals were brought to the Constitutional Court asking to abolish some 30 articles or paragraphs of the new labour code, claiming their unconstitutionality ([37]).

Both constitutional claims argue the unconstitutionality especially regarding the extended powers of trade unions (they can forbid overtime work, influence the content of internal acts of employer, conclude a collective agreement even if employees who are not trade union members do not agree), problematic relationship to civil code (e.g. regarding the possibility to withdraw from any contract, invalidity of legal act), etc.

([37]) See still pending case no. Pl ÚS 83/06.

The new Labour Code brings the following changes, as declared by the legislation's drafter, the Ministry of Labour and Social Affairs:

- Link to the civil code by the delegation method;
- Introduction of the principle of 'what is not forbidden is permitted', superseding the existing principle of 'what is not permitted is forbidden', thus bringing greater contractual liberty;
- Greater work contract flexibility and allowing alternative forms of employment;
- Introduction of working time accounts.

On the other hand, the following did not materialise:

- Liberalisation of termination of employment;
- Change in the status of trade unions that would correspond better to the low level of trade union membership in the Czech Republic.

In 2006, a special act was adopted for the area of occupational health and safety: Act No 309/2006 Coll., on further requirements with regard to occupational health and safety.

In Slovakia, Act No 82/2005 Coll., on illegal work, was passed. This act was intended to protect the labour market and employees as such from illegal employment.

It is fair to say that there has been a pronounced shift in the labour law of both countries in the past 10 years. Given that from a conceptual point of view, and in the area of private law in particular, no radical changes were made, it is an acceptable generalisation to state that European Community law had probably the greatest influence on the current form of labour law in both the Czech Republic and the Slovak Republic. Harmonisation requirements brought about the most sweeping changes in both Czech and Slovak labour law. This affirmation however shall not reduce the importance of some changes made in labour law in both countries. Notable in this regard are the increased emphasis on contract freedom and the reintroduction of a strong relationship between the civil code and Labour Code (in Slovakia through the principal of subsidiarity, in the Czech Republic through the principal of delegation). Having set out an overview of labour law developments in the Czech Republic and Slovakia, in the following part we concentrate on the evolution of certain features of the labour law system in the two countries, as well as looking at the current situation in certain areas of labour law.

Part II. Current situation in and prospects for labour relations in the Czech Republic and the Slovak Republic

Highly topical aspects of labour law currently include new ways of regulating labour relations and new forms of work in general, the shift towards activating participants in the labour market with a view to making the labour market flexible, and, last but not least, there is broad debate on employee adaptability, which in post-communist countries is mainly linked to mobility. All these aspects of the current situation in labour relations in the two countries will be dealt with in turn in this second part of the study.

II.1. New ways of regulating work

Besides labour legislation, collective agreements as the result of collective bargaining are one of the most important sources of the regulation of labour relations.

After 1989 collective bargaining started to regain its rightful place and grew in importance as the trade unions became relatively strong forces in both countries. Even so, the trade unions never again achieved either the level of membership or the social importance they had enjoyed before 1989 ([38]).

In both republics, the source of legislation on collective bargaining continued to be Act No 2/1991 Coll., on collective bargaining. This act lays down procedural rules for collective bargaining, and the legislation on this area is thus essentially the same in both countries. Among other things, the act on collective bargaining defines the two basic types of collective agreement that can be concluded as a result of collective bargaining. The two types of collective agreement are:

- Enterprise-level — concluded at enterprise level between an employer and trade unions; and
- Higher-level — concluded for several enterprises at once, as a rule for an entire sector, between an employers' organisation and a trade union federation. ([39])

As far as the relationship between these two collective agreements is concerned, in wage matters the higher-level collective agreement takes precedence, so an enterprise-level collective agreement may not conflict with a higher-level collective agreement. Section 4(2) (c) of the collective bargaining act provides that a collective agreement is invalid if it 'guarantees employees wage entitlements in a greater scope than the scope defined by a higher-level collective agreement as the highest admissible, and is so (invalid) in the part exceeding such highest admissible scope'.

Higher-level collective agreements may also be extended to cover other entities that were not involved in the bargaining process.

([38]) For more information see below.
([39]) Cf. Section 3(2) of Act No 2/1991 Coll., on collective bargaining.

In the Czech Republic, the Ministry of Labour and Social Affairs had been endowed with this authority up to 1 March 2004 — it could issue a decree extending a higher-level collective agreement to employers who did not take part in negotiating the agreement and who are not members of the employer organisation that concluded the agreement but carry on an equivalent business under equivalent social and economic conditions. Section 7 of the collective bargaining act, which provided for this eventuality, was repealed in 2003 by a decision of the Constitutional Court of the Czech Republic promulgated in the Collection of Laws under number 199/2003. The Constitutional Court repealed this provision with reference to its indeterminateness, which diminishes legal certainty and even the independence of the courts. The new wording of Section 7 of the collective bargaining act in the Czech Republic permits the extension of higher-level collective agreements only if the parties to this agreement represent the largest number of employers and employees in the given sector and issue a joint declaration requesting that the Czech Ministry of Labour and Social Affairs effect such an extension ([40]).

In Slovakia, this problem with the original wording of the legislation was resolved by an amendment of the provision in question, which currently continues to enable the Slovak Ministry of Labour, Social Affairs and the Family to extend higher-level collective agreements to employers that are not members of the employer organisation that is party to the agreement, but only if the employers agree with the extension ([41]).

A recently published study has the following to say of the relationship between enterprise-level and higher-level collective agreements: ‘Unlike a number of EU states, in the Czech Republic the core of social dialogue lies at the national and enterprise level, while sectoral structures (higher-level structures/structures covering several employers) and regional structures are less significant. The structural basis for social dialogue at this level is insufficient owing to both employers’ reluctance to award negotiating powers to sectoral organisations and unclear sectoral divisions (there is no clear definition of a sector).’ ([42])

The relationship between collective agreements and the operative legislation on labour relations is governed by the relevant provisions of the Labour Code in both countries.

Up to 31 December 2006, this relationship was governed by Sections 20 and 21 of Act No 65/1965 Coll., Labour Code. Under these provisions, in collective agreements it was possible to regulate wage and other labour entitlements within the framework set by the labour legislation. If the Labour Code expressly permitted, it was possible to increase or broaden certain labour entitlements in collective agreements over and above the framework set by the Labour Code.

Section 23(1) of the new Czech Labour Code ([43]) provides that ‘wage or pay rights and other rights in labour relations may be regulated first and foremost in a collective agreement’. This is thus a more general rule than that contained in the old Labour Code, whereby there is no express prescription of a framework determined by the labour legislation that the provisions of a

([40]) Cf. Section 7 of Act No 2/1991 Coll., on collective bargaining, as amended.
([41]) Cf. Section 7(1) of Act No 2/1991 Coll., on collective bargaining, as amended as of 1.1.2004.
([42]) Kroupa, A. and collective: Trade Unions, Employers, Social Partners — trade union membership in the Czech Republic and the main factors shaping its development, Research Institute of Labour and Social Affairs, Prague 2004.
([43]) Act No 262/2006 Coll., Labour Code.

collective agreement must remain inside. The new Labour Code also regulates in greater detail collective agreements and the fundamental requirements for their substance and form.

Section 231 of the Slovak Labour Code, Act No 311/2003 Coll., provides that 'collective agreements regulate working conditions, including wage conditions and employment conditions, relationships between employers and employees, relationships between employers or their organisations and one or more organisations of employees more favourably than as regulated by the Labour Code, or other labour regulation, if the Labour Code, or other piece of labour legislation, do not expressly so prohibit, or if their provisions do not indicate that there may be no deviation therefrom.' Collective agreements are expressly given precedence over an employment contract, with the understanding that any part of the employment contract that conflicts with the collective agreement is invalid.

Since 2002, collective agreements have been admissible in public and state service in Slovakia. A collective agreement in public service may regulate the conditions for provision of pay particulars and other entitlements of employees in employment relations only within the scope laid down by law ([44]).

The summary that can be drawn from the above is that the legislation on collective labour law in both countries is conceived in a way that collective agreements represent an important source of law but must not conflict with the labour legislation in terms of substance.

To complete the picture, it should be added that there have been dramatic declines in trade union membership in both the Czech Republic and Slovakia, most notably in the first half of the 1990s. The principal reason was historical: up to 1989 the trade unions in the then socialist Czechoslovakia had played the role of a kind of additional state authority, which, at one time, even paid out sickness insurance benefits. While trade union membership was over 90 % in the Czech Republic at the end of the 1980s, in 2001 around 33 % of all employees were trade union members. The Czech Republic is widely held to have the lowest proportion of employees covered by collective agreements.

An official survey of coverage by collective agreements took place in Slovakia in 2003. Its results reveal that the total extent of coverage by higher-level collective agreements is 40 % of employees (approx. 600 000), i.e. 28 % of the total number of economically active persons (2.1 million).

The following table compares changes in trade union membership in certain EU states. It shows that while approx. 50 % of all employees are covered by collective agreements in Slovakia, in the Czech Republic the proportion was approximately just one quarter in the year 2000.

([44]) Cf. Act No 313/2001 Coll., on public service.

Table 1 Trade Union Membership in Selected EU Member States ([45])

	Trade union membership (%)		Collective agreement coverage (%)		Centralisation of bargaining		Coordination of bargaining	
	1990	2000	1990	2000	1990–1994	1995–2000	1990–1994	1995–2000
CZ	46	27		25+	1	1	1	1
AT	47	37	95+	95+	3	3	4	4
DE	31	25	80+	68	3	3	4	4
PT	32	24	70+	80+	4	4	4	4
HU	63	20		30+	1	1	1	1
PL	33	15		40+	1	1	1	1
SK	57	36		50+	2	2	2	2

NB:
Numbers with + mean minimum estimation, so it can be even more.
Centralisation of bargaining:
1 = bargaining mostly at firm level
2 = combination of sectoral and firm level bargaining, prevailing firm level
3 = prevailing sectoral level
4 = prevailing sectoral level, sometimes bargaining at central level
5 = bargaining at central level

Coordination of bargaining

Intensity of coordination by bargaining on wages. 1 = very low, 5 = very high.

The data may be inaccurate, however, as some other studies provide considerably different results. For example, Jurajda ([46]) estimates that coverage by collective agreements in enterprise was higher than 50 % in the Czech Republic at the start of 2004. Furthermore, coverage is higher than 70 % when extensions of higher-level collective agreements are taken into account. And it is also probable that more than 80 % of firms with over 250 employees have concluded a collective agreement.

Nevertheless, it is the rate of trade union membership that has for long been published — and this rate is truly around 30 % of employees ([47]) which ranks both countries among those with relatively low trade union membership rates.

II.1.1. The tripartite system and its specific status in the Czech Republic and Slovakia

Social dialogue per se has gone down different evolutionary paths in the two countries in recent years and currently takes a different form in each country. One interesting factor in this context is the tripartite system, i.e. a kind of collective bargaining conducted at national level. Its parties are:

([45]) OECD (2004): Employment Outlook, Paris: OECD.
([46]) Jurajda Š. (2005): 'Czech Firm-Level Bargaining and Wages: Evidence from Matched Employer-Employee Data', Interim presentation of CNB Research Project No E1/05.
([47]) Moreover, the categories of employees organised in trade unions are mostly civil servants or employees of large originally state-owned companies, which have been privatised.

- representatives of employees,
- representatives of employers,
- the state.

Tripartite consultations appeared to be essential primarily in the first years of the existence of the democratic Czechoslovak state, as they had the potential to serve as some kind of regulator of economic transformation and it was to some extent possible to protect the population from excessively insensitive steps that could prove a major threat to society and keep social tensions low. The outcome of tripartite discussions was a ‘General Agreement’, which existed until the break-up of the federation. A study published in the Czech Republic in 2002 has this to say of its importance: ‘The signing of a general agreement was very important in the first years of transformation, because both the trade unions and employer federations had minimal negotiating experience and the government took the dominant role. Concluding the General Agreement and demanding its implementation was therefore expedient.’ ([48])

The tripartite system in the Czech Republic was somewhat transformed in the second half of the 1990s: the ‘Council of Economic and Social Agreement’ was established, composed of the same representatives as negotiated the general agreements. The Council started to express comments on the evolution of labour and social legislation in the country.

In Slovakia, however, general agreements continued to be signed in the second half of the 1990s. Here too, however, problems emerged, mainly because employee representatives, i.e. primarily the Confederation of Trade Unions of the Slovak Republic, did not agree with the form of the Council of Economic and Social Agreement. The general agreement was criticised for being a mere political declaration, without precise and binding formulations; it was only signed after the state budget was approved; and it did not constitute a consensus between the social partners that would lead to the general agreement serving as a regulator of social dialogue. And so, a few years later than in the Czech Republic, the tradition of general agreements was abandoned in Slovakia as well. The last general agreement was signed in Slovakia in the year 2000.

Further evidence of the tripartite crisis in Slovakia is the fact that in 1999 the ‘tripartite act’, Act No 106/1999 Coll., on economic and social partnership, was passed. This act defined the rules of social partnership at summit level, defined representativeness criteria for the social partners and determined how they would be represented in the Council of Economic and Social Agreement. However, as soon as it was passed the act came in for strong criticism from all the social partners and evidently did not bring the expected improvement in social dialogue. In October 2004 this act was repealed and replaced by an amendment of what is called the Competencies Act, which made the Council of Economic and Social Agreement one of the government’s advisory bodies ([49]).

II.1.2. Other new ways of regulating employment

During the 1990s, a special form of employment that came to be known as the ‘Švarc system’ (after a businessman of the same name) became widespread in both countries. Under this system,

([48]) Hála, J. and collective: Development of Social Dialogue in the Czech Republic, Research Institute of Labour and Social Affairs, Prague 2002.

([49]) For more information see http://www.zkop.sk.

the firm's work is not done by employees but through entrepreneurs or traders or independent self-employed persons under a civil law contract for work or another arrangement, often falling under commercial law. As a rule, employers paid these 'employees' the expense of acquiring a trade licence, but that was the sum total of their obligations. In this way employers divested themselves of all the obligations imposed on them by labour legislation (e.g. the obligation to comply with the legally prescribed working time or to provide employees statutory recuperation leave, or obligations stemming from an employer's liability for damages, again as laid down by labour legislation). In addition, this obviation of the labour regulations led to considerable losses in mandatory payments towards social security insurance and tax losses ([50]).

A more stringent ban on the 'Švarc system' came in the new act on employment, Act No 435/2004 Coll. The equivalent shift in Slovakia came in the amendment of the Labour Code (Act No 210/2003 Coll.), which modified Section 7 so that it prescribed that employers are obliged to perform their predominant business activity primarily through employees in an employment or equivalent labour relation. This was intended to prevent other types of contract than employment contracts — e.g. civil law or commercial law contracts — being used for the performance of dependent work. Slovakia also has a new law, Act No 82/2005 Coll., on illegal work. It defines illegal work as dependent work carried out by a natural person for another person that is an entrepreneur if no labour relation is established between such persons or if the illegal employee is a foreigner without a residence and employment contract or a candidate for employment who has not declared his actual employment. The act forbids such work and lays down penalties for such illegal employment. Control powers under the act are exercised by work inspectorates and the labour, social affairs and family authorities.

In defence of those employers that used the 'Švarc system' (and evidently still do, though less overtly), it is fair to say that this way of regulating labour relations using civil and commercial contracts was essentially necessitated by their practical experiences. It was a form of out-sourcing activities. That is because the economy required employers to react to its needs flexibly and often sporadically. Moreover, the existing legislation was causing more and more problems for employers facing foreign competition, primarily because of the growing cost of labour. They therefore responded to momentary needs by, among other things, using the 'Švarc system' and started calling more loudly for legislation covering further labour relations that would be able to serve for various forms of 'atypical employment'.

For example, Slovak expert literature has recently been speaking in favour of making Slovak labour law provide more room for new forms of work in order to enable greater labour market flexibility. R. Schronk, for example, proposes that Slovak labour law should again embrace the 'agreement on work activity', which could represent one possible solution to atypical forms of employment. This agreement, he states, might in future be able to help at least in part resolve this problem by preserving the protection of employees that legislation in other branches of the law does not afford ([51]).

([50]) In the Czech Republic this conduct has many times been declared illegal not just from the point of view of violation of the labour legislation (viz. Supreme Administration Court decision 3 Ads 82/2005-50), but also in terms of breach of the tax regulations (viz. Supreme Administration Court decisions 2 Afs 131 / 2005 — 49, 2 Afs 176 / 2004 — 1401, 2 Afs 140 / 2004 — 15326., 2 Afs 161 / 2004 — 131).

([51]) Cf. Schronk, R.: Reform of Labour Law — an ongoing saga, in: *Justičná revue* no. 4/2005

The current Slovak Labour Code provides for atypical employment in the form of work done under agreements on work performed outside an employment relation and based on:

- an agreement on the performance of work, or
- an agreement on temporary work by students.

In each case the work must be defined in terms of its result and its performance under employment would be either impractical or uneconomical for employers ([52]).

Working from home can be regarded as another atypical form of employment. From the legal point of view, however, this is merely a special kind of employment relationship, where the place of work is specified not as the employer's workplace but instead, under terms agreed in the employment contract, the place of work is the employee's home or another agreed place during working hours that the homeworker himself schedules ([53]).

By contrast, in the Czech Republic the hitherto existing rules have essentially been retained for agreements on work done outside employment and thus under:

- an agreement on the performance of work, or
- an agreement on work activity.

Employers may make only subsidiary use of these agreements on work done outside employment, i.e. only if their business cannot be carried out by employees. ([54])

The provision of Section 18 of the Czech Labour Code, which delegates authority to named provisions of the civil code governing acts in law, may be regarded as another form of regulation of dependent work in the Czech Republic. Among these provisions is Section 51 of the civil code, which deals with 'innominate contracts'. An employer and employee may thus conclude a contract that will in a particular way regulate their labour relation without this constituting a labour law action leading to the establishment of a labour relation governed by the Labour Code. This is more of a hypothetical option, however, as the legislation on the employment relation and work done outside employment is sufficiently broad to allow the contractual provision in question to be characterised as an employment contract or an agreement on work done outside employment.

([52]) Section 223 of Act No 311/2001 Coll., Labour Code.
([53]) Cf. Section 52 et seq. of Act No 311/2001 Coll., Labour Code.
([54]) Cf. Section 74(1) of Act No 262/2006 Coll., Labour Code.

II.2. From job security to employability

Right at the start of this chapter it should be pointed out that it is exceedingly difficult to push through genuine reform of the labour protection legislation in both the Czech Republic and Slovakia. That is partly due to both countries' recent history of excessive protection of employees, implementation of full employment and generous welfare system. It was only after 1989, that unemployment first became manifest in the then Czechoslovakia and ways were sought to prevent it and, if it did arise, reduce it.

In view of the above, this chapter will look at the legislation on termination of employment and at employment policy in the Czech Republic and in Slovakia.

II.2.1. Legislation on termination of employment — genuine labour protection?

It has been proposed in both countries that the possibility of terminating employment by notice should be relaxed to some extent. At present employers can only terminate employment by notice on explicitly named grounds laid down by the Labour Code. The upshot of this legislation is not increased protection of employees and increased job security, however.

Employers are often compelled by circumstances to obviate the Labour Code and force an employee to terminate his employment by agreement, e.g. if the employer has found a better candidate for the job. In this context it has been suggested in both countries that the option be introduced for employers to terminate employment by notice on any grounds or even without giving reasons (this option has so far been available to employees alone), with the understanding, however, that an employer making use of this option would be obliged to financially compensate his employee for the termination of employment — e.g. by a payment of 7 to 12 times his hitherto average earning. The expert public (lawyers and academics) largely considered this solution relatively feasible and capable of stabilising the labour market. However, this option was not incorporated into any of the new legislation and the new Labour Codes in both countries failed to fulfil the expectations placed in them.

Employers may still terminate employment by notice on the following grounds alone ([55]):

(a) if the employer or part thereof is wound up;

(b) if the employer or part thereof relocates;

(c) if the employee is made redundant by a decision of the employer concerning organisational changes;

(d) if the employee is no longer able to do his existing work for health reasons or loses the medical fitness required for it;

(e) if the employee ceased to satisfy the professional or other requirements for the work he is employed to do;

(f) for breach of work discipline.

([55]) A precise and exhaustive definition of reasons for which employers may serve notice on their employees is contained in Section 63 of Slovak Act No 311/2002 Coll. and Section 52 of Czech Act No 262/2006 Coll.

Other ways of terminating employment are very similar in both countries, which is a consequence of their long shared history of labour law. The relevant provisions of the Labour Code ([56]) provide that employment may be severed solely by:

- agreement,
- notice,
- notice with immediate effect,
- termination during the trial period.

Fixed-term employment may also terminate upon expiration of the given period.

Neither Czech nor Slovak labour law provides for any other means of terminating employment.

Nevertheless, Section 76 of the Slovak Labour Code makes it obligatory for employers to enable an employee to choose between severance payment and a notice period.

For the benefit of employees the Labour Code provides that if, in the event of an invalid termination of employment, an employee notifies his employer that he insists on keeping his job, the employment relation persists. The employer is then obliged to invite the employee to return to work and at the same time to provide wage compensation for a period of at most 9 months (12 months up to 2003). The Czech Labour Code contains an equivalent provision. In general, however, the Slovak regulation on termination of labour relationship is less protective than the Czech one.

In connection with the legislation regulating termination of employment as one of the instruments of social protection for employees, it is perhaps possible to express some regret that neither country has found enough political will to push through the afore-mentioned proposals for relaxing what are otherwise considerable restrictions on employers' unilateral termination of employment. One might even presume that if the proposed changes in this area were adopted in at least one of the countries, a healthy revival of the entire labour market and a fall in the extent of non-compliance with the law might be expected.

II.2.2. Employment policy — an effective tool for increasing employability?

Development of unemployment in the Czech Republic and Slovakia

The launch of an employment policy, principally through the adoption of Act No 1/1991 Coll., on employment, was one of the first steps taken by the government formed after 1989. Even though it would be wrong to describe the rise in unemployment as a social problem at that time, it was clear that the continuing privatisation of inefficient and unprofitable state firms would indeed lead to increased unemployment. Increased unemployment affected the Czech Republic in the mid 1990s; in Slovakia it came somewhat later, but hit even harder.

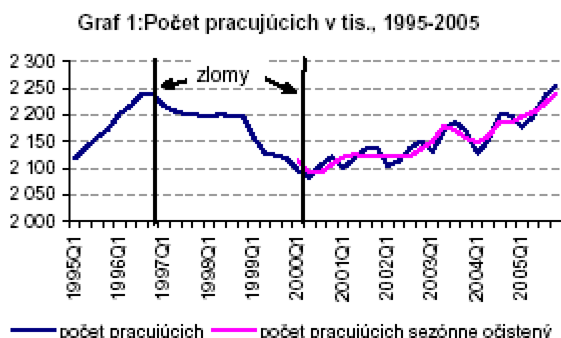
Employment in Slovakia peaked at the end of 1996, when employment was mainly increasing in services and industry. It later became clear that that rate of employment was not stable in the long term. At the start of 1997 employment started to fall and 1999–2000 brought the biggest

([56]) Section 48 of Act No 262/2006 Coll. and Section 59 of Act No 311/2001 Coll.

ever crisis on the Slovak labour market. However, a study recently published by the Slovak Ministry of Labour, Social Affairs and the Family ([57]) points out that employment has been rising in Slovakia since the year 2000. The study's authors attribute the rise mainly to the liberalisation of the Labour Code and the labour market's consequent greater flexibility.

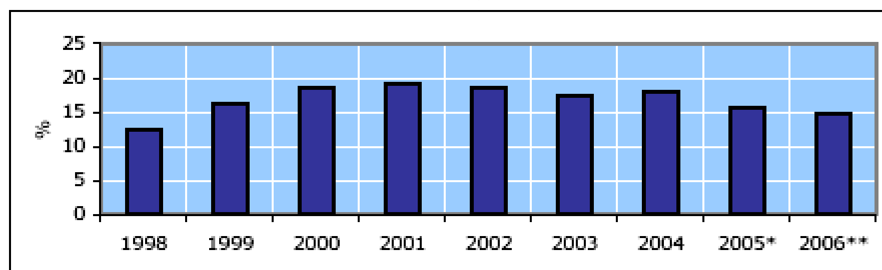
Graph 1, taken from the cited study, shows the changes in the number of people in work, in thousands, from 1995 to 2005, and identifies two moments in time that divide the period into three stages. The fall in employment in Slovakia is found in the stage from 1997 to 2000.

Graph 1. Number of workers 1995–2005(thousands)



By contrast, the following graph shows the rate of unemployment in Slovakia between 1998 and 2006. It is interesting to note that the increase in the number of workers that started in the year 2000 was reflected in a fall in the rate of unemployment almost two years later — not until 2002.

Graph 2. Annual rates of unemployment in Slovakia 1998–2006



Sario: Macroeconomic development ([58])

In general terms it can be said that the rate of unemployment in Slovakia has for a long time remained above the 10 % level and in fact hovers around the 15 % mark, which makes the Slovak Republic a European Union country with a relatively high rate of unemployment, and its unemployment rate figures are almost a third higher than in the Czech Republic.

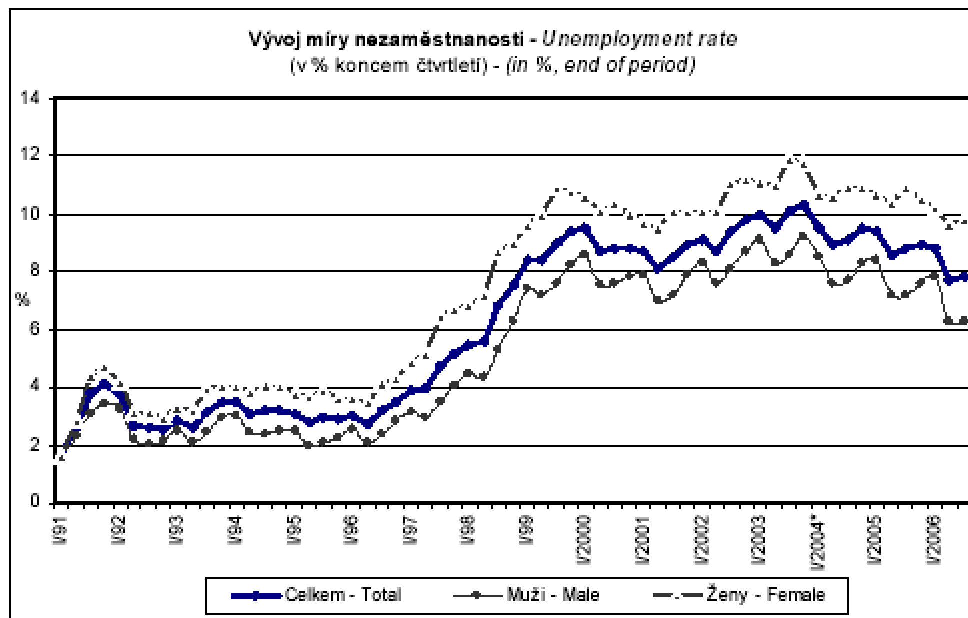
The following graph shows how the rate of unemployment developed from 1991 to 2006 in the Czech Republic. It is evident from the graph that, besides the first 'transformation shock' effect at the start of the 1990s, when the first increase in unemployment followed the abolition of the duty to work and the closing of the first unprofitable state firms, unemployment in the Czech

([57]) Senaj, M.,Belavý, M. The Labour Market Yesterday, Today and Tomorrow, Social Policy Institute of the Ministry of Labour, Social Affairs and the Family, Bratislava 2006.

([58]) http://www.sario.sk/swift_data/source/dokumenty/Makroekonomicke_ukazovatele.pdf.

Republic throughout the first half of the 1990s can be characterised as negligible. There was a relatively sharp rise in the rate of unemployment in the Czech Republic in the years 1997–2000. However, since then unemployment has fallen from 10 % to 8 % in the Czech Republic.

Graph 3: Annual rates of unemployment in the Czech Republic 1991–2006



Source: RILSA ([59])

Understandably, it should be pointed out that all national statistics on unemployment rates are considerably distorted, given that there are relatively large differences between social situations in individual regions in both countries. Above all, it is the regions that were traditionally dominated by heavy industry or the arms industry that have encountered major problems since the start of the 1990s.

Legislation on employment policy

The legislation governing employment policy was changed in both the Czech Republic and Slovakia in 2004. In Slovakia Act No 5/2004 Coll., on employment services, was adopted; in the Czech Republic Act No 435/2004 Coll., on employment. Both new acts implemented the European Community directives concerning employment services and equality in this area.

With some degree of generalisation it is fair to say that the two acts are largely similar, particularly as regards employment services in the area of active employment policy. Employment policy tools are:

- services,
- money contributions with an activating and motivating function.

For the sake of clarity we summarise individual benefits and services in the following table comparing legally regulated employment policy instruments in the Czech Republic and Slovakia.

([59]) http://www.vupsv.cz/fakta/graf6.pdf.

Table 2. Employment policy instruments regulated in the Czech Republic and Slovakia

Instrument	**Czech Republic (Act No 435/2004 Coll.)**	**Slovakia (Act No 5/2004 Coll.)**
SERVICES	Mediating employment (+ keeping records of job seekers)	Mediating employment (+ keeping records of job seekers)
	Advice services	Advice services
	Retraining	Training and preparation for the job market
MONEY BENEFITS	Bridging allowance	Self-employment allowance
		School-leavers' work experience allowance
	Employees' transport allowance	Commuting allowance
	Allowance for switch to new business programme	
	Allowance for orientation	
OTHER INSTRUMENTS	Investment incentives	
	Publicly beneficial work	
	Socially expedient jobs	

The table shows that Czech law encompasses more active employment policy tools and places considerable emphasis on promoting employment by supporting employers, whereas Slovakia puts more stress on support targeted directly at the unemployed person/job seeker.
Employment policy devotes special attention to the disabled, for whom special employment policy instruments balance out labour market opportunities.

Slovak legislation contains more instruments in this area than Czech law. The Slovak act on employment services provides for the following benefits:

- Allowance for employment of a disadvantaged job seeker;
- Allowance to disabled persons for self-employment;
- Allowance for establishing and conserving a protected workshop or protected job;
- Allowance for a work assistant;
- In addition, supported employment agencies can be established in Slovakia to mediate work with particular regard to disabled persons and the long-term unemployed.

In the Czech Republic only the following employment policy instruments for the disabled are provided for:

- Work rehabilitation;
- Protected jobs and protected workshops and allowances for their establishment and operation;

- Allowance to support the employment of a disabled person;
- Stipulation of a 'mandatory proportion' of disabled persons that an employer with over 20 employees must employ or buy products from a firm that employs a majority of disabled persons. To fulfil their obligation employers may also contribute to the state budget chapter designated for promoting employment of disabled persons.

In connection with the new employment policy legislation in both states it can be said that both Czech and Slovak laws implement the main guidelines for Member States' employment policy as defined by a Decision of the European Council ([60]). These are mainly guidelines 17, 19 and 21, dealing with full employment, the creation of inclusive job markets and promoting flexibility combined with job security. Nevertheless, these are guidelines, or rather goals, that are supposed to be attained on a timescale of several years. The right legal conditions are in place for achieving these goals, but the legal conditions need to be supported by the right social conditions, especially as regards inclusion and flexibility combined with security.

II.2.3. Fight against discrimination in Czech and Slovak labour law

The issue of equal opportunities is closely linked to employability and employment in general. Whereas labour protection, chiefly before termination of employment but in other areas as well, was already highly developed in both states before 1989, implementing equal opportunities is an entirely new issue that was not covered by Czech or Slovak legislation until preparations were being made for entry to the European Union. For that reason, slightly more room will be given to the issue in this study.

First, both states modified their labour legislation and implemented the relevant Community directives in their Labour Codes, employment acts and other regulations. At the same time, both states tried to adopt a universal anti-discrimination act.

Equal opportunities legislation in the Czech Republic

In the Czech Republic, equal opportunities in labour relations are currently covered by the following legislation:

- **Act No 262/2006 Coll., Labour Code**

Section 16 of the code provides that: '(1) Employers are obliged to ensure equal treatment of all employees as regards their working conditions, remuneration for work and the provision of other monetary considerations and considerations of monetary value, professional training and the opportunity of attaining promotion or other advancement in employment.

(2) Any kind of discrimination is forbidden in labour relations. The concepts of direct discrimination, indirect discrimination, harassment, sexual harassment, persecution, instructions to discriminate and incitement to discrimination and cases where different treatment is admissible are governed by a special legal regulation.

([60]) Cf. Council Decision of 12.7.2005 on guidelines for the employment policies of the Member States (2005/600/EC).

(3) Different treatment in the cases pursuant to subsection 2 is not deemed to be discrimination if it follows from the nature of work activities or contexts that the reason constitutes a fundamental and decisive requirement for the performance of the work to be done by the employee and which is essential for the performance of such work; the objective pursued by such an exemption must be legitimate and the requirement commensurate. A temporary measure adopted by employers when taking on natural persons into employment, in professional training of employees and opportunities to achieve promotion or another position in employment and designed to ensure that an equal representation of men and women is attained is also not deemed discrimination, provided that such measure is warranted by an unequal representation of men and women at the employer. The employer's actions must not, however, lead to the detriment of an employee of the opposite sex whose qualities are higher than the qualities of the natural person (employee) in respect of whom the employer applies the temporary measure pursuant to the second sentence above.'

The Labour Code refers to a special legal regulation, intended to be the act on equal treatment and on legal means of protection against discrimination (anti-discrimination act). This act had not been passed when the Labour Code took effect, however. The draft anti-discrimination act was returned by the senate of parliament and the chamber of deputies did not pass the act in May 2006. That gave rise to a fairly paradoxical situation whereby the new Labour Code regulates the implementation of equal opportunities much more briefly than the old code. Moreover, the fact that the Labour Code refers to a non-existent regulation gives rise to something of a legal vacuum, which is not a good thing. On the other hand, this is only one of the Labour Code's many shortcomings which evoked a wave of criticism from the expert public (many lawyers, academics and some representatives of social partners).

As regards the anti-discrimination act, which is again being worked on, it is supposed to be a universal act governing all aspects of equal treatment and should implement all the relevant directives impinging on this issue. The act should set out a definition of direct and indirect discrimination, define discriminatory reasons and regulate certain aspects of the fight against discrimination.

As in the previous draft, it is envisaged that the authority that will oversee compliance with equal treatment and equal opportunities will be the public defender of rights — the ombudsman. The office of the ombudsman should play the role of independent body overseeing equal treatment according to the requirements of the appropriate directive. When this aspect of the equal opportunities legislation was being discussed, proposals for the establishment of a new independent authority specialising in this issue were not accepted. The main reason was the endeavour to keep public administration economical. Broadening the powers of the ombudsman's office was seen as the most economical solution.

This solution is somewhat problematic from the legal point of view, however. Its biggest weakness is the fact that the ombudsman by definition oversees the conduct of the public administration authorities and its purpose is to protect citizens from mistakes committed by these authorities so that the positions of the citizen and public administration body, which, by nature of the matter and the nature of public law, are based on a superior/inferior relationship, are made somewhat more even. In the vast majority of cases, however, equal opportunities is a matter of

private law relations and discrimination generally takes place in the private law sphere — at the level of private companies etc. The office of the ombudsman will thus taken on an extra agenda, but one that represents an entirely new type of activity — that may cause some problems, especially in the beginning. At the same time, it should be realised that the act on the ombudsman awards it practically no executive powers. That means that the ombudsman is currently essentially an advisory and auxiliary body that can comment on the actions of public administration authorities but cannot influence them in any practical way.

On the other hand, one argument in favour of the proposed solution for the independent authority overseeing compliance with equal opportunities and equal treatment is that this is the solution opted for by many other EU Member States; it is also reasonable to assume that this will be an opportunity to bolster the status of the ombudsman in Czech society. Although certain problems may emerge, it is evidently possible to award the ombudsman stronger powers in the area of equal opportunities than it previously possessed. On the other hand, this procedure is not even necessary, as the civil courts have jurisdiction over equal opportunities and proceedings are regulated by the civil procedural rules — the burden of proof lies with the employer, i.e. the person that is obliged to ensure equality in the workplace and in recruitment.

- **Act No 435/2004 Coll., on employment**

At present, the act on employment contains the most detailed treatment of equal opportunities and also implements Community directives on equal opportunities in the greatest detail.

The act on employment's relatively extensive Section 4 contains a legal definition of direct and indirect discrimination and discriminatory reasons and circumstances under which ostensibly discriminatory conduct is not deemed such ([61]).

Understandably, however, the act on employment only concerns legal relations related to employment policy. Section 4(1) of the act on employment provides that 'the participants in legal relations of employment are obliged to ensure equal treatment of all natural persons exercising the right to employment'. It is therefore not possible to seek redress under this act in the event of discrimination arising, for example, during employment etc. The act on employment evidently applies only to legal relations arising in connection with recruitment. It can therefore apply to discrimination arising during selection processes for a particular position etc.

- **Act No 251/2005 Coll., on work inspection**

The act on work inspection regulated the transfer of certain powers of the labour offices to work inspectorates. Powers related to equal treatment were among those transferred.

The act on work inspection provides that the State Work Inspection Authority and inspectorates check compliance with obligations from legislation that establishes rights and obligations for

([61]) For example, Section 4(1) provides that 'Differentiation stipulated by this act or a special legal regulation is not deemed unequal treatment.' Similarly, Section 4(3) provides that 'Different treatment is not deemed to be discrimination if it follows from the nature of work activities or contexts that the reason constitutes a fundamental and decisive requirement for the performance of the work to be done by the employee and which is essential for the performance of such work; the objective pursued by such an exemption must be legitimate and the requirement commensurate.'

labour relations for employees, the relevant trade union body or works council or health and safety representatives ([62]).

The act on work inspection also defines misdemeanours by natural persons and administrative offences by legal persons in the area of equal treatment ([63]).

An employer commits an administrative offence or misdemeanour if it fails to provide equal treatment for all employees, discriminates against employees, punishes or disadvantages employees for seeking to exercise their rights and claims by legal means, or fails to discuss complaints concerning the exercise of rights and obligations stemming from labour relations with an employee or his representative. If the work inspectorate finds such irregularities at an employer, a fine may be imposed.

The establishment of work inspectorates is sometimes perceived in the Czech Republic as the fulfilment of the requirement in Community law to set up an independent body to oversee compliance with the principle of equal treatment. That is not entirely correct, however, as although the work inspectorates do oversee equality in labour relations and may impose penalties for shortcomings, they do not satisfy the condition of independence that Community law sets down. Work inspectorates are established by law, fall under the authority of the Ministry of Labour and Social Affairs and are financed out of the state budget.

Despite the shortcomings that can still be found in the area of equality in labour relations, it can be assumed that Czech law has implemented the directives governing equal treatment and opportunities. However, it will take several years for equal treatment to become a matter of course for society as such.

Equal opportunities legislation in Slovakia

The situation with regard to discrimination is noticeably clearer in Slovakia. That is because Slovakia managed to adopt an anti-discrimination act in 2004, i.e. a general regulation governing all aspects of equal treatment and the ban on discrimination.

- **Act No 365/2004 Coll., on equal treatment in certain areas and on protection against discrimination.**

The anti-discrimination act regulates protection against discrimination in several areas. These are equal treatment and protection against discrimination in:

  - Social security and healthcare;
  - The provision of goods and services;
  - Education;
  - Labour and equivalent relations.

The most extensive part of the act is devoted to compliance with the principle of equal treatment in labour relations.

([62]) Cf. Section 3(1) of Act No 251/2006 Coll., on work inspection.
([63]) Cf. Sections 11 and 24 of Act No 251/2006 Coll., on work inspection.

In these relations, discrimination is prohibited on grounds of gender, religious persuasion or faith, racial origin, national or ethnic origin, disability, age or sexual orientation. In this context the principle of equal treatment is applied in conjunction with the rights laid down by labour law.

The act provides a more detailed definition of gender-based discrimination if discrimination is based on pregnancy or motherhood ([64]) and of disability-based discrimination in access to employment or career advancement ([65]). Section 8 of the act gives a negative definition of discrimination. It is interesting to note that registered churches and religious societies are essentially exempted from the discrimination ban in this provision. Section 8(2) of Act No 365/2004 Coll. provides that different treatment on grounds of gender, age, religious persuasion or faith and sexual orientation is not discrimination in the case of employment in such organisations or the performance of work for them. Here, the religion or faith proclaimed by the church or religious society may be grounds for different treatment. This provision's vagueness could make it problematical and could even, in certain areas of society, create a discriminatory environment.

With regard to the procedural entitlement of someone feeling discriminated against, the act lays down the right for everyone, i.e. not just Slovak citizens, to seek the cessation of discriminatory conduct in a court, specifically a civil court. The burden of proof is with the person who is claimed to have violated the principle of equal treatment. Nevertheless, the act does not introduce a special, independent body or authority to oversee equal opportunities.

Another part of Section 8 caused the anti-discrimination act to appear before the Constitutional Court of the Republic of Slovakia shortly after it entered into force. The Constitutional Court repealed the provision of Section 8(8), which read: 'In order to ensure equal opportunities in practice and compliance with the principle of equal treatment it is possible to adopt special balancing measures to prevent disadvantaging related to racial or ethnic origin.' The Constitutional Court substantiated its ruling on the basis of the insufficient definition of the beneficiaries of the contested provision and thus the de facto establishment of unequal status (the provision only applies to racial grounds). The Constitutional Court found the absence of any temporary nature of such measure, if adopted, as another shortcoming of the provision ([66]).

Overall, the act is somewhat chaotic and unsystematic; that makes the legislation highly confusing, which in turn diminishes legal certainty in this area. On the other hand, it is undoubtedly a positive step in the sense that it gives Slovak law a single yet comprehensive piece of legislation, in which most of the provisions implement European Community law in this area.

- **Act No 311/2001 Coll., Labour Code**

The Labour Code contains general provisions concerning equal treatment and related obligations for employers. In so doing, the Labour Code refers to the anti-discrimination act. Section 13 thus contains merely a general provision to the effect that employers are obliged in labour relations to treat employees in accordance with the principle of equal treatment. Additionally, it affords

([64]) Cf. Section 6 of Act No 365/2004 Coll., the anti-discrimination act.
([65]) Cf. Section 7 of Act No 365/2004 Coll., the anti-discrimination act.
([66]) Cf. Finding of the Constitutional Court of the Republic of Slovakia PL. ÚS 8/04, promulgated in the Colletion of Laws under number 539/2005.

employees the right to complain to their employer in connection with a violation of the principle of equal treatment and the employer's obligation to respond to the complaint without undue delay, redress the situation, refrain from such conduct and eliminate any consequences ([67]).

- **Act No 5/2004 Coll., on employment services**

The act on employment services does not deal with equal treatment at any great length. Section 13 merely regulates the labour offices' obligation to inform job candidates of their right to equal treatment in access to employment.

Act No 125/2006 Coll., on work inspection

This act does not lay down any special powers for work inspectorates; it merely confers upon them oversight over compliance with labour regulations governing labour relations ([68]). However, that evidently authorises the work inspectorates to oversee equal treatment in labour relations and to impose fines and other penalties for non-compliance with the law, as the act on work inspection enables.

Whereas in the Czech Republic special acts constitute the primary legal source in the area of equal treatment, in Slovakia these regulations merely complement the general anti-discrimination act. Both countries' experiences demonstrate, however, that the form in which anti-discrimination rules are regulated is not the most important aspect of protection against discrimination. Anti-discrimination rules as set out by the European Community are de facto implemented in both countries. Both societies now face a far tougher challenge, however, namely putting the legal rules into practice and establishing the principle of equal treatment and equal opportunities in the life of society as a whole.

II. 3. Labour law and adaptability

The final subchapter in this part of the study is devoted to the issue of adaptability in labour law in the Czech Republic and Slovakia. Right at the outset it should be stressed that in both countries it took a relatively long time for labour law to absorb new forms of work and new aspects of the development of work. The reason evidently lies in the relatively conservative concept of labour law as a whole and also the public's conservative approach to labour law. New forms of work are therefore relatively difficult to put into effect, so the workforce remains relatively inadaptable. If we are to examine adaptability and labour law, it is first necessary to mention how new aspects of labour are legally regulated in both countries. However, it would be wrong to overlook the sociological and political aspects of this issue, which put the considerations about the legislation into a real context.

II.3.1. Legislation governing new forms of work and new aspects of labour relations

In the Czech Republic, certain new aspects of labour relations were not governed by legislation until the new regulations — the act on employment, which regulated agency recruitment, and the new Labour Code, which brings entirely new rules for working time accounts, for example — were passed.

([67]) Cf. Section 13(4) of Act No 311/2001 Coll., Labour Code.
([68]) Cf. Section 2 of Act No 125/2006 Coll.

Adaptability is dealt with by the new Labour Code primarily through provisions on working time ([69]). Part-time work is defined by a shorter working time. If employment takes place over shorter working time, the wage level corresponding to the work done is also adjusted according to the length of working time ([70])

The Labour Code also regulates certain instruments for distributing working time, namely:

- Uneven distribution of working time;
- Flexible distribution of working time;
- Working time accounts (an entirely new conceptual development).

Uneven distribution of working time is defined relatively liberally; the act only restricts it in the interest of setting rest periods. Section 83 provides that: 'In the event of uneven distribution of working time into individual weeks in a schedule of shifts the average weekly working time without overtime must not exceed the prescribed weekly working time for a period of at most 26 consecutive weeks. Only a collective agreement may define such period as at most 52 consecutive weeks. The length of a shift must not exceed 12 hours in the event of uneven distribution of working time.' There is thus protection of the length of individual shifts and the period in which work can be distributed unevenly and then be averaged into weekly working time.

Flexible distribution of working time is used in the Czech Republic far more than part-time work, which is only slowly coming to the forefront of attention and while still only availed of to a limited extent is mainly used by women caring for children. As part of the uneven distribution of working time, the employee himself chooses when to start and finish his working time on individual days within periods of time set by the employer ('optional working time'). A period of time in which the employee is obliged to be in the workplace ('basic working time') is inserted between two periods of optional working time. Flexible working time is used both in even and uneven distribution of working time ([71]).

As said before, the 'working time account' is an entirely new concept in Czech law, one that practical experience has shown to be necessary for quite some time. The working time account is another way of unevenly distributing working time that may be contained only in a collective agreement or internal regulation. To use working time accounts the employer must have the prior consent of the individual employees that will be affected by this working time distribution. When applying working time accounts, employers are obliged to keep an employee's working time account and wage account ([72]). Working time accounts will be used chiefly by those employers whose business involves seasonal work or work on one-off large-volume orders where the need for work is sporadic.

The Labour Code also contains new provisions on the working conditions of employees performing work of a special nature. This will apply to all employees who do not perform work

([69]) In this context one can remark that these rules constitute to some extent the liberal part of the Labour Code, but as a whole it largely took on the existing, unsatisfactory concept of labour law and also contains a large number of problematic provisions.
([70]) Cf. Section 80 of Act No 262/2006 Coll., Labour Code.
([71]) Cf. Section 85 of Act No 262/2006 Coll., Labour Code.
([72]) Cf. Sections 86 and 87 of Act No 262/2006 Coll., Labour Code.

in the workplace and distribute their working time themselves. In this context the act provides that the provisions on the distribution of working time do not apply to them, that they are not compensated for overtime work or work on public holidays and that such employees have no claim to compensatory wages in the event of important personal obstacles to work on the part of the employee ([73]).

Another aspect we can include under the concept of adaptability is the legislation on 'posting'. This refers to situations where employees are sent to perform work in another European Union Member State. In this case the act regulates the jurisdiction of the Labour Code in matters of working time, rest periods etc., provided the period for which the employee is posted to perform work within the framework of the transnational provision of services in the Czech Republic does not exceed a total of 30 days in a calendar year ([74]). That does not apply if an employee is posted to perform work within the framework of the transnational provision of services by an employment agency.

The last, but no less important new form of work is 'agency employment'. It was first regulated in Act No 435/2004 Coll., on employment. It is a form of employment brokering, whereby employees are temporarily assigned to work for another legal or natural person by an employment agency. An employment relation, or agreement on work, is concluded between a natural person and employment agency for the purpose of the performance of work at a user (another employer using the agency's services). The temporary assignment of an employee may only take place on the basis of an agreement as specified in the Labour Code. Section 308 of the Labour Code regulates the particulars of such an agreement.

It is also stipulated that throughout the temporary assignment of the employment agency's employee for the performance of work at a user it is the user that sets the agency's employee work tasks, organises, manages and controls his work, puts in place favourable working conditions and ensures health and safety at work.

The Slovak Labour Code contains almost identical provisions on agency employment, with the difference that the employment agency is called the 'temporary employment agency' and the user is called the 'user employer" ([75]).

The Slovak Labour Code is somewhat more conservative than its Czech counterpart in respect of new aspects of the distribution of working time. Sections 87 and 89 regulate uneven distribution of working time and flexible working time. The Labour Code places uneven distribution of working time into a relationship of subsidiarity with even distribution. It is stipulated that uneven distribution of working time comes into consideration if the nature of work or conditions of operation do not permit working time to be distributed evenly. By agreement with employee representatives or with an employee, employers may distribute working time unevenly over individual weeks for a period of 4-12 months, if the business requires differing levels of work in the course of a year.

([73]) Cf. Section 317 of Act No 262/2006 Coll.
([74]) Cf. Section 319 of Act No 262/2006 Coll.
([75]) Cf. Section 58 of Act No 311/2001 Coll.

Conversely, flexible working time is specified in favour of the employee and the Slovak Labour Code distinguishes between a flexible working day, flexible working week and flexible four-week working period. The definition of flexible working time is the same as in the Czech Republic.

The Slovak Labour Code has no concept of working time accounts and does not regulate the posting of employees abroad.

The above can be summarised by saying that both Czech and Slovak labour law is open to the application of part-time employment and thus to the creation of new jobs. However, one problem that remains is that part-time work is not particularly popular in either state. The principal reasons are the income aspect of the issue and the disadvantageousness of such an arrangement for employers. Neither side in labour relations thus views part-time work as a particularly positive solution. One group that is motivated to make use of this option is parents (as a rule mothers) caring for young children. Here too, though, employers' attitudes are a problem. Work involving flexible distribution of working time or uneven distribution of working time is increasingly being used in both countries. From this point of view the Council's recommendations for the Czech Republic and Slovakia ([76]) focus more on social policy than labour law, where such possibilities are already in place.

II.3.2. Adaptability from the point of view of labour mobility

Many European Union documents speak of labour mobility as a very important employment policy tool. It is therefore perhaps surprising that following the accession of new Member States to the EU the majority of the existing EU 15 introduced 'transitional periods' restricting the mobility of labour from these new member countries in an attempt to protect their own labour markets. In the case of the Czech Republic and, to a considerable extent, Slovakia as well, all these fears were baseless and unwarranted. The official rhetoric says that the number of employees who want to work in a different member country is low and thus cannot lead to the destabilisation of European job markets (this position is also confirmed by various surveys).

The Czech government has officially promoted labour mobility, e.g. as part of the National Employment Action Plan (which contains measures to improve the poor working of the housing market and support for transport) or Economic Growth Strategy. These are not binding documents, however, so whether the measures are adopted or not depends on political will.

The results of recently published research by the Sociological Institute of the Academy of Sciences of the Czech Republic ([77]) give a picture of internal mobility. In connection with work mobility it was found that around a quarter (24 %) of employees expect their job to change within two years; 6 % expect to be promoted; and 17 % are considering switching to a different employer. It is mostly university-educated people and those aged 20–29 who expect their job to change. Similarly, promotion is expected mainly by university graduates, white-collar workers generally but in this case specifically people in a higher age group: 30–44 years of age. Men expect promotion roughly three times more frequently than women. Moving to a different

([76]) Council Recommendation of 14.10.2004 on implementation of the employment policies of the Member States (2004/741/EC).
([77]) From a research project titled Our Society 2002, drawn up by L. Rezková, Sociological Institute 2002.

employer is planned more frequently by people with lower education levels, in manual professions, by those aged up to 45 and private sector employees.

The Slovak government recently published a report titled 'Report on the Current State of the Socio-economic Standard in the Regions of Slovakia and Measures to Eliminate Socio-economic Differences in Individual Regions" ([78]), wherein one chapter is devoted to active policy for the labour market and labour mobility. Among other things, the report draws attention to the adoption and quick amendment of Act No 5/2004 Coll. on the new form of Slovak employment policy. The following were identified as the key trends in 2005 in active labour market policy: increasing the employability of job seekers through training and preparation for the job market, professional advice services, school-leavers' work experience, activation and relocating for work. In this context the mobility of the workforce plays a key role in eliminating differences in standards of living between regions. The Slovak government also promotes internal labour mobility as well as cross-border mobility. However, it should also be pointed out that the Slovak population is not yet entirely flexible as far as mobility is concerned, though it has already achieved a very good standard of mobility compared with the Czech Republic. The biggest current obstacle to internal mobility of labour has proven to be the housing shortage.

Overviews published on the Euractiv website ([79]) provide some interesting information about attitudes to mobility in the Czech Republic and Slovakia.

For example, it is interesting that Slovaks are the only nation in central and eastern Europe that is convinced that international mobility is good for the individual (over 60 %). Czechs, Hungarians and Poles are more sceptical (approx. 45 % in the Czech Republic and Hungary; less than 40 % in Poland). The same report draws attention to the fact that the will to move abroad for work does not depend solely on the actual attitude to mobility: it also depends on economic and social conditions (unemployment, living conditions). More than 50 % of Poles and more than 35 % of Slovaks are willing to move to another EU country for work. The figure is less than 30 % for the Czech Republic and Hungary.

According to research conducted in the Czech Republic by the Research Institute of Labour and Social Affairs from 2000 to 2003, 15.4 % of respondents of productive age are considering relocating for work. The list of most attractive destinations is headed by Great Britain and Ireland (37.6 %), Germany (32.1 %) and Austria (14.7 %). Data on actual migration are not available; but it is a reasonable estimate that approximately 25,000 Czechs worked in another Member State before EU accession. At the same time, 42 % of Czechs working in Germany commuted to work (cross-border workers). 32 % of all Czechs working in Austria commuted to work. This figure is generally believed not to have changed much since the Czech Republic joined the EU.

Public debate on worker mobility is limited. As international mobility evinced by Czech workers has been low, the public and media concentrate more on the influx of foreign workers looking for jobs in the Czech Republic.

([78]) http://government.gov.sk/infoservis_archiv.php?adm_action=13&ID=303.
([79]) http://www.euractiv.cz/cl/81/2854/Mobilita-pracovniku-v-zemich-stredni-a-vychodni-Evropy.

By contrast, there are 170 000 to 200 000 Slovaks working abroad, mainly in the Czech Republic, Hungary, Great Britain and Ireland. Slovaks travel to some countries, e.g. Germany and Italy, for seasonal work (especially in agriculture and tourism). The number of Slovaks travelling abroad for work has risen since EU accession. Almost 6 000 workers commute to Hungary every day. Roughly 70 000 Slovaks work in the Czech Republic, with roughly a quarter of them commuting to work. The opportunities for working in Austria are confined by the restrictions on the free movement of labour.

As we have already stressed, Slovaks have a positive attitude to mobility (according to Eurostat more than 60 % of Slovaks think that international mobility is a good thing). Many people see mobility as a necessity — particularly in connection with high unemployment and low wages on the market. Many migrants, and young people in particular, are thus prepared to accept employment whose qualification requirements are lower than their educational achievement.

The above information about adaptability and labour law in the Czech Republic and Slovakia can be summarised by saying that the relatively conservative legislation in this area and insufficient available housing in both countries considerably reduce the population's adaptability within its own country. Conversely, as regards external adaptability and, for example, travelling abroad to work, some groups of the population of both countries are even prepared to relocate to other European Union countries for work. This willingness is much higher among Slovaks, a large number of whom migrate to the Czech Republic for work. Czechs, by contrast, display a relatively low willingness to relocate for work. Nevertheless, in both countries it can be stated categorically that the concerns of older EU member countries concerning excessive labour migration from Slovakia or the Czech Republic were baseless and unwarranted.

Conclusions

To conclude this study we can elaborate on certain problems that were outlined in the study and will undoubtedly influence the further evolution of labour law in the Czech Republic and in the Republic of Slovakia.

First and foremost, it should be stressed that despite the proclaimed attempts at a genuine reform of labour law in both countries, the bold steps required in this field of law have not yet been taken in either of the countries under scrutiny. Although it might seem that constantly referring to the legacy of the communist period is no longer in tune with reality, in the area of labour law the opposite is true. It is evident from how labour law has evolved in both countries that the links to the Soviet model are still too strong and it is relatively difficult to break these ties, including from the political point of view.

There can be no doubt that Slovakia has displayed the more determined endeavour in this sense: above all, in the latest amendments of the Labour Code it sought to weaken the protection afforded to employees somewhat and widen employers' room for manoeuvre and boost their competitiveness.

Reducing the protection of employees is proving highly problematic, however, chiefly due to the adverse social situation in certain Slovak regions and the relatively high overall rate of unemployment in the country. It is very dangerous to reduce the labour protection of the population without the existence of the strong safety-net afforded by social security.

By contrast, although the adoption of the new Labour Code in the Czech Republic changed its basic concept as regards contractual liberty and the increased focus on private labour law, the continuing strong protection of employees in labour relations and the maintenance of trade unions in a strong position (where they exist) in the workplace mean that the desired reduction in non-compliance with the provisions of the Labour Code and in the incentives for employers to unilaterally choose alternatives to an employment relationship has not materialised. The Czech Republic shows that excessively high legal protection of employees does not actually lead to greater protection — the opposite, in fact — because employers are not at all motivated to try to comply with the Labour Code and labour legislation and workers do not insist, in fear of losing their job.

Critics of the excessive conservatism of labour law in both countries refer primarily to the rules for terminating employment. Nevertheless, in this context it is necessary to draw attention to the fact that devising effective rules for the termination of employment is evidently the hardest socio-political task in labour law. That is because it is necessary to reflect the situation in society accurately and make allowance for an acceptable balance between liberalising the labour market and protecting employees so that both legal certainty and social security are conserved and at the same time the labour market as such does not stagnate.

As far as the radicalism of reforms is concerned, after the first reforms that freed labour law from the concept of the socialist social model, the biggest influence on the evolution of labour law, particularly in the last 10 years, has been European Community law and European Union policy

in this area. This does not just mean the harmonisation of national law with the requirements of the relevant Community directives; certain EU documents that are not legally binding, including the application of the open method of coordination, have also been implemented, e.g. in national action plans regarding employment policy etc.

In this context it is fair to say that one positive aspect of current labour law in both countries is the new legislative treatment of employment, with particular emphasis on active employment policy and the introduction of anti-discrimination rules into both states' legal systems. Both these steps are fully in line with labour law trends in the European Union and also reflect the topics that are currently at the forefront of debate in this field. At the same time, these two very aspects, and particularly the emphasis on active employment policy, can be denoted as the direction in which both countries must head if they want to achieve truly flexible labour markets. Given the social situation (particularly in Slovakia) and the relatively high numbers of socially excluded citizens (i.e the position of the Roma population mainly in Slovakia, but also in the Czech Republic,), increased labour market flexibility categorically cannot be achieved by reducing social protection and the protection of labour as such. A better route would be to support employment and promote employability, as recommended by the Council Recommendation on the implementation of Member States' employment policies and the Council Decision on guidelines for Member States' employment policies, which are both cited in this study.

This study shows that labour law in the Czech Republic and Slovakia is essentially very similar, which is clearly linked to the shared historical roots of the countries' legal orders as such.

Perhaps the only major differences concern anti-discrimination rules and new forms of work. By contrast, the legal rules for termination of employment are almost identical: the only differences concern the ban on notice for certain groups of employees and exemptions from this ban. Another similarity between the two countries is the criticism aroused by the new Labour Codes: criticised in Slovakia for its ostensibly overly liberal concept; and, conversely, in the Czech Republic, for the fact that it inordinately conserves the existing state of affairs and contains numerous legislative errors.

To end this study, one can say that defining an ideal degree of employee protection in labour law is one of the hardest tasks facing legislators in this field. In both countries this is made all the more complicated by the fact that labour law has a very pronounced impact on ordinary social relationships, but these are not established and influenced solely by labour legislation but also, and maybe most importantly, by the overall situation in society, its economic efficiency, political and social stability and its culture. From this point of view I dare say that that labour law in the Czech Republic and Slovakia, and above all its application, face a very long road yet before an at least satisfactory state of affairs is reached, in the form of a stable labour market with employers and employees who are aware of the law and their rights and know how to exercise these rights in accordance with the spirit of labour law. The application of common Community rules may be a useful guideline for both countries in this regard.

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The evolution of labour law in Estonia

Dr iur. Merle Muda

Executive summary

Due to the small role of social partners in shaping employment relationships, the latter are mainly regulated by legislation in Estonia. The bulk of Estonian labour legislation was adopted in the first half of the 1990s. It was clear already at the time of adoption of these laws that they were rapidly drafted transitional laws, which aimed to give the parties to employment relationships initial guidance on behaviour in conditions of market economy.

The most important law that determines the ideology of the whole regulation of employment relationships, the Republic of Estonia Employment Contracts Act (hereinafter TLS), is valid since 1992 and is largely based on the Labour Code of the Estonian Soviet Socialist Republic that regulated employment relationships during the Soviet period. Since the TLS was created mainly to govern the employment relationships of persons working for large production enterprises, it does not meet the needs of today's economic and social life. The TLS like other labour legislation has been harmonised with the European Union law, but its concept is not suitable for regulating the social relations that have developed between employees and employers by the beginning of the 21st century. The TLS is not based on the individual nature of employment relationships, which is why its provisions are not flexible and do not take sufficient account of the interests of employees and employers.

The Estonian labour law reform plan prepared at the beginning of the 1990s foresaw the drafting of a labour code immediately after the single acts on employment relationships were adopted. However, this plan was discarded quite soon and it was decided to first only focus on creating new rules for employment contracts. Eight draft laws regulating employment contracts were prepared in Estonia during 1995–2005, but none of them were adopted for various political reasons. The latest draft was withdrawn by the government of the Republic from the parliament (Riigikogu) in the spring of 2005 and no new draft has been prepared till now.

That is why the Estonian labour law has not significantly developed during 1995–2005. The major changes that have been introduced to the applicable labour laws have been due to the need to harmonise the Estonian labour law with the requirements arising from the European Union directives. In the areas covered by this report, the European Union legislation has influenced domestic law most in the following matters:

1) extension to men of the guarantees formerly applicable only to women raising a child or taking care of a person with total incapacity for work, in order to avoid discrimination of employees (2002);
2) introduction of the concept of collective redundancy (2003);
3) abolishment of dismissal due to an employee's age (prepared in 2005, adopted in 2006);
4) reduction of the weekly maximum working time from 60 to 48 hours (2002).

People usually work in typical employment relationships in Estonia, while new, flexible forms of working are little used. Of the new forms of employment relationships, fixed-term employment contracts, part-time work and on-call time are regulated in the greatest detail by law. This is because it was considered necessary to regulate these issues already at the beginning of the 1990s; the provisions on fixed-term contracts and part-time work have been supplemented

in line with the requirements of European Union law. The other new forms of employment relationships covered by this report are not regulated by law.

As regards the employability, mobility and adaptability of workers, one of the key aspects is a worker's opportunity to participate in training, which is guaranteed mainly via a system of study leaves. On the other hand, it is important that a worker finds a new job as soon as possible after the termination of employment. Estonian labour legislation poses no obligations on employers in this respect, but attempts are being made to solve these issues through various employment services. The situation is the same as regards promotion of the employability of elderly persons, young people and others falling into the group at risk of social exclusion.

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List of abbreviations

AÜS — Trade Unions Act
KLS — Collective Agreements Act
KTTLS — Collective Labour Dispute Resolution Act
PuhkS — Holidays Act
RT — *Riigi Teataja* (the State Gazette)
TäKS — Adult Education Act
TDVS — Employees Disciplinary Punishments Act
TLS — Employment Contracts Act
TPS — Working and Rest Time Act
TTTS — Employment Services and Employment Subsidies Act
TUIS — Employees' Representatives Act
VÕS — Law of Obligations Act

1. New ways of regulating work: legislation, collective bargaining and beyond

(1) Role of social partnership/consultation

Social partners do not play a great role in shaping employment relationships in Estonia ([80]). This is due to the historical development of trade unions. The first unions of employees were founded in Estonia in 1905. Classic trade unions developed by the end of the 1920s, but they were not active long because Estonia was occupied by the Soviet Union in 1940. Between 1940 and 1991 when Estonia was part of the Soviet Union, trade unions played an important role in social affairs; 97–99 % of workers belonged to trade unions by the end of the 1980s. However, the Soviet trade unions were not traditional organisations protecting the rights and interests of workers, but their main task was to implement the action programmes of the Communist Party.

Reorganisation of the Estonian trade unions began at the end of the 1980s, influenced by economic reforms in the Soviet Union. After Estonia regained its independence in 1991, the competence of trade unions changed in connection with the transfer to market economy and privatisation. Representing and protecting the work-related and social interests of the members on the company, branch of the economy and state levels became the main goal of trade unions. Fundamental changes in the sphere of activity of trade unions resulted in a substantial reduction in the number of trade union members. Because trade unions largely fulfilled the tasks assigned by the Communist Party in the Soviet period, the massive leaving of members was motivated by a wish to live free from party dictation.

Currently there are two confederations of trade unions in Estonia: the Confederation of Estonian Trade Unions (EAKL) ([81]) and the Estonian Employees' Unions' Confederation (TALO) ([82]). The EAKL was founded in 1990 and it unites transport, industrial and medical workers, seamen, people employed in commerce, etc ([83]). The TALO was founded in 1992 and it unites cultural, educational and research workers ([84]).

Although the Trade Unions Act (hereinafter AÜS) ([85]) regulating the legal status of trade unions, which gives broad competence and guarantees to the selected representatives of trade unions in companies, was passed in 2000, trade unions are not uniting large numbers of people in Estonia. Rather, statistical surveys show that the numbers of trade union members and the number of entities where a trade union is active have decreased over the years. While trade unions covered 14.3 % of all employees in 2000, only 8.5 % of employees belonged to trade unions in 2005. In 2000, a trade union was active in 24.5 % of entities; in 2005, only in 19.3 % of entities ([86]). Employee surveys show that in the opinion of a large proportion of employees, belonging to a trade union has no advantages at all ([87]).

([80]) About the role of workers' organisations in shaping employment relations in Estonia see: Muda, M. Estonia. Handbook on Employee Involvement in Europe, edited by Manfred Weiss and Michał Seweryński. Kluwer Law International, 2004.

([81]) The EAKL website is http://www.eakl.ee/.

([82]) The TALO website is http://www.talo.ee/.

([83]) The EAKL has 43 776 members as of 2006. See: EAKL will be 16 years old. EAKL. News, 12.04.2006(in Estonian). Available at: http://www.eakl.ee/uudised/0604121.htm, 20.11.2006.

([84]) The TALO had about 30 000 members as of 2005. See: Estonian Employees' Unions' Confederation. General information. Available at: http://www.talo.ee/doc/inenglish/TALOinglise.htm, 20.11.2006.

([85]) Trade Unions Act. Adopted on 14 June 2000 — RT I 2000, 57, 372; 2002, 63, 387. (Available in English at:http://www.legaltext.ee/text/en/X30087K1.htm, 20.11.2006.)

([86]) Labour Market and Working Life 2005, p. 30 (in Estonian). Available at: http://www.sm.ee/www/gpweb_est_gr.nsf/HtmlPages/tooturg_2005/$file/tooturg_2005.pdf, 20.11.2006.

([87]) Working Life Barometer 2005. Population Survey Report, p. 56 (in Estonian). Available at: http://www.sm.ee/est/HtmlPages/TooeluBaromeeter-aruanne16–01–2006/$file/Tööelu %20Baromeeter-aruanne %2016–01–2006.pdf, 20.11.2006.

The main representative organisation of employers in Estonia is the Estonian Employers' Confederation (ETTK) ([88]). The ETTK was founded in 1997 by the merger agreement of two employers' unions: the Estonian Confederation of Industry and Employers (founded in 1991) and the Estonian Confederation of Employers Organisations (founded in 1995). The ETTK represents all the main industry unions and larger companies such as Eesti Energia, Eesti Post, Eesti Telefon, Eesti Raudtee, etc ([89]).

Since social partners have little influence on the shaping of employment relationships, the role of collective agreements in regulating employment relationships is also not big. However, the relative importance of collective agreements has somewhat grown: while in 1998 and 2002, respectively 11 % and 22 % of entities had collective agreements, 25 % of entities had collective agreements in 2005 ([90]). According to the Ministry of Social Affairs database, 281 collective agreements were made in Estonia in 2001–2006 ([91]).

Collective bargaining usually focuses on issues of occupational safety and working time. The amount of wages, length of holiday and term of the employment contract are usually agreed on an individual basis ([92]).

(2) Relationships between statutory law and collective bargaining

The various areas of employment relationships are regulated by individual laws in Estonia. The most important laws regulating individual employment relationships are:

- Republic of Estonia Employment Contracts Act (entered into force in 1992; hereinafter TLS) ([93]);
- Working and Rest Time Act (entered into force in 2002; hereinafter TPS) ([94]);
- Holidays Act (entered into force in 2002; hereinafter PuhkS) ([95]);
- Wages Act (entered into force in 1994) ([96]);
- Employees Disciplinary Punishments Act (entered into force in 1993; hereinafter TDVS) ([97]);
- Occupational Health and Safety Act (entered into force in 1999) ([98]);
- Individual Labour Dispute Resolution Act (entered into force in 1995) ([99]).

Collective employment relationships are regulated by the following acts:

([88]) The ETTK website is http://www.ettk.ee/.
([89]) The ETTK unites 1500 Estonian enterprises that collectively employ 145 000 people. See: About the Confederation (in Estonian). Available at: http://www.ettk.ee/et/liidust/uldinfo, 20.11.2006.
([90]) Working Life Barometer 2005 (reference 8), p. 54.
([91]) Collective Agreements. Collective Agreements Database (in Estonian). Available at: http://www.sm.ee/www/gpweb_est_gr.nsf/pages/goproweb0053, 20.11.2006. According to TLS Section 4[1](1), concluded collective agreements are registered in the database maintained by the Ministry of Social Affairs.
([92]) Working Life Barometer 2005 (reference 8), p. 60.
([93]) Republic of Estonia Employment Contracts Act. Adopted on 15 April 1992 — RT 1992, 15/16, 241; 2006, 31, 236. (Available in English at: http://www.legaltext.ee/text/en/X1056K10.htm, 20.11.2006.)
([94]) Working and Rest Time Act. Adopted on 24 January 2001 — RT I 2001, 17, 78; 2006, 14, 112(Available in English at: http://www.legaltext.ee/text/en/X40079K4.htm, 20.11.2006.)
([95]) Holidays Act. Adopted on 4 April 2001 — RT I 2001, 42, 233; 2003, 82, 549. (Available in English at: http://www.legaltext.ee/text/en/X50054K2.htm, 20.11.2006.)
([96]) Wages Act. Adopted on 26 January 1994 — RT I 1994, 11, 154; 2005, 39, 308. (Available in English at: http://www.legaltext.ee/text/en/X1037K6.htm, 20.11.2006.)
([97]) Employees Disciplinary Punishments Act. Adopted on 5 May 1993 — RT I 1993, 26, 441; 2000, 102, 674. (Available in English at: http://www.legaltext.ee/text/en/X1042.htm, 20.11.2006.)
([98]) Occupational Health and Safety Act. Adopted on 16 June 1999 — RT I 1999, 60, 616; 2005, 39, 308. (Available in English at: http://www.legaltext.ee/text/en/X30078K4.htm, 20.11.2006.)
([99]) Individual Labour Dispute Resolution Act. Adopted on 20 December 1995 — RT I 1996, 3, 57; 2006, 7, 42. (Available in English at: http://www.legaltext.ee/text/en/X1040K2.htm, 20.11.2006.)

- Trade Unions Act (entered into force in 2000);
- Employees' Representatives Act (entered into force in 1993; hereinafter TUIS) ([100]);
- Collective Agreements Act (entered into force in 1993; hereinafter KLS) ([101]);
- Collective Labour Dispute Resolution Act (entered into force in 1993; hereinafter KTTLS) ([102]).

The Government of the Republic and the Minister of Social Affairs have adopted various regulations to provide the codes of conduct required for the implementation of the laws.

In Estonia, the ideology of the regulation of employment relationships is determined by the TLS, which was adopted with the chief aim of taking into account, as opposed to the Labour Code of the Estonian Soviet Socialist Republic ([103]), the changed economic situation and the emergence of private ownership. Since the TLS was drafted as a transitional law, the Ministry of Social Affairs and the Ministry of Justice have prepared various draft laws on employment contracts, which have not been adopted due to various political reasons. The latest draft Employment Contracts Act was completed at the end of 2003 and the parliament (*Riigikogu*) read it once. In May 2005 the government withdrew the draft from the *Riigikogu* and a new version of it has not been drafted till now.

Since most of the labour laws were drafted at the beginning of the 1990s in order to establish initial rules for the functioning of employment relationships in the changed economic environment, a majority of the labour law provisions have become obsolete by now and the entire regulation of employment relationships needs renewal. New regulation of employment contracts should be developed as a first step of reforms.

The laws governing individual employment relationships have been greatly influenced by the ESSR Labour Code which was in force in the Soviet period. The rules are therefore often detailed and do not leave much space for the social partners to make agreements.

According to KLS Section 4(2), the terms and conditions of a collective agreement which are less favourable to employees than those prescribed by a law or other legislation are invalid. The legislation regulating employment relationships is thus imperative, and collective agreements may only agree on more favourable conditions for the employees (e.g. wages higher than the national minimum wage, working time shorter than that prescribed by law; larger benefits upon termination of employment contracts, etc.).

As mentioned above ([104]), social partners do not play a significant role in shaping employment relationships — only a small percentage of employees belong to trade unions and neither do collective agreements regulate employment relationships to any great extent, although the TUIS, AÜS and KLS all legally support the entry into collective agreements. Collective agreements often copy the provisions of the applicable labour laws, while the real guarantees to the employees are represented by only a few agreements on raising the corporate wage level or on the payment of bonuses.

([100]) Employees' Representatives Act. Adopted on 16 June 1993 — RT I 1993, 40, 595; 2002, 111, 663. (Available in English at: http://www.legaltext.ee/text/en/X2001K2.htm, 20.11.2006.)

([101]) Collective Agreements Act. Adopted on 14 April 1993 — RT I 1993, 20, 353; 2002, 61, 375. (Available in English at: http://www.legaltext.ee/text/en/X2002K4.htm, 20.11.2006.)

([102]) Collective Labour Dispute Resolution Act. Adopted on 5 May 1993 — RT I 1993, 26, 442; 2002, 63, 387. (Available in English at: http://www.legaltext.ee/text/en/X1039K1.htm, 20.11.2006.)

([103]) Labour Code of the Estonian Soviet Socialist Republic. Adopted on 5 July 1972. Tln: Eesti Raamat, 1985. Chapter IX (Sections 125–130) of the ESSR Labour Code is still valid and governs the employee's liability in the event of causing damage to the employer.

([104]) See paragraph 1(1).

Still, in his overview of the settlement of collective labour disputes in 2005, the Public Conciliator ([105]) states that collective agreements have more substance than in previous years, when they were largely just copies of the applicable labour law provisions. More attention is now being paid to additional benefits, training and continuing education, rest time and other social guarantees: benefits for parents at the beginning of the school year, Mother's Day benefit, childbirth allowance, employer's insurance against accidents, etc. The Public Conciliator also mentions that labour disputes have become more complicated and solutions are harder to find. Trade unions have become active; employers are often presented with a very lengthy draft collective agreement from the beginning, which stifles the opponent's wish to negotiate and sign the agreement ([106]).

It may thus be said that employment relationships are mainly regulated by laws in Estonia. The little relevance of collective bargaining in shaping employment relations is mainly due to the weak position of trade unions in the labour market. Collective agreements are rare also because the laws provide for detailed rules regarding employment relationships and the social partners must not agree on conditions less favourable than those for the employees.

(3) Types of collective agreements

According to KLS Section 2(1), a collective agreement is a voluntary agreement between employees or a union or federation of employees and an employer or an association or federation of employers, and also state agencies or local governments, which regulates the employment relations between employers and employees.

As mentioned above ([107]), collective agreements play only a marginal role in shaping employment relationships. Since there are few collective agreements, no clearly identifiable types of collective agreements have emerged.

A collective agreement may be bilateral or tripartite. A bilateral collective agreement is concluded between the workers' representative(s), union or federation of employees on one part and the employer or a union or federation of employers on the other part. In the event of a tripartite collective agreement, the third party is the Government of the Republic or the local government (KLS Section 3).

The rules governing tripartite collective agreements are somewhat contradictory and should be omitted from the law. KLS Section 4(1) provides that a collective agreement applies to such employers and employees who belong to an *organisation* which has entered into a collective agreement, unless the collective agreement prescribes otherwise. However, where the state or local government is a party to a collective agreement, it should comply with the agreement too, but the KLS does not provide for this. Another problem arises in the settlement of collective labour disputes. According to KTTLS Section 2(1), a collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions. The parties to a collective labour dispute are an employer or an association or federation of employers and employees or a union or federation of

([105]) Under KTTLS Section 8, conciliators are impartial experts who help the parties to labour disputes reach mutually satisfactory resolutions. The Public Conciliator is appointed to office for a term of three years by the Government of the Republic on the basis of a joint agreement of the Ministry of Social Affairs and confederations of employers and of employees (subsections 1 and 3).

([106]) Public Conciliator. Settlement of Collective Labour Disputes in 2005 (in Estonian). Available at: http://www.riikliklepitaja.ee/index.php?pgID=2&newsID=106, 20.11.2006.

([107]) See paragraphs 1(1) and 1(2).

employees (KTTLS Section 3(1)). The state or local government being a party to a collective agreement cannot thus be a party to a collective labour dispute. Hence, the tripartite collective agreement means a social pact in practice.

Based on the specification of the parties to a collective agreement, collective agreements can be made on three levels:

1) a company, agency or other organisation;
2) a branch of the economy or a region;
3) the state.

Most collective agreements are made on the company level. Branch (sectoral) level collective agreements are not particularly common. The agreement on the minimum hourly wage of healthcare professionals (24.9.2004) and the general agreement regulating the working conditions of transport and road workers (13.4.2005) should be mentioned as the branch level agreements that govern the largest numbers of employees and employers. Collective agreements are rarely made on the state level. Agreements on the wages of educational and cultural workers between the Government of the Republic and the TALO belong to this category, amongst others.

(4) Relationships between levels of bargaining

As mentioned above ([108]), collective agreements are concluded on three levels: company, agency or other organisation; branch or region; and the state. The following parties usually enter into collective agreements on these different levels:

levels / parties	company, agency or other organisation	branch or region	state
bilateral collective agreement	1. collective of employees (including trade union) 2. employer	1. federation of employees 2. federation of employers	1. confederation of employees 2. confederation of employers
tripartite collective agreement	1. collective of employees (including trade union) 2. employer 3. local government	1. federation of employees 2. federation of employers 3. local government	1. confederation of employees 2. confederation of employers 3. Government of the Republic

It is possible that a federation of employees is a party, representing the employees, to a collective agreement applicable in a company. The Government of the Republic as an employer may also enter into agreements on all the levels without belonging to any employers' organisations.

If the trade union of a company, agency or other organisation is a member of a federation of trade unions, which in turn may be a member of a confederation of trade unions (e.g. a particular

([108]) See paragraph 1(3).

hospital's medical society is a member of the Estonian Medical Association, which is a member of the EAKL), whereas each level's trade union may enter into collective agreements, an employee may be covered by more than one collective agreement. In such a case, the provision which is most favourable to the employee applies (KLS Section 4(3)). For example, if a hospital's medical society has agreed with the employer on a doctor's minimum monthly wages of EEK 15 000, but the wages agreement between the Estonian Medical Association and the Hospitals Association entitles a doctor to a minimum of EEK 12 000 a month, the hospital's wages have to comply with the internal agreement of the hospital.

Under KLS Section 4, a collective agreement entered into between an association or federation of employers and a union or federation of employees and a collective agreement entered into between a confederation of employers and a confederation of employees may be extended by agreement of the parties in respect of the conditions governing wages, as well as work and rest time. The scope of extension is determined in the collective agreement. The conditions of extended collective agreements are published by the Minister of Social Affairs in the publication Official Notices (*Ametlikud Teadaanded*). The terms and conditions of extended collective agreements enter into force on the day following publication of the notice (subSections 4 and 5).

The KLS thus allows associations or federations of employers and unions and federations of employees to extend the collective agreements concluded between the respective associations or federations to employers not belonging to such associations or federations, regardless of such employers' consent. The parties to the collective agreement agree on the extension and, as a rule, the agreement is extended to other employees and employers active in the same area ([109]).

Although the KLS rules on the extension of collective agreements give the social partners a greater chance to participate in the shaping of employment relationships, the great freedom of action of the parties to the agreements may have unfair results. The shortcoming of the KLS is the overly general wording of the procedure for extension of collective agreements; it does not consider the interests of the persons to whom the agreement is extended. This is the case, for example, if small associations of employers and employees extend their mutual collective agreement, which gives the employees substantial benefits, to other employers of the same industry, who are not able to comply with the agreement. Neither can the latter dispute the content of the extended collective agreement. This is why the mechanism of extension of collective agreements should be much more specific.

(5) Individualisation of employment relationships

Since collective agreements have no major role in regulating employment relationships in Estonia, it is the applicable legislation that largely determines the content of employment relations. When an employee commences work, an employment contract is concluded; it must be a written contract pursuant to TLS Section 28(1).

According to TLS Section 14, the rights granted to employees by law or administrative legislation or collective agreements may be extended by employment contracts. Employment contract terms which are less favourable to employees than those prescribed by law or other legislation are invalid. The legislation regulating employment relations is thus imperative, and an

([109]) The agreement on the minimum hourly wage of healthcare professionals (24.9.2004) and the general agreement regulating the working conditions of transport and road workers (13.4.2005) should be mentioned among the Estonian extended collective agreements between federations.

employment contract may specify only more favourable conditions for the employee. Neither can an employment contract contain conditions worse for the employee than the conditions of the collective agreement. Any such conditions are invalid and the provisions of the collective agreement apply (TLS Section 15).

In practice, the parties to an employment contract thus mainly proceed from the employment contract concluded between them in shaping their employment relationship. While most employment contracts made in the 1990s only specified the mandatory conditions of an employment contract as provided in TLS Section 26(1), employment contracts have become much more thorough these days. On the one hand, this is due to the employers' better knowledge of labour legislation; on the other hand, the changed economic environment has motivated the employers' interest in establishing rules in those areas which are not regulated or are only superficially regulated by law (e.g. prohibition on competition and the confidentiality obligation of the employee, training of the employee, etc.).

(6) Sources of regulation other than statutory law and collective bargaining

As mentioned above ([110]), the content of employment relationships is mainly defined by the legislation in Estonia. The relations between an employee and employer are rarely regulated by collective agreements.

The most important document that sets out the individual rights and obligations of the parties to an employment relationship is the employment contract ([111]).

Besides the aforementioned legislation, contracts and agreements, the relations between an employee and employer are also governed by internal work procedure rules. Under TLS Section 40(1), for employers with at least five employees, internal procedures are regulated by internal work procedure rules. Internal work procedure rules must determine at least the following: the beginning and end of working time; time provided for rest and meals; time and place of payment of wages; the procedure for giving instructions pertaining to work; general instructions on occupational health and safety and on fire hazards (TLS Section 41(1)). Internal work procedure rules are prepared by the employer and approved by the Labour Inspectorate (Sections 42 and 43). TLS Section 47 provides that provisions of internal work procedure rules which are contrary to law, administrative legislation or a collective agreement are invalid.

In practice, the content of the relationship between an employee and employer is also regulated by the employer's unilateral decisions on the organisation of the company's or employee's work. According to TLS Section 16, terms established by unilateral decisions of employers which are less favourable to employees than those prescribed by law, administrative legislation, collective agreements or employment contracts are invalid.

Case law and practice have little impact on shaping employment relationships. Although the decisions of the Supreme Court as the court of highest instance are not binding on courts of lower instances, the latter still follow the Supreme Court's positions when making their decisions.

([110]) See paragraph 1(2).
([111]) See paragraph 1(5) for details.

2. From job security to employability

(1) Protection against dismissals

(a) General description

The TLS provides for employees' protection against dismissal by establishing detailed rules of conduct for the employer ([112]). The procedure for dismissal has been largely unchanged since the TLS's adoption in 1992. The main changes were the introduction of collective redundancy in 2003 and the abolition of dismissal due to age in 2006. Both these changes were necessitated by bringing the TLS into compliance with the requirements of European Union directives (98/59/EC ([113]) and 2000/78/EC ([114]), respectively).

TLS Section 86 provides the specific grounds on which an employer can dismiss an employee. These grounds are:

1) liquidation of the enterprise, agency or other organisation;
2) bankruptcy of the employer;
3) lay-off of employees;
4) unsuitability of an employee for his or her job or the work to be performed due to professional skills or for reasons of health;
5) unsatisfactory results of a probationary period;
6) long-term incapacity for work of an employee;
7) breach of duties by an employee;
8) loss of trust in an employee;
9) indecent act by an employee;
10) an act of corruption of an employee.

In cases 1–3, the employer terminates the employment contract for economic reasons, in cases 4–6 for reasons pertaining to the employee's capacities or personal attributes, and in cases 7–10 for reasons pertaining to the employee's conduct ([115]).

Where an employer dismisses a large number of employees for economic reasons so that it constitutes collective redundancy in accordance with TLS secion 89(1), the employer is required to follow the procedural rules for collective redundancy.

An employer is required to give prior notice of dismissal and pay compensation only upon dismissal for economic reasons and reasons arising from the employee's capacities or personal attributes, if this is provided by law.

An employer has to keep in mind that dismissal is prohibited during certain periods (an employee's incapacity for work, holiday, etc.). If an employer wishes to dismiss a pregnant woman, a person raising a child under three years of age, a minor, or an employees'

([112]) For details see Muda, M. Termination of Employment Relationships: Legal Situation in Estonia, 2006. Chapter 5. Dismissals in Estonia: Overview. Termination of Employment Relationships. Publications. Labour Law and Work Organisation. Employment, Social Affairs and Equal Opportunities. European Commission. Available at: http://ec.europa.eu/employment_social/labour_law/docs/report_estonia_en.pdf, 20.11.2006.

([113]) Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies — OJ L 225, 12.8.1998, p. 16–21.

([114]) Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation — OJ L 303, 2.12.2000, p. 16–22.

([115]) Muda, M. Termination of Employment Relationships: Legal Situation in Estonia (reference 33), p. 20.

representative, the employer has to consider that dismissal of such persons on certain bases is prohibited or is possible only with a labour inspector's consent.

The precise specification in law of the grounds of dismissal has not justified itself in practice. The law is so detailed that employers are often unable to choose the correct basis or to decide whether dismissal is possible in the given case at all. Therefore, the rules governing dismissal should be less formal ([116]).

(b) Dismissal for economic reasons

An employment contract is terminated due to the *liquidation of the enterprise, agency or other organisation* usually when the legal person is dissolved (liquidated). Upon dismissal due to the liquidation of the legal person, the employer must inform the employee at least two months in advance and pay compensation to the employee equivalent to twice the average monthly wage if the employee was employed for up to five years; three times the average monthly wages if the employee was employed for 5–10 years, and four times the average monthly wage if the employee was employed for more than 10 years (TLS Section 91(1) 1)).

According to TLS Section 97(2), when an employer *is declared bankrupt (*[117]*)*, the trustee in bankruptcy may terminate employment contracts with the employees after the bankruptcy order has been issued. According to Section 1(1) of the Bankruptcy Act ([118]), bankruptcy means the insolvency of a debtor declared by a court judgment. Depending on the creditors' interests, the trustee appointed by the bankruptcy order may continue the employment relationships with the employees or terminate the employment contracts due to bankruptcy. Upon dismissal due to bankruptcy, the trustee is not required to give prior notice to the employees. Employees are paid compensation for dismissal as follows: in the amount of two average monthly wages if the employee was employed for the employer for up to five years; three average monthly wages if the employee was employed for 5–10 years, and four average monthly wages if the employee was employed for more than 10 years (TLS Section 91(1) 1)). According to the Unemployment Insurance Act ([119]), a certain part of the compensation for dismissal due to the employer's bankruptcy is paid to the employees by the Unemployment Insurance Fund (Section 20) ([120]). As from 1 January 2007, the Unemployment Insurance Fund pays compensation to dismissed employees in an amount of up to two average gross monthly wages of the employee, but not more than one Estonian average gross monthly wage as published by the Statistical Office, insofar as the employer did not pay the compensation.

According to TLS Section 98(1), an employer may *lay off* an employee if the work volume decreases, the job is lost due to reorganisation of production or work, two employees are entitled to the same job, and in other cases that require the termination of work. When a need for lay-offs arises, the employer has to identify, based on the criteria for preferential right to remain at work as prescribed in TLS Section 99, which employees' employment contracts the employer can terminate. Once the employees to be laid off are identified, the employer has to offer them another job if possible (TLS Section 98(2)). If an employee refuses a job thus offered, the

([116]) Ibid.
([117]) This procedure for dismissal also applies in the event of abatement of the bankruptcy proceedings.
([118]) Bankruptcy Act. Adopted on 22 January 2003 — RT I 2003, 17, 95; 2006, 7, 42. (Available in English at: http://www.legaltext.ee/text/en/X70024.htm, 20.11.2006.)
([119]) Unemployment Insurance Act. Adopted on 13 June 2001 — RT I 2001, 59, 359; 2005, 57, 451 (Available in English at: http://www.legaltext.ee/text/en/X50053K4.htm 20.11.2006.)
([120]) Besides compensation for dismissal, the Unemployment Insurance Fund also compensates employees for any wages and holiday pay not received from the employer.

employer may dismiss the employee. Upon dismissal due to a lay-off, the employer must give the employee prior notice and pay compensation. If an employee has worked less than five years for the employer, the employer must give the employee two months prior notice of dismissal and pay compensation equal to twice the average monthly wage. If an employee has worked 5–10 years for the employer, the employer must give the employee three months prior notice of dismissal and pay compensation equal to three times the average monthly wage. If an employee has worked more than 10 years for the employer, the employer must give the employee four months prior notice of dismissal and pay a compensation equal to four times the average monthly wage (TLS Section 87(1) 3 and Section 90(1) 1). TLS Section 98(3) gives an employee the right to demand his or her re-employment, if the employer creates new jobs or has vacant positions within six months of the dismissal.

Lay-off is regulated in the greatest detail among the economic reasons for dismissal. Since the rules are exact, it is easy for employers to err against the requirements of law when dismissing an employee. When an employer cannot prove that a lay-off is due to a reason provided in the TLS or has not complied with the criteria for selection of employees upon the lay-off or has not offered an employee another job prior to dismissal, the lay-off is unlawful. This why employers often try to avoid lay-offs and terminate employment contracts by mutual agreement in a lay-off situation, while paying the employees compensation for termination which is equal to compensation for a lay-off. The rules governing lay-offs should be more flexible ([121]).

(c) Dismissal due to an employee's capacities or personal attributes

An employer may dismiss an employee due to *unsuitability*, if the employee, due to his or her abilities, skills, knowledge, etc. cannot perform his or her duties as required ([122]). According to TLS Section 101(1), the reason for dismissal on this ground may be: insufficient professional skills, insufficient language or communication skills, deterioration of the employee's health, lacking a document which is a precondition for such work, or failure of the employee to develop his or her professional knowledge if this is necessary for the performance of the work.

According to TLS Section 101(4), before dismissal, an employer has to offer an employee a job corresponding to the employee's skills and health; if another job is not available or the employee refuses the job, the employment contract may be terminated. Upon dismissal due to an employee's unsuitability, the employer must give at least one month's prior notice and pay compensation equal to one average monthly wage (TLS Section 87(1) 4 and Section 90(1) 2).

Pursuant to TLS Section 33, an employment contract may prescribe a probationary period in order to confirm that the employee has the necessary health, abilities, suitable social skills and professional skills to perform the work agreed on in the employment contract; the probationary period may last up to four months. The employer assesses the results of the probationary period and may dismiss the employee if the results of the probationary period are unsatisfactory. Upon dismissal due to *the unsatisfactory results of a probationary period*, the employer is not required to give prior notice or pay compensation to the employee.

TLS Section 107(1) provides that an employer may dismiss an employee if the employee has been absent from work due to incapacity for work for more than four consecutive months ([123]) or

([121]) Muda, M. Termination of Employment Relationships: Legal Situation in Estonia (reference 33), p. 31.
([122]) Ibid, p. 27.
([123]) More than eight consecutive months in the case of tuberculosis.

more than five months during a calendar year [124]. An employer may dismiss an employee due to *long-term incapacity for work* only during the incapacity for work. Under TLS Section 87(1) 5, an employer must give an employee at least two weeks' prior notice of dismissal due to long-term incapacity for work. Compensation is not mandatory.

(d) Dismissal due to an employee's conduct

Breach of duties is understood as an employee's failure to perform his or her duties or to perform them as required. According to TLS Section 103, an employer may dismiss an employee due to breach of duties if the employee's conduct impeded the work and the employee is subject to a disciplinary punishment which has not expired [125], or if the employee was in severe breach of duties. In reality, the latter is the most frequent cause among the above. A severe breach of duties means a fundamental breach of contract; the breach must result in severe consequences or a threat of severe consequences (e.g. being intoxicated at work, being absent from work without good reason).

Pursuant to TLS Section 104(2), an employee may be dismissed due to *loss of trust* if the employee has:

1) caused a deficit in, damage to, or destruction, loss or theft of the property of the employer;
2) stolen the property of a co-worker at the workplace;
3) endangered the preservation of the property of the employer;
4) caused distrust of the employer by consumers, clients or business partners.

In all these cases, the dismissal must be related to causing damage or a threat of damage to the employer.

Since under TLS Section 48(1) 3), employees must refrain from activities which endanger the property of the employer, loss of trust essentially implies a breach of duties by the employee. If in the event of a breach of any other duties, an employer can terminate an employment contract due to the breach, then in the event of a breach of the obligation to avoid causing damage, the contract has to be terminated due to loss of trust. The distinction is formal and has not justified itself in practice, especially because if an employee is in breach of his or her duties and the employer dismisses him or her due to loss of trust, but cannot prove to the labour dispute resolution body the damage or threat of damage caused by the employee, the dismissal is unlawful. It is not reasonable to list the grounds for dismissal pertaining to employees' conduct in such a high degree of detail in the law [126].

An employer may dismiss teachers, instructors of minors or others whose duties are to teach or educate youth, and support staff of local government administrative agencies, on grounds of *an indecent act*. Acts which are contrary to generally recognised moral standards or which discredit an employee or employer are considered to be indecent (TLS Section 105). In practice, employment contracts are only rarely terminated due to indecent acts; usually such dismissals concern teachers who have hit a child, been drunk in a public place, etc.

(124) More than eight months during a calendar year in the case of tuberculosis.
(125) A disciplinary punishment expires after one year of imposition of the punishment (TDVS Section 13).
(126) Muda, M. Termination of Employment Relationships: Legal Situation in Estonia (reference 33), p. 23.

Pursuant to Section 5(1) of the Anti-corruption Act ([127]), an *act of corruption* is the use of official position for self-serving purposes by an official who makes undue or unlawful decisions or performs such acts, or fails to make lawful decisions or perform such acts. Since according to Section 4 of the Anti-corruption Act, an official usually means a public servant who is not employed under an employment contract, there is no practical need for this basis for dismissal. An act of corruption is essentially equal to breach of duties.

Upon dismissal for reasons arising from an employee's conduct, an employer is not required to give prior notice or pay compensation to the employee. However, an employer is required to follow the procedure for dismissal as the procedure for imposition of a disciplinary punishment which is provided by the TDVS. Before dismissal, an employer has to establish the employee's fault, follow the deadlines for imposition of a disciplinary punishment as prescribed in the TDVS, formulate the disciplinary punishment in writing, etc. Since the procedure for disciplinary punishment is regulated in very great detail, employers often violate the rules of the TDVS. Such rigid regulation has not justified itself in practice and the procedure for disciplinary punishment of employees should be simplified ([128]).

(2) Promotion of employability

The employability of persons can be promoted via labour legislation if the established rules are flexible and allow the parties to an employment contract to adapt to the requirements of the labour market. In addition to how the entry into employment contracts ([129]) and an employee's protection in the event of dismissal ([130]) are regulated, the degree of ease with which a party to an employment contract can unilaterally amend the conditions of the contract is another indicator of the flexibility of employment relationships. After the TLS was adopted, these rules have been supplemented only by an employee's possibility to request a change in the standard of working time ([131]). As required by directive 97/81/EC ([132]), TLS Section 63(1) obliges an employer to consider, whenever possible, the request of a full-time employee to work part-time, or the request of a part-time employee to work full-time or to increase the number of the employee's working hours. An employer must consider an employee's request to change the agreed standard of working time only if the employer can give the employee a different standard of working time. It is the employer who assesses such a possibility. If an employee finds that an employer has unjustly disregarded his or her request to change the standard of working time, the employee may refer to a labour dispute resolution body to settle the dispute.

([127]) Anti-corruption Act. Adopted on 27 January 1999 — RT I 1999, 16, 276; 2004, 71, 504. (Available in English at: http://www.legaltext.ee/text/en/X30032K5.htm, 20.11.2006.)

([128]) Muda, M. Termination of Employment Relationships: Legal Situation in Estonia (reference 33), p. 24.

([129]) See paragraph 3(1)(a) about entry into fixed-term employment contracts.

([130]) See paragraph 2(1) for details.

([131]) Besides changing the standard of working time, an employee may request permanent or temporary transfer to another job. An employee may request permanent transfer to another job if, by decision of a doctor, continuation in the former job is not advisable for reasons of health (TLS Section 61). According to TLS Sections 62 and 63, an employee has the right to request from the employer temporary easement of working conditions or temporary transfer to another job due to illness and during pregnancy. An employee may request a transfer if the employer can offer a job that the employee's health allows him/her to perform.

([132]) Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC — Annex: Framework agreement on part-time work — OJ L 4, 20.1.1998, p. 9–14.

The employer's possibilities of unilaterally amending the conditions of employment contracts have remained the same since the adoption of the TLS. An employer may transfer an employee temporarily to another job in the events of production emergencies ([133]) and work stoppages ([134]). Pursuant to TLS Section 64(1), employers have the right to amend the bases for remuneration of employees and work regimes upon major reorganisation of production or work (e.g. the introduction of a new technology) if they notify the employees thereof in writing at least one month in advance. TLS Section 68 provides that upon a temporary decrease in work volume or orders, an employer has the right, with the consent of a labour inspector and the employee, to establish part-time working time for an employee or to send the employee on a holiday with partial pay for up to three months per year. An employer is required to give an employee at least two weeks' advance notice in writing of the application of part-time working time or sending him or her on a holiday with partial pay. The duration of part-time working time must not be less than 60 % of the standard working time prescribed in the employment contract, and the holiday pay payable during holidays with partial pay must not be less than 60 % of the minimum wage. If an employee does not agree to amending the employment contract pursuant to the procedure provided in TLS Sections 64 or 68, the employee may resign and the employer must pay the employee compensation equivalent to twice the average monthly wage.

It follows that the employer's possibilities of unilaterally amending employment contracts are relatively limited. Transferring an employee to another job due to extraordinary circumstances is simpler. In other cases, an employee may object to the amendments and resign. In the event of an employer's amendment of an employment contract, it should also be kept in mind that collective agreements cannot contain arrangements for additional possibilities for amending employment contracts, if these are less favourable for an employee than provided by the TLS.

One of the main methods of increasing employability is providing people with conditions for retraining and lifelong learning ([135]). Also, in addition to labour law measures, employability could be promoted via social care regulation. It should be mentioned that a new Employment Services and Employment Subsidies Act was adopted in Estonia in 2005 (entered into force in 2006; hereinafter TTTS) ([136]), which provides for various active employment measures for increasing employment. The act provides for 13 employment services, including: employment mediation, employment training, career counselling, practical training, public work, work exercise, wages aid for employers, setting-up aid, etc. (TTTS Section 9(1)).

(3) Training and lifelong learning

The Adult Education Act was passed in Estonia in 1993 (hereinafter TäKS) ([137]), which provides the bases for adult education and training and the legal guarantees for adults to be able to access the learning they desire during their lifetime (Section 1). This act has been amended several

([133]) A production emergency is the need, arising from extraordinary circumstances, to temporarily transfer an employee to another position (TLS Section 65(1)).
([134]) According to TLS Section 66(1), work stoppage is the stopping of work due to a lack of necessary organisational or technical conditions, *force majeure* or other circumstances.
([135]) See paragraph 2(3) for details.
([136]) Employment Services and Employment Subsidies Act. Adopted on 28 September 2005 — RT I 2005, 54, 430; 2006, 26, 191.
([137]) Adult Education Act. Adopted on 10 November 1993 — RT I 1993, 74, 1054; 2004, 41, 276 (Available in English at: http://www.legaltext.ee/text/en/X70035K1.htm, 20.11.2006.)

times over the years; the elaborations have concerned the general principles of adult education, securing learning possibilities, as well as organisation and financing of training.

TäKS determines who may carry out training, and under what conditions. Adult education is coordinated by the Ministry of Education and Research; it is financed from various sources (state, local government, natural or legal person).

According to TäKS Section 3, adult education takes three forms:

1) formal education acquired within the adult education system — provides the opportunity to acquire basic education and general secondary education in the form of evening courses, distance learning or as an external student, to acquire secondary vocational education on the basis of basic education in the form of evening courses or distance learning, to acquire secondary vocational education on the basis of secondary education in part-time study or as an external student and to acquire higher education in part-time study or as an external student;
2) professional education and training — provides the opportunity to acquire and develop professional, occupational and/or vocational knowledge, skills and experience and the opportunity for retraining at the place of employment or at an educational institution;
3) informal education — provides the opportunity to develop personality, creativity, talents, initiative and a sense of social responsibility and to accumulate the knowledge, skills and abilities needed in life.

According to a labour force survey conducted in 2005, an estimated 168 800 working-age people are acquiring formal education within the adult education system; 22 % of them are working. 2.1 % of the working-age population, i.e. 21 700 persons had participated in courses within the four weeks preceding the survey in 2005. Most of these courses were professional — 56 % of all participants in courses were developing themselves professionally. 23 % of participants in courses attended hobby courses ([138]).

An employee is granted a study leave at the employee's request in order to participate in education and training. An employer may postpone the grant of study leave if more than 10 % of the employees are on study leave at the same time (TäKS Section 9).

According to TäKS Section 8, in order to participate in formal education within the adult education system, study leave is granted on the basis of a notice from the relevant educational institution for the duration of the study session for at least 30 calendar days in an academic year. Of these 30 days, the employer has to continue paying the average wages of the employee for 10 days. For the remaining days of study leave, the employer pays the employee at least the minimum wage. In the case of formal education acquired within the adult education system, additional study leave must be granted for the completion of study:

- 28 calendar days in the case of basic education;
- 35 calendar days in the case of secondary education;
- 42 calendar days in the case of higher education or the defence of a Bachelor's level degree;
- 49 calendar days in the case of the defence of a Master's or Doctoral thesis.

([138]) These statistics cover other forms of engagement besides working under employment contracts. For details see: Labour Market 2005, edited by Raul Eamets. Statistics Estonia, 2006, p. 10–11.

If the leave intended for formal education acquired within the adult education system is not enough, an employee may request additional holiday without pay of at least seven calendar days. In order to participate in professional education and training, study leave of at least 14 calendar days in a year must be granted on the basis of a notice from the relevant educational institution, and the employee continues to receive his or her average wages. In order to participate in informal education, study leave without pay of at least seven calendar days in a year is granted on the basis of a notice from the relevant educational institution.

Retraining and lifelong learning are further supported by the employer's obligation under the PuhkS to grant an employee a leave for entrance examinations. According to PuhkS Section 34(1), an employer is required to grant a holiday without pay at an employee's request for taking the entrance examinations of a vocational educational institution, institution of applied higher education or a university.

An employee's possibilities of retraining are also promoted by the rule set forth in TLS Section 49(5) 1, according to which an employer must organise, and cover the cost of, vocational training if the employer changes the requirements for professional skills (including proficiency in the official language and foreign languages) necessary for performance of the work. This rule was established in 2000 in order to prevent dismissal due to an employee's unsuitability, where the employer changes the requirements for professional skills so that an employee can no longer perform his or her job due to the changed requirements. For example, if an Estonian employer makes contacts with a Finnish company, the employer cannot require an employee to immediately speak Finnish when communicating with the new partner. The employer must enable the employee to participate in e.g. Finnish language courses and cover the expenses of such participation.

Before dismissal due to lay-off and the unsuitability of an employee ([139]), an employer is required, if possible, to offer the employee a job which the employee can perform. An employer need not train an employee under the TLS if the other job offered implies the employee's retraining. This would be a good opportunity to facilitate an employee's retraining and maintaining his or her job, especially if such training is not unreasonably complicated or expensive for the employer.

Various action programmes for retraining and lifelong learning have been prepared on the national level; the Lifelong Learning Strategy 2005–2008, which was approved by the Government of the Republic of 3 November 2005 with the aim of increasing the possibilities and readiness of the Estonian people to learn ([140]), will certainly make a contribution in the future.

(4) Young people at work: bridging the gap between school and labour market

The unemployment rate among young people (aged 15–24) is twice as high as the average in Estonia. The unemployment rate of young people declined sharply from 21.7 % in 2004 to 15.9 % in 2005 along with an overall drop in unemployment in 2005. The unemployment rate of young people had not been so low since 1998. It is not only drop-outs and unskilled young people who face unemployment problems, but also those who have studied a profession and are looking for the first job ([141]).

([139]) See paragraphs 2(1)(b) and 2(1)(c) for details.
([140]) Lifelong Learning Strategy 2005–2008(in Estonian). Available at: http://www.hm.ee/index.php?popup=download&id=3810, 20.11.2006.
([141]) Labour Market and Labour Life 2005 (reference 7), p. 12–13.

Labour law measures can be used to increase the employment rate of young people who have just finished school by giving employers incentives for hiring young people. While various labour laws prescribe restrictions on the work of minors, i.e. young people aged 13–17, no such restrictions apply in the case of the employment of young people aged 18–24 (who have completed studies at an educational institution). Neither do employers enjoy any fiscal or other incentives for employing young people. Attempts have been made to increase the employment rate of young people by various national projects for the development of special employment services.

(5) Active ageing

The employment rate of older persons (aged 55–64) was 56.1 % in Estonia in 2005. The number of inactive people ([142]) among the elderly age group has sharply decreased over the past nine years, by a total of 29 %. Most of the elderly inactive have retired or are absent from the labour market due to illness ([143]).

The employment rate of elderly people, including the pension-aged could be increased by giving the employers incentives for hiring these people. Currently there is no special regulation on the engagement of elderly people under the labour or other legislation.

The employment of elderly people will certainly be facilitated by the amendment to the TLS that entered into force on 4 March 2006 and revoked the provision that allowed an employment contract to be terminated due to an employee's age. Under that provision, an employer had the right to dismiss an employee entitled to old-age pension from the state when the employee reached the age of 65. This ground for dismissal was omitted from the TLS in order to prevent discrimination of employees on the basis of age. Since after the entry into force of the amendment, an employee who reaches the age of 65 can be dismissed on the same grounds and pursuant to the same procedure as other employees, the elderly have more confidence and greater opportunities for active participation in the labour market.

Attempts have also been made to increase the employment of elderly people by various national projects for the development of special employment services.

(6) Categories of workers at risk of social exclusion

Besides young people as mentioned above ([144]), disabled persons are one of the major groups at risk of social exclusion. The employment rate of disabled persons was 26 % in 2002 ([145]). The labour legislation does not provide for any exceptions for the employment of disabled persons. However, the TTTS provides for special employment services for disabled persons as of the year 2006: adaptation of working premises and work equipment, technical aids free of charge, assistance in job interviews, and work with a support person (Sections 20–23). Attempts have also been made to increase the employment of disabled persons via relevant national projects.

Persons raising a child younger than three may also constitute a risk group with respect to social exclusion. Various labour laws provide for sizable guarantees for these employees. For example, according to TLS Section 92(1), an employer must not dismiss a person raising a child under three years of age due to lay-off, unsuitability of the employee, or long-term incapacity for

([142]) People who do not work and are not looking for a job are considered to be inactive.
([143]) Labour Market and Labour Life 2005 (reference 7), p. 4, 16–17.
([144]) See paragraph 2(4).
([145]) Action Plan for Growth and Jobs, 2005–2007. For Implementation of the Lisbon Strategy. Republic of Estonia. Tallinn, 2005, p. 48. Available at: http://www.riigikantselei.ee/failid/1.October_2005_Estonian_Action_Plan_for_Growth_and_Jobs.pdf, 20.11.2006.

work; dismissal on any other grounds ([146]) is subject to a labour inspector's consent. The rights of persons raising a child under the age of three in connection with parental leave are rather burdensome for employers. Pursuant to PuhkS Section 29, parental leave may be used in one part or in parts at any time until the child reaches three years of age. Thus, a person raising a child under three years of age is completely free to decide when to use parental leave and when to work. On one hand, persons raising a child younger than three years of age enjoy great guarantees that facilitate the combining of work and family life. On the other hand, giving certain groups of employees very large guarantees can result in employers' reluctance to employ anybody who raises a child under three years of age. However, no statistics are available and no actions have been brought to the courts in this connection.

3. Labour law and adaptability

(1) New forms of employment relations

(a) Fixed-term contracts

Most employees ([147]) in Estonia have entered into employment contracts for an unspecified term. In 2005, the employment contracts of 88.9 % of employees were made for an unspecified term and 11.1 % were for a fixed term ([148]).

According to TLS Section 27(2), an employment contract may be entered into for a fixed term:

1) for completion of a specific task (e.g. summer repairs of a schoolhouse);
2) for replacement of an employee who is temporarily absent (e.g. on parental leave or studying abroad);
3) for a temporary increase in work volume (e.g. a greater volume of orders);
4) for performance of seasonal work (seasonal work is work that cannot be performed all year round, e.g. certain works in the agricultural, forestry, tourism sectors);
5) if the employment contract prescribes special benefits (e.g. training at the employer's expense);
6) in other cases prescribed by law or by regulations (according to various legislation, fixed-term employment contracts may be concluded e.g. with the creative workers of performing arts institutions, school principals, lecturers, etc.).

The above list is exhaustive and fixed-term contracts cannot be concluded for any other reasons. Where a fixed-term contract is made on a basis other than those specified in the TLS, an employee may dispute the fixed term of the contract. In such case, TLS Section 15 applies, under which any conditions of an employment contract that are unfavourable to an employee are invalid.

The maximum length of a fixed-term employment contract is five years (TLS Section 27(2)) regardless of the basis for conclusion of the contract.

In connection with the transposition of the rules of Directive 1999/70/EC ([149]) to Estonian law, the provisions governing fixed-term employment contracts were supplemented in 2004. In

([146]) See paragraph 2(1)(a) for details.
([147]) These statistics cover other forms of engagement besides working under employment contracts.
([148]) Labour Market 2005 (reference 59), p. 15.

line with the directive, TLS Section 27(4) sets out the principle that if a fixed-term employment contract for completion of a specific task or for a temporary increase in work volume is entered into for the performance of the same work for more than two consecutive terms, each following employment contract entered into for a fixed term for the performance of the same work is deemed to be an employment contract entered into for an unspecified term. Entry into an employment contract is deemed to be for a consecutive term if the period between the termination of one employment contract and the entry into a new employment contract does not exceed two months.

In addition to the above, TLS Section 13[2] sets out the rule arising from Directive 1999/70/EC, according to which fixed-term workers must not be treated in a less favourable manner than permanent workers unless different treatment is justified on objective grounds arising from the law or collective agreement. An employer must also inform the representatives of the employees and fixed-term workers of vacant permanent jobs, considering the qualification and skills of the worker.

A fixed-term contract terminates upon expiry of the term. According to TLS Section 77, an employer must give an employee at least 2 weeks' notice of the expiry of a fixed-term contract if the contract was made for more than one year, and at least five days' notice if the contract was made for up to one year. An employee must give at least five days' prior notice. The law obliges the parties to an employment contract to give prior notice because a fixed-term contract may be made for up to five years, and if the parties wish to extend the employment relationship, the contract is not terminated. If neither party requests termination of an employment contract or if a new employment contract is not entered into and the employment relationship continues after expiry of the term of the contract, then the fixed-term employment contract becomes an employment contract entered into for an unspecified term (TLS Section 78). A fixed-term employment contract may also be terminated before the term on any of the other grounds provided by law.

It may be said following from the above that fixed-term work is quite thoroughly regulated in Estonia. The TLS provides for specific cases in which a fixed-term employment contract may be concluded. The rules governing this issue should be somewhat more flexible — the TLS list of grounds for conclusion of fixed-term employment contracts should be extended or the parties should be given the possibility of agreeing on further grounds in a collective agreement.

(b) Part-time work

According to TPS Section 6, part-time working time is working time determined by an employer which is shorter than the established standard for working time and which is applied by agreement between an employee and the employer.
Part-time work is not very common in Estonia. Most employees work full time, only 7.2 % work part time. The main reason behind this is the low wages — part-time work does not give sufficient income to live on ([150]).

The TPS and other labour legislation do not provide for any restrictions on part-time workers. Even if a part-time worker works only 10 hours a week, he or she is still entitled to at least 28 calendar days of holiday and has all the rights of a full-time worker. This is in line with

([149]) Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — OJ L 75, 10.7.1999, p. 43–48.
([150]) Labour Market 2005 (reference 59), p. 14 and p. 16.

the rule contained in TLS Section 13[1](1), which arises from Directive 97/81/EC, according to which part-time workers must not be treated in a less favourable manner than full-time workers unless different treatment is justified on objective grounds arising from the law or collective agreement.

Due to the need to harmonise the Estonian labour law with Directive 97/81/EC, another principle was added to the TLS in 2004, according to which an employer must inform the representatives of the employees and a full-time worker of the opportunity for part-time work and a part-time worker of the opportunity for full-time work, considering the qualification and skills of the worker (Section 13[1](2)).

Under TLS Section 68, an employer may apply part-time working time to an employee upon a temporary decrease in work volume or orders. This requires the consent of a labour inspector and the employee. An employer may apply part-time work for up to three months during a calendar year; the duration of working time during this period must not be less than 60 % of the standard working time prescribed in the employment contract.

(c) Temporary agency work

The first temporary work agencies were founded in Estonia in 2002 ([151]). Although according to statistics, only 0.1 % of employees have a contract with a temporary work agency ([152]), an increasing number of new companies employ workers for the purpose of assigning them to third parties for a fixed term. There are currently about 12 temporary work agencies in Estonia ([153]).

The Estonian legislation does not contain special rules on agency work, neither have there been any related disputes. At the same time, temporary work agencies often face difficulties trying to arrange the activities of temporary workers mediated in the framework of the applicable labour legislation. Since temporary agency work is not regulated, the employment relationship issues of such mediated or temporarily assigned workers are determined in an employment contract between the agency and the worker and an authorisation agreement between the agency and a third party (the user enterprise). Since the number of temporary agency workers on the Estonian labour market will probably increase, special regulation of tripartite employment relationships is required in order to give sufficient protection to, and to facilitate the use of, temporarily assigned workers. It is also important to launch supervision over the activities of temporary work agencies.

(d) On-call work

TPS Section 10 makes it possible for employers to require employees to be available during rest time, i.e. the employee has rest from work, but must be available to the employer for the performance of extraordinary duties (subSection 1) ([154]). On-call time may be established if due to the nature of work, it may be necessary to engage the employee to perform unexpected and urgent tasks (e.g. medical workers, rescue workers, etc.).

([151]) Temporary agency work in an enlarged European Union. European Foundation for the Improvement of Living and Working Conditions. Luxembourg: Office for Official Publications of the European Communities, 2006, p. 11. Available at: http://www.eurofound.eu.int/publications/files/EF05139EN.pdf, 20.11.2006.

([152]) Working Life Barometer 2005 (reference 8), p. 14.

([153]) Temporary agency work in an enlarged European Union (reference 72), p. 11.

([154]) Where e.g. a medical worker is on-call at the workplace, this is considered to be working time and TPS Section 10 does not apply.

On-call time is established in addition to the duration of the general working time. The duration of on-call time must not exceed 30 hours a month (TPS Section 10(2) and (3)). On-call hours are not included in working time if the employee is not called to work. If the employee is called to work, the hours worked are counted as working time.

Since on-call time is highly inconvenient for rest (a worker cannot travel far from home, must be ready to immediately attend work when called, etc.), this time is compensated by additional remuneration. The amount of additional remuneration is determined by a collective agreement or employment contract. If additional remuneration is paid per hour of on-call time and the worker is called to work and performs duties, the on-call time is reduced by the respective number of hours (e.g. a worker works 10 hours out of 30 on-call hours) and the additional remuneration is also reduced. The hours worked are treated as overtime, since on-call time is additional to the general working time.

Although the applicable TPS entered into force in 2002, the earlier TPS, which was adopted in 1993, also contained similar rules on on-call time.

(e) Economically dependent workers

Estonian legislation is not familiar with the concept of economically dependent workers and no such category exists in practice. However, it is possible to work under various civil law contracts in addition to an employment contract. According to Part 8 of the Law of Obligations Act (hereinafter VÕS) ([155]), services may be provided to other persons under various contracts: authorisation agreement, contract for services, brokerage contract, agency contract, contract of commission, etc., which are more or less similar to employment contracts.

Of the agreements and contracts governed by the VÕS, authorisation agreements and contracts for services have the most in common with employment contracts. Pursuant to VÕS Section 619, by an authorisation agreement, one person (the mandatary) undertakes to provide services to another person (the mandator) pursuant to an agreement (to perform the mandate) and the mandator undertakes to pay remuneration to the mandatary therefor if so agreed. VÕS Section 635(1) provides that by a contract for services, one person (the contractor) undertakes to manufacture or modify a thing or to achieve any other agreed result by providing a service (work), and the other person (the customer) undertakes to pay remuneration therefor.

In practice, employers often conclude authorisation agreements or contracts for services with the employees in order to avoid the entry into employment contracts and giving the employees the guarantees provided by labour legislation. Usually a worker works under an authorisation agreement or contract for services for some time, after which the employer terminates the contract in the manner prescribed in the VÕS without giving the worker the protection provided by the TLS. In such cases, workers often find that although they worked under an authorisation agreement or contract for services, it was essentially an employment contract and should have been terminated in accordance with the TLS. Workers refer to the courts and request that the authorisation agreement or contract for services be recognised as an employment contract. In such disputes, the law places the burden of proof on the employer — TLS Section 8 provides that in the case of a dispute over the nature of a contract, the parties are deemed to have entered into an employment contract unless the alleged employer proves otherwise or unless it is evident that the parties entered into a different kind of contract.

([155]) Law of Obligations Act. Adopted on 26 September 2001 — RT I 2001, 81, 487; 2005, 61, 473. (Available in English at: http://www.legaltext.ee/text/en/X30085K2.htm, 20.11.2006.)

Based on the characteristic features of different contracts, the Estonian legal theory has developed several criteria for identifying the nature of a given contract. One of the most important points of departure when distinguishing between contracts is to analyse the extent to which a worker depends on the employer. This position is supported by the Supreme Court who finds that in order to decide on the existence of an employment relationship (under labour law), the dependence between the worker and the employer should be considered first of all, i.e. the extent to which the worker is subordinated to the employer in the given disputed relationship, or the extent of the worker's independence. It is the greater dependence of the worker upon the employer that distinguishes an employment contract from other contracts in civil law ([156]).

(f) Subcontracting/outsourcing

In addition to temporary agency work ([157]), there is no special practice on subcontracting/outsourcing of employees.

(g) Pools of workers ('multisalariat')

There is neither special regulation nor practice on pools of workers ('multisalariat').

(h) Telework

Teleworkers account for 5.4 % of all workers in Estonia. However, the demand for flexible jobs is greater than the supply — 7 % of workers would be interested in teleworking, but they cannot telework in their jobs for their current employers ([158]).

The Estonian labour legislation does not contain special provisions on teleworkers, but does not prevent the parties to an employment contract from agreeing on teleworking arrangements.

Improving employers' awareness of the possibilities of teleworking, as well as tax incentives for employers for compensating to the employee the costs of teleworking, would contribute to a broader use of teleworking.

(i) Company networks

There are no labour law provisions regulating company networks. Where an employee works e.g. in a subsidiary belonging to a corporation, the labour law provisions applicable to him or her are the same as those applicable to the employees of companies not belonging to the corporation.

(2) Working time

(a) Working hours

Although the applicable TPS was adopted in 2001 and entered into force in 2002, the working and rest time rules contained in it are largely the same as the provisions of the former TPS adopted in 1993. The major changes in the regulation of working and rest time are related to the transposition of Directives 2003/88/EC ([159]) and 94/33/EC ([160]) to the Estonian law.

([156]) Supreme Court civil matters No 3–2-1–3-05 (RT III 2005, 25, 253) and No 3–2-1–9-05 (RT III 2005, 25, 254).
([157]) See paragraph 3(1)(c).
([158]) Labour Market 2005 (reference 59), p. 14–15.
([159]) Directive 2003/88/EC concerning certain aspects of the organisation of working time — OJ L 299, 18.11.2003, p. 9–19. The TPS was,

According to TPS Section 4(1), the general national standard for working time of employees is eight hours per day or 40 hours per week ([161]). Upon the recording of total working time ([162]), the recording of working time shall be based on the general national standard for working time (TPS Section 4(2)). The parties must not agree on a greater number of working hours than the standard prescribed by the TPS. However, it is possible to agree on a smaller number of working hours. For example, a collective agreement may establish a general working time standard of 35 hours a week, but such agreements are not common.

The general national standard for working time is applied also to workers who work under several employment contracts. Working under several employment contracts simultaneously to earn more is quite common in Estonia ([163]). Compliance with the national standard for working time is very difficult to check when a person works for several employers, since there is no mechanism of identifying whether or not a full-time worker has a contract with another employer. An employer is not required to identify whether a person the employer is hiring is already working in another job. Working time is thus recorded for each employer separately and compliance with the mandatory standard for working time cannot be guaranteed.

Overtime work exceeding the general standard for working time may be performed if the parties to the employment contract have agreed on it. Following from Directive 2003/88/EC, TPS Section 9(1) contains a rule according to which working time together with overtime must not exceed an average of 48 hours per week during a four-month recording period. This provision changed the maximum weekly working time compared to the earlier regulation. The old version the TPS allowed employees to work overtime for four hours per day and established 12 hours as the maximum duration of a shift. Consequently, it was possible that the maximum working time per week ran well over 48 hours (5 ([164])x12=60 hours per week) ([165]).

As the actual need to work more in order to increase income had not ceased when restrictions were imposed on the working time of an employee, TPS Section 9(4) gives a possibility to work overtime with the employee's consent to the extent of 200 additional hours per year. As there are approximately 47 working weeks in a year, the maximum rate of overtime is 576 hours per year in Estonia (47x8+200=576) ([166]). The state's allowing such a great number of overtime hours raises doubts whether the overtime rules ensure sufficient protection of the worker's health. However, large numbers of overtime hours are not common practice. The average working week was 41 hours in Estonia in 2005. 5 % of employees performed overtime work every day, 13 % every week, 12 % once or twice a month, and 20 % less frequently. On average, workers work 8.2 hours overtime a week ([167]).

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however, drafted on the basis of Directive 93/104/EEC which regulated the organisation of working time in the EU before 2004.

([160]) Directive 94/33/EC on the protection of young people at work — OJ L 216, 20.8.1994, p. 12–20. For more details about the changes in the regulation of working time of minors, see: Muda, M. Trends in Regulating Working and Rest Time in Estonia. Proceeding From the European Union Law. — Juridica International. Law Review. University of Tartu, V, 2000, p 146–147.

([161]) TPS Section 5 provides for reduced working time, i.e. working time shorter than the general national standard, for certain workers. Reduced working time has been established for minors; workers who perform underground work, work that poses a health hazard or work of a special nature; teachers and educators working in schools and other childcare institutions, etc. The reduced working time is the full working time standard of these workers.

([162]) In the case where standard for working time is used during a period longer than a working day, recording of total working time shall be applied.

([163]) 10 % of people have a second job, on which they spend an average of 16.8 hours a week (these statistics cover other forms of work besides work under employment contracts). Working Life Barometer 2005 (reference 8), p. 69.

([164]) In the case of a five-day working week.

([165]) Muda, M. Impact of the European Community Labour Law on Estonian Labour Legislation. Labour Law in United Europe. 2003 m. spalio 16–18 d. Tarptautinës mokslinës konferencijos medþiaga. Vilnius, 2004, p. 97.

([166]) Ibid, p. 98.

([167]) Working Life Barometer 2005(reference 8), p. 69–72.

Following from the requirement of Directive 2003/88/EC that the weekly working time including overtime must not exceed 48 hours, the possibility of having a second job ([168]) was abolished in Estonia. The old version of the TPS established that the working time of a person with a second job should not exceed 20 hours per week at the second job; if a person with a second job worked part-time at his or her principal job, the total working time in the principal job and the second job together should not exceed 60 hours per week. The conflict with the directive here was obvious; working for more than 48 hours per week was absolutely legal. As a person usually held a second job at the same undertaking, where the employee also had his or her principal job, one of the aims of establishing this regulation was the precise calculation and limiting of the working time of an employee. Working in a second job had also been caused by the need to increase an employee's income ([169]).

People holding a second job were also part-time workers. They did not have several guarantees (people holding a second job were laid off in the first order, they lacked guarantees upon termination of the employment contract, etc.) which had been ensured to people working in principal jobs. Thus, the law established unequal treatment of part-time workers and full-time workers and this was not in accordance with the requirements of Directive 97/81/EC ([170]).

Based on Article 17(1) of Directive 2003/88/EC, amendments were made to the scope of the TPS. The provisions of TPS Section 1(3) 1 are relevant to making employment relationships more flexible; accordingly, certain provisions of the TPS (concerning overtime, working during evening or night time, breaks for rest and meals, weekly rest period, etc.) need not be applied to employees who have independent decision-making powers and determine their working time themselves pursuant to their employment contracts, and their working time is not directly or indirectly determined by unilateral decision of the employers or agreement between the parties ([171]).

Employees who have independent decision-making powers are the persons the nature of whose work allows them to decide on the independent performance of their work, which is why it is not reasonable to restrict them by the organisation of working time as specified in the internal work procedure rules of the employer. These are usually managers, creative workers, researchers, teachers, etc. It is also unthinkable to fully apply the TPS to persons who are allowed under their employment contracts to perform their work at home or at another place outside the employer's premises.

It is important to stress that the employees with independent decision-making powers must perform their duties, and if these require presence at the workplace at a certain time (organising the work of subordinates, attending meetings, receiving customers, etc.), such employees must certainly comply with the designated time for the performance of their duties.

(b) Working time arrangements and access to career breaks

In order to make career breaks possible, it is important how flexibly the organisation of working time enables employees to combine their work and family life. The Estonian working and rest

([168]) This means a second job under another employment contract for the same or other employer outside the working hours of the principal job.

([169]) Muda, M. Trends in Regulating Working and Rest Time in Estonia. Proceeding From the European Union Law — Juridica International. Law Review. University of Tartu, V, 2000, p. 148.

([170]) Muda, M. Impact of the European Community Labour Law on Estonian Labour Legislation (reference 86), p. 98.

([171]) The wording of the last part of the provision, 'and their working time is not directly or indirectly determined by unilateral decision of the employers or agreement between the parties', cannot be considered successful. Where an employer cannot interfere with an employee's organisation of work in any way, it is clearly not an employment contract relationship.

time regulation has not been changed much in this respect in recent years and both the TPS and PuhkS give various guarantees to employees who have family duties.

According to the TPS, pregnant women and, in the case of a relevant decision of a doctor, other employees are not allowed to work overtime or to work at night and during the weekly rest period. A person raising a child under 12 years of age or a disabled child or a person taking care of a person with total incapacity for work may be required in the case of *force majeure* to work overtime and during the weekly rest period, as well as at night, only with the person's consent (Section 8, Section 11(3) and (4), Section 22(3) and (4)).

As a major change facilitating the combining of work and family life, a provision arising from Article 9 of Directive 92/85/EEC ([172]) was added to the applicable version of the TPS, according to which an employer is required to grant a pregnant woman free time for ante-natal examination on the time indicated in a decision of a doctor, and such time is included in working time (Section 17).

In addition to the above, TPS Section 18 obliges an employer to grant an employee raising a child under 1.5 years of age additional breaks for feeding the child in addition to the general breaks for rest and meals. The additional break is granted at least every three hours with a duration of not less than 30 minutes every time. The duration of a break granted for feeding two or more children of up to 1.5 years of age is at least one hour. If an employee so requests, the breaks prescribed for feeding a child are added to the breaks for rest and meals, or the working day is reduced by the corresponding period of time.

In connection with the need to perform family duties, PuhkS gives employees the possibility to use the following leaves for parents: pregnancy and maternity leave, adoptive parent's leave, parental leave, additional childcare leave, additional childcare leave without pay.

PuhkS Section 27 provides that women are granted pregnancy and maternity leave of 140 calendar days, or 154 calendar days in the case of a multiple birth or a delivery with complications. A woman has the right to commence pregnancy and maternity leave at least 70 calendar days before the estimated date of delivery as determined by a doctor.

The possibility of a parental leave is also an important guarantee for combining work and family life. According to PuhkS Section 29, a mother or father may request a parental leave. If they do not request a parental leave and another person (e.g. grandmother) takes care of the child, the other person is also entitled to a parental leave. Parental leave may be used in one part or in parts at any time for raising a child of up to three years of age, i.e. an employee may take a leave, terminate the leave after some time, come to work, and take a leave again. This makes it very difficult for an employer to organise work, since the employer never knows, when hiring a substitute, how long the substitute can work and when another substitute will be needed. It is therefore important that the employee and employer mutually agree on the procedure for using parental leave.

Pursuant to Clause 2(1) and (2) of Directive 96/34/EC ([173]), which regulates the use of parental leave, men and women workers are guaranteed an individual right to parental leave; to promote equal opportunities and equal treatment between men and women, this right should be granted on a non-transferable basis. According to the PuhkS, parental leave can be used by one of the parents by agreement of the parties. Generally, the mother of the child takes parental

([172]) Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) — OJ L 348, 28.11.1992, p. 1–8.

([173]) Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC — OJ L 145, 19.6.1996, p. 4–9.

leave; fathers do not use that opportunity as a rule. Thus, parental leave can be transferred — if the father of a child does not take leave, the mother has a right thereto ([174]). This regulation is not in line with Directive 96/34/EC.

Another leave available to parents in Estonia that should be pointed out is the additional leave which was added to the PuhkS in 2002. According to PuhkS Section 30(1), a father has the right to be granted an additional childcare leave of 14 calendar days during the pregnancy leave or maternity leave of the mother or within two months after the birth of the child. This provision gives a father greater opportunities to participate in taking care of the child.

(3) Labour law and human resource development

In employment relationships, human resource development mostly depends on the employer's personnel policy. Each employer decides how important it is for the employer to develop the staff with their diverse knowledge and skills.

Labour law can influence the development of human resources, especially by giving the employees opportunities for continuous professional and personal development. In Estonia, employees can participate in formal education acquired within the adult education system, professional education and training, and informal education, for which the TäKS entitles them to a study leave ([175]). The employee and employer mutually agree on the procedure for participating in training and using study leaves.

From the aspect of human resource development, it should be considered to supplement the TLS by the employer's obligation to organise retraining for an employee in the case of a need for a lay-off, unless this is excessively burdensome for the employer, if this would enable an employee to continue working for the employer.

(4) Mobility and adaptability

An employee's mobility and adaptability on the labour market largely depend on the level of his or her education. The greater the employee's opportunities to complement his or her knowledge and skills according to the labour market's needs, the more mobile and adaptable he or she is.

As mentioned above ([176]), the study leaves system provided in the TäKS gives employees the opportunity of continuous self-development in Estonia.

An employee's mobility and adaptability become especially topical in the event of a lay-off. To prevent unemployment, TLS Section 98(2) obliges an employer to offer an employee another job, if possible, before dismissal, but where another job is not available, the employer may dismiss the employee. An employer has no other obligations (e.g. counselling, organising training, etc.) in addition to offering another job which would ensure a new job for the employee. An employer is thus not obliged under the Estonian legislation to take measures for improving an employee's mobility and adaptability on the labour market.

([174]) Muda, M. Trends in Regulating Working and Rest Time in Estonia. Proceeding From the European Union Law (reference 90), p. 153–156.
([175]) See paragraph 2(3) for details.
([176]) See paragraph 2(3).

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The evolution of labour law in Cyprus and Malta

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List of Acronyms for Chapter I

AKEL — Progressive Party of the Working People
COLA — Cost Of Living Allowance
DEOK — Democratic Labour Federation of Cyprus
EDEK — Movement of Social Democrats
EIRO — European Industrial Relations Observatory
ETUC — European Trade Union Confederation
ETYK — Cyprus Union of Bank Employees
GSEE — General Confederation of Greek Workers
HRDA — Human Resource Development Authority
ICFTU — International Confederation of Free Trade Unions
ILO — International Labour Organisation
IOE — International Organisation of Employers
ITUC — International Trade Union Confederation
JAP — Joint Assessment Paper
KEBE — Cyprus Chamber of Commerce and Industry
NAP — National Action Plan
NGO — Non-Governmental Organisation
OEB — Employers and Industrialists Federation
OELMEK — Organisation of Greek Secondary Education Teachers
PASYDY — Pancyprian Union of Public Servants
PEO — Pancyprian Workers' Federation

POAS — Pancyprian Federation of Independent Trade Unions
POED — Pancyprian Organisation of Greek Teachers
SEK — Cyprus Workers' Confederation
UEAPME — European Association of Craft, Small and Medium-sized Enterprises
UNICE — Union of Industrial and Employers' Confederations of Europe
WCL — World Confederation of Labour

List of Acronyms for Chapter II
AYS — Active Youth Scheme
BPA — Business Promotion Act
CERA — Conditions of Employment Regulations Act
DIER — Department of Industrial and Employment Relations
EIRA — Employment and Industrial Relations Act
EIRO — European Industrial Relations Observatory
EMWA — Equality for Men and Women Act
ERB — Employment Relations Board
ESF — European Social Fund
ESTS — Extended Skills Training Scheme
ETC — Employment and Training Corporation
ETPS — Employment and Training Placement Scheme
FHRD — Federation of Human Resource Development
FOI — Federation Of Industry
GRTU — General Retailers and Traders Union
GWU — General Workers Union
ICC — International Chamber of Commerce
ICFTU — International Confederation of Free Trade Unions
IRA — Industrial Relations Act
ILO — International Labour Organisation
ITUC — International Trade Union Confederation
JES — Job Experience Scheme
LFS — Labour Force Survey
LN — Legal Notice
MBB — Malta Business Bureau
MCAST — Malta College for Arts, Science and Technology
MCCE — Malta Chamber of Commerce and Enterprise
MCESD — Malta Council for Economic and Social Development
MEA — Malta Employers' Association
MHRA — Malta Hotels and Restaurants Association
MUT — Malta Union of Teachers
NEA — National Employment Authority
NGO — Non-Governmental Organisation
NRP — National Reform Programme
NSO — National Statistics Office
OHSA — Occupational Health and Safety Authority
RS — Redeployment Scheme
TAS — Technician Apprenticeship Scheme

UHM — Union Haddiema Maghqudin
WFTU — World Federation of Trade Unions
WSS — Work Start Scheme

Executive summary

This report traces the development of Labour Law and the implications for industrial relations, as well as social and employment policy more generally, in the two small Mediterranean countries of Cyprus and Malta during the period 1995–2005. This period was particularly important for the two countries as it coincided with their efforts for accession to the European Union (EU) and the process of harmonisation with the *acquis communautaire*.

Since their independence in 1960 and 1964 respectively for Cyprus and Malta, successive governments in each country — working with the social partners — have sought to steer a policy of social cohesion to underpin their development efforts. Whilst these strategies were successful in fostering a long period of economic growth and peaceful labour relations, a major outcome was the existence of relatively inflexible labour markets. Liberalisation and globalisation of international markets, coupled with the pressure exerted by the accession process, which required the implementation of the *acquis communautaire* necessitated a series of changes with far-reaching implications in social and economic affairs. Naturally the framework of labour law — and labour practices thereof — came under increasing pressure to adapt and reform.

This executive summary describes the main aims and objectives of the report on the evolution of labour law in Cyprus and Malta in the period 1995–2005, and provides an outline of the component chapters. Specifically, the report is divided into three chapters. The first and second chapters consist of the individual reports on Cyprus and Malta respectively. These constitute the main body of the report and investigate the evolution of labour law in the two countries separately and the implications for industrial relations, employment and social policy. The third chapter provides a concluding overview of the two countries' experiences and an evaluation of the state of implementation of the *acquis communautaire* in the fields examined.

More analytically, Chapter I on the evolution of labour law in Cyprus is subdivided into six parts (A-F), which trace the historical background and institutional framework of labour law developments, job security and employability, adaptability and equal opportunities. Reference is made to the key actors, the characteristics and methods of policy regulation, with particular focus on the process of harmonisation with the *acquis communautaire*. The evolution of labour law and its reliance on statutory regulation vis-à-vis the traditional voluntary nature of Cypriot industrial relations are also addressed.

Part A begins with an overview of the historical background of the emergence in Cyprus of industrial relations in general and labour law in particular. The social partners are identified and the collective bargaining process is described, with reference to the main regulatory techniques that traditionally existed in the country, particularly the Industrial Relations Code that constituted the main mechanism for collective bargaining and dispute resolution.

Part B looks at new ways of regulating work in Cyprus in view of the process of harmonisation with the European *acquis*. In this respect, the harmonisation process in relation to labour law is reviewed, with specific reference to core pieces of legislation in the areas of employment and social affairs, as well as health and safety at work. The ways of regulating the national minimum wage are also discussed.

Part C deals with the issues of job security and employability in the context of prevailing market conditions, the legal framework and established practices. Issues of training and lifelong learning are examined, and wider concerns regarding the gap between school and labour market and ways of introducing young people to the workplace are considered. Reference is also made to the Social Insurance Fund and ways of securing its future viability in light of current practices and low birth rate concerns.

Part D focuses on the process of adaptability and the gradual liberalisation of the labour market, in view of the transposition of pertinent EU directives into national law. Although the labour market retains the traditional features of employment relations, there is a clear trend towards more flexible and atypical employment practices, even though there is little experience in Cyprus in most forms of atypical employment. At the same time, the statistical data indicates that most people on part-time or temporary employment would prefer a more 'traditional' form of employment.

Part E outlines the policies and mechanisms established by the government in an effort to promote equal opportunities for women and young people. In this respect, the regulatory adjustments made to gender issues in the process of the country's harmonisation are discussed. Reference is also made to how inequality affects women in terms of higher unemployment — especially among younger women — and lower salaries. The statutory and policy measures taken to balance work and family life are also discussed.

Finally, Part F gives an overview of the Cypriot case and makes some final remarks.

Chapter II looks at the evolution of labour law in Malta. The chapter is also subdivided into six parts (A-F), tracing the historical background and institutional framework of labour law developments in Malta, job security and employability, adaptability and equal opportunities.

Part A presents the background to the evolution of labour law and the supporting institutional framework, focusing on issues specific to the Maltese industrial relations situation. This part also looks at the main actors within the institutional framework and discusses the process of social dialogue within the country.

Part B considers new ways of regulating work. It provides information on the legal framework regarding various aspects of the work environment, while main acts and subsidiary law are discussed. This is followed by a presentation of the issues surrounding the statutory minimum wage, health and safety matters and the role of the Occupational Health and Safety Authority.

Part C looks at various changes that are necessary to transform job security to employability and reviews the various schemes available especially to the unemployed. Ways of bridging multi-level gaps in society, particularly between school and work and the skills gap in the economy, are also considered.

Part D discusses the prospects for adaptability with a focus on atypical work, including fixed-term contracts and telework. Conditions of work that may help in the adaptability process are examined.

Part E considers the issue of promoting equal opportunities especially with a view to the goals of the Lisbon Agenda for increased participation of the female population.

Finally, Part F gives an overview and makes recommendations on ways of improving the work environment by ensuring guarantees for the employees without causing frictions in the labour market.

In Chapter III (the conclusion), the main issues discussed in the two country specific chapters are retrospectively assessed, as they are brought together in an effort to highlight core considerations, concerns and challenges, and point out similarities and differences between the two national experiences.

Chapter I
Case Study on Cyprus

Introduction

This chapter traces the evolution of labour law in Cyprus in the period 1995–2005, with particular emphasis on the process of harmonisation with the *acquis communautaire*. In this respect, it addresses the transformation of labour law regulatory practices vis-à-vis the traditional voluntary nature of industrial relations and the impact that EU compliance pressures exerted on this framework ([177]).

The period in question was critical for Cyprus because events and processes outside the immediate focus of industrial relations shaped the national agenda and indirectly affected industrial relations as well. These events and processes included:

(a) The accession process and harmonisation with the *acquis communautaire* — Whilst much remains to be done before the *acquis* is fully implemented, the accession process itself brought about a major restructuring of the economy, the society, and public life in general.

(b) Concerted efforts to reach agreement on the Cyprus problem prior to EU accession — Whilst these efforts did not succeed, the resolution of the Cyprus question and the reunification of the island's economy remain a daunting task, which will continue to exert considerable influence on future developments.

(c) The impact of globalisation and the general process of liberalisation domestically — The forces of globalisation and the process of liberalisation of the economy intensified competition, forcing the further restructuring of the economy.

A core characteristic of traditional industrial relations practices in Cyprus has been its voluntary tripartite nature built on consensus, as opposed to a strictly statutory system. The harmonisation process, however, shifted the balance of industrial relations, giving more weight to statutory means of regulation. By the time of accession to the EU on 1 May 2004, Cyprus had succeeded in transposing the relevant directives in the field of labour law ([178]).

A. Historical background and general framework

1. Historical background: industrial relations and labour law

The early history of industrial relations in Cyprus begins around 1910 when the first trade unions were established in the form of social clubs. In this early period the embryonic trade union

([177]) The report focuses on the Government-controlled area of the Republic of Cyprus. The northern part of the island has remained outside the control of the Republic since the Turkish invasion of 1974. The Republic of Cyprus acceded to the EU on 1 May 2004, but the application of the *acquis communautaire* was suspended in the northern part.

([178]) See Annex A for Cyprus, for labour law directives transposed into national law.

movement was united, fighting for survival and acceptance. The British Colonial government introduced the first Trade Unions Law in 1932. This law, which for the most part is still in force today, led to the appointment of the first Trade Union Registrar and provided the framework for the establishment of proper trade unions.

The period 1929–45 was an exceedingly difficult period for the underdeveloped agricultural economy of Cyprus. Economic conditions deteriorated rapidly forcing thousands of farmers to seek employment in the towns and mining areas. From 1932 to 1938 foreign companies rapidly developed the mining industry. At the same time, the construction industry grew considerably along with the liquor, tobacco and tanning industries. The growth of the secondary sector of the economy led to the creation of a working class.

In the early 1940s the young trade union movement was divided along ideological lines resulting eventually in the formation of two separate trade union movements: the Pancyprian Trade Union Committee that was later renamed the Pancyprian Workers' Federation (PEO), and the Cyprus Workers' Confederation (SEK).

In 1948 an important new development took place with the establishment of the Labour Advisory Board and the four Joint Staff Committees. The Advisory Board was a tripartite body of social dialogue, which continues to play an important role in industrial and labour relations to date. The Joint Staff Committees were responsible for industrial relations in the public sector ([179]).

The period leading up to 1950 saw the creation of a number of smaller trade unions formed along professional lines. This was complemented by an unprecedented growth and strength in terms of membership, power and success. From 1950 onwards trade unions continued to develop rapidly. In 1954, the Pancyprian Federation of Turkish Trade Unions was established, whilst throughout the 1950s a large number of independent trade unions were also registered. These independent trade unions mainly represented employees in semi-public organisations. At the same time, trade unions in the public sector also experienced rapid development with the establishment of the Pancyprian Union of Public Servants (PASYDY), the Pancyprian Organisation of Greek Teachers (POED), and the Organisation of Greek Secondary Education Teachers (OELMEK) ([180]). In 1955 the Union of the Banking Employees of Cyprus was also registered as a trade union, and still remains the sole representative of employees in the banking sector.

The early period following the declaration of independence in 1960 was very active in terms of establishing the foundations of labour law on the basis of the existing legal structure and the relevant ILO Conventions. The Constitution safeguards all fundamental rights and freedoms. It also includes three articles dealing specifically with industrial relations (Articles 21, 26 and 27). These articles recognise the right to freedom of peaceful assembly, freedom of association — including forming or joining a trade union — and with some exceptions the right to strike ([181]).

([179]) The four committees were: the Joint Staff Committee (for Civil Servants); the Joint Labour Committee (for Government Industrial Workers); the Joint Committee (for Technical School Teachers and Teachers of Basic and Secondary Education); the Joint Committee (for Members of the police force).

([180]) These trade unions are reviewed later in this section.

([181]) Kapardis 2004: 4.

During this period Cyprus also ratified ILO Convention No 87 on the Freedom of Association and the Right to Organise, and ILO Convention No 98 on the Right to Organise and Collective Bargaining. All these rights acquired legal stature. In 1962 the first social contract was signed between the social partners. This was the 1962 Basic Agreement, which secured the right to organise, negotiate, sign collective agreements, as well as the right to strike. It also made provisions for dealing with industrial disputes. In 1965 a new Trade Unions Law was passed, providing extensive protection and total freedom regarding the registration of trade unions (on the basis of specific provisions laid out in the law).

The main characteristics of the post independence period leading up to the Turkish invasion of 1974 were the urbanisation of the population, the establishment of light industry, and the substantial improvement of living standards ([182]). The invasion of 1974 and the occupation of 38 % of the territory of Cyprus led to an unprecedented economic and social dislocation. In the period immediately following the Turkish invasion, amid efforts to reconstruct the economy, the trade union movement suspended the submission of any claims, and volunteered a scaled reduction in salaries and benefits of up to 25 %. During this period the government, with the consent of the social partners, presented to the House of Representatives a series of amendments to basic labour laws that allowed for the temporary reduction in salaries and social insurance benefits. The economy started to recover fast from the ruins of war, and pre-invasion income levels were restored by 1979. Thereafter, the reconstruction and modernisation that was achieved was so remarkable that it was characterised as an ‘economic miracle’ ([183]).

In 1977 the social partners amended the Basic Agreement of 1962 and agreed on the introduction of the Industrial Relations Code, which is still in force today ([184]). The Code, which is discussed in more detail later, regulates the process of collective bargaining and dispute resolution and takes into consideration the provisions of ILO Recommendation on the examination of Grievances ([185]).

Cyprus constitutes a model of tripartite consensus-building cooperation, where social dialogue is well established. Under the guidance of successive administrations, the social partners established a number of tripartite committees — most of them under the jurisdiction of the Ministry of Labour and Social Insurance — which provide forums for sharing views and offering advice to the Minister regarding the best way forward ([186]).

2. The changing face of the Cyprus labour market: key characteristics

The labour market in Cyprus is constantly expanding along with the overall economy. In 1995 the gainfully employed population was 284 400. By 2004 this number increased to 322 500, adding a total of 38 100 new jobs in the economy (Table 1). This increase was the outcome of natural population increases, net immigration of expatriate Cypriots and the introduction of

([182]) Theophanous 1995: 15.
([183]) For an economic analysis of the period see Christodoulou 1992, 1995 and Theophanous 1995.
([184]) For a more detailed discussion on the historical background and evolution of the labour movement in Cyprus see Paionides 1995 and Ioannou 2002.
([185]) Examination of Grievances Recommendation (R130), 1967.
([186]) Mallis and Messios 2003 point out how useful the tripartite social dialogue in the harmonisation process was and how well the social partners worked at the policy and technical levels in order to complete the process in an orderly and timely manner. For further discussion on social dialogue in Cyprus see Paionides 1995; Ioannou 2002; Kapardis 2003, 2004; Yannakourou and Soumeli 2004.

foreign workers. In fact, a total of 46 217 foreign nationals were legally working in Cyprus on temporary work permits in 2004 (Table 4).

The vast majority of the gainfully employed — more than 70 % — worked in the services sectors in 2004. About 20 % were employed in the secondary sectors and less than 8 % in the primary sectors. Of these, wholesale and retail trade accounted for 17.6 % of the gainfully employed in 2004, manufacturing accounted for 10.6 % and construction for 10.2 % (Table 1).

Table 1 — Gainfully employed population: 1995–2004

	1995	2000	2001	2002	2003	2004
Economically active population (thousand)	302.70	325.10	330.60	335.30	340.10	347.00
As % of the total population	46.10	46.60	46.90	46.90	46.60	46.30
Gainfully employed population (thousand)	284.40	302.00	308.60	311.90	316.00	322.50
Male (%)	61.00	59.10	58.80	58.40	58.30	57.50
Female (%)	39.00	40.90	41.20	41.60	41.70	42.50
Gainfully employed by economic activity						
In 000s of persons						
Primary sectors	30.50	25.80	25.30	24.90	24.70	24.40
Secondary sectors	73.10	64.70	64.70	65.30	66.70	68.90
Manufacturing	44.00	37.00	35.70	34.60	34.00	34.30
Construction	27.70	26.20	27.50	29.30	31.30	33.00
Electricity, gas & water	1.40	1.50	1.50	1.40	1.40	1.60
Tertiary sectors	180.80	211.50	218.60	221.70	224.60	229.20
Wholesale and retail trade	49.50	54.20	56.00	56.80	56.50	56.90
Hotels and restaurants	30.10	33.00	33.50	32.00	31.90	32.10
Transport, storage and communication	17.90	21.40	22.20	21.90	21.60	21.90
Financial intermediation	12.30	16.00	15.70	15.60	15.80	16.00
Real estate and business activities	12.60	15.20	15.70	16.30	16.80	17.70
Other	58.40	71.70	75.50	79.10	82.00	84.60
In % of total gainfully employed						
Primary sectors	10.72	8.54	8.20	7.98	7.82	7.57
Secondary sectors	25.70	21.42	20.97	20.94	21.11	21.36
Manufacturing	15.47	12.25	11.57	11.09	10.76	10.64
Construction	9.74	8.68	8.91	9.39	9.91	10.23
Electricity, gas & water	0.49	0.50	0.49	0.45	0.44	0.50
Tertiary sectors	63.57	70.03	70.84	71.08	71.08	71.07
Wholesale and retail trade	17.41	17.95	18.15	18.21	17.88	17.64
Hotels and restaurants	10.58	10.93	10.86	10.26	10.09	9.95
Transport, storage and communication	6.29	7.09	7.19	7.02	6.84	6.79
Financial intermediation	4.32	5.30	5.09	5.00	5.00	4.96
Real estate and business activities	4.43	5.03	5.09	5.23	5.32	5.49
Other	20.53	23.74	24.47	25.36	25.95	26.23

Source: Republic of Cyprus, Statistical Service official website.

For the most part, with the exception of the immediate years following the Turkish invasion, the labour market in Cyprus displayed conditions of full employment. The registered unemployed in 2004 numbered 12 700 persons and the unemployment rate was 3.6 %. This compares sharply with an unemployment rate of just 2.6 % in 1995. The percentage of the unemployed under the age of 25 in the total of registered unemployed has been steadily declining in the period. More than half of the registered unemployed were secondary school graduates (both General and Technical) without tertiary education. At the same time the number of unemployed with only

primary education was about 22 % of the total in 2004 and those with tertiary education around 21 %. However, these statistics are not easily comparable because of population differences and different dynamics in terms of frictional unemployment (Table 2).

Table 2 — Registered unemployed: 1995–2004

	1995	2000	2001	2002	2003	2004
Registered Unemployed (thousand)	7.90	10.90	9.50	10.60	12.00	12.70
Unemployment rate (%)	2.60	3.40	2.90	3.20	3.50	3.60
Male	1.90	2.70	2.30	2.30	2.50	2.60
Female	3.70	4.40	3.80	4.30	4.90	5.10
Unemployed under 25 years as % of total	14.80	11.00	11.70	12.70	13.10	11.60
Unemployed by level of education (%)						
No schooling	1.00	0.60	0.40	0.30	0.30	0.30
Primary	27.00	28.10	24.00	21.90	21.80	22.30
Secondary General	44.60	45.80	46.50	47.70	47.20	46.60
Secondary Technical	6.30	8.90	9.30	9.10	9.60	9.40
Tertiary	21.10	16.60	19.90	21.10	21.10	21.40

Source: Republic of Cyprus, Statistical Service official website.

Traditionally the unemployment rate in Cyprus was estimated as a percentage of the registered unemployed in the gainfully employed population. As of 2002 onwards the unemployment rate is also estimated using the Labour Force Survey in line with EU practice. The survey methodology shows somewhat higher unemployment rates than the traditional method. The unemployment rate at the end of 2004 was estimated at 4.6 % by the survey method (and 5.2 % in 2005) compared with 3.6 % by the traditional method ([187]).

Unemployment rates are higher among young people and the female population. Young people tend to exhibit higher rates of frictional unemployment until they settle with a more suitable or more desirable job. Female participation rates remain low for a number of reasons. Childcare combined with lack of corresponding infrastructure and limits on flexible forms of employment such as part-time or telework, are contributing factors. A more integrated public policy on childcare, school hours and care for the elderly could potentially facilitate higher participation rates among the female population. It is interesting to note that unemployment is higher and employment rates correspondingly lower, for young women below the age of 25 where family responsibilities have higher priority.

In general, employment rates in Cyprus are satisfactory and remain at levels higher than the EU averages. Specifically, the employment rate for the age group 15–64 in 2005 was 68.5 % for Cyprus compared with 63.5 % in the Eurozone. Employment rates in Cyprus were higher in comparison with EU averages, for men as well as for women and display small changes over time. Employment rates increased more noticeably in the case of women between 2001 and 2005 whereas corresponding rates for men dropped albeit marginally (Table 3).

Looking at all age groups for Cyprus, the increase in the total employment rate between 2001 and 2005 is entirely attributable to higher employment rates for women. Whereas the corresponding employment rates for men remained unchanged in the period, employment rates for women rose from 48.8 % to 49.9 %. There were significant shifts in the age group 25–54

([187]) Employment and unemployment data of the Labour Force Survey is obtainable on the Eurostat official website, structural indicators.

where the corresponding employment rate for women rose by almost four percentage points to 72.2 % in 2005 whilst the employment rate for men actually dropped by about two percentage points. Naturally the lowest employment rates occur in the age groups of 15–24 and the 65+ (Table 3).

Table 3 — Employment rates by age group and sex (%)

	2005			2001		
	Total	Men	Women	Total	Men	Women
All Ages	59.8	70.7	49.8	59.2	70.7	48.8
15–64	68.5	79.2	58.4	67.9	79.4	57.1
15–24	36.7	40.5	33.2	39.0	40.4	37.7
25–54	81.8	91.8	72.2	80.7	93.5	68.6
55–64	50.6	70.8	31.5	49.1	66.8	32.2
65+	11.4	19.5	4.7	10.6	17.9	4.5
EU Rates: age group 15–64						
Euro zone	63.5	71.8	55.2	62.2	72.0	52.4
EU-15	65.2	72.9	57.4	64.0	73.1	55.0
EU-25	63.8	71.3	56.3	62.8	71.3	54.3

Source: Republic of Cyprus, Statistical Service, Labour Force Survey 2005, and Eurostat website, Structural Indicators, Employment.

Following a period of rapid economic expansion during the 1980s and early 1990s, labour shortages began to appear in the economy, which in some cases were quite acute. Legislation was thus passed allowing businesses to hire foreign nationals from oversees. At the end of 2005 a total of 46 217 foreign workers were employed in Cyprus on temporary work permits. Of these about 8.7 % were employed in primary sector activities, 18.1 % in the secondary sector and the remaining 73.2 % in the services industries — mainly in tourist related activities and domestic help.

Table 4 — Foreign workers by economic sector

	Number of workers		% Distribution	
	2004	2005	2004	2005
Primary sectors	3 893	4 022	8.99	8.70
Secondary sectors	8 282	8 358	19.12	18.08
of which: Manufacturing	3 808	3 897	8.79	8.43
Construction	4 463	4 450	10.31	9.63
Tertiary Sectors	31 130	33 837	71.89	73.21
Wholesale and Retail Trade	4 101	4 728	9.47	10.23
Hotels	2 976	2 752	6.87	5.95
Restaurants	5 427	5 662	12.53	12.25
Other trading services	1 196	1 427	2.76	3.09
Education, health and social activities	1 354	1 385	3.13	3.00
Private households	14 290	15 736	33.00	34.05
Other	1 786	2 147	4.12	4.65
Total	43 305	46 217	100.00	100.00

Source: Ministry of Labour and Social Insurance, Annual Report 2005.

Also since the partial lifting of restrictions on the free movement of people across the Green Line (cease fire line) on 23 April 2003, an estimated 10 000 Turkish Cypriots have been working in the government-controlled areas, either on full-time or part-time basis ([188]).

3. The main actors of the labour market in Cyprus

Industrial Relations in Cyprus rest on two pillars: tripartite cooperation and voluntarism. The three parties to industrial relations in Cyprus are the employers' organisations, the trade unions and the government. Close cooperation and consensus building constituted the foundations of peaceful labour relations, underpinning a long period of sustained high growth. At the same time, tripartite cooperation and consensus building were instrumental in the success of the voluntary nature of industrial relations in Cyprus. Both employers' organisations and trade unions are well established, and have strong and effective organisational structures.

In Cyprus there are two main employers' organisations, which represent almost all the members of the business/entrepreneurial community. These are the Employers and Industrialists Federation (OEB) and the Cyprus Chamber of Commerce and Industry (KEBE). Both organisations have equal representation in the various tripartite bodies, such as the Labour Advisory Board, the National Employment Committee, the Economic Consultative Committee, the Social Security Committee, and others. Individual enterprises can become members of either or both of these organisations.

OEB was founded in 1960 and its members come from all sectors and industries of the economy. OEB's membership comprises 53 main professional and sector associations representing more than 4 500 enterprises corresponding to more than 60 % of the private sector's workforce. It is a member of the International Organisation of Employers (IOE), the Union of Industrial and Employers' Confederations of Europe (UNICE), and others. OEB is also a member of the following EU bodies: the European Economic and Social Committee, the European Foundation for the Improvement of Living and Working Conditions, the European Agency for Health and Safety at Work, and the European Social Dialogue Committee.

KEBE was founded in 1927 and it is the umbrella organisation of the regional Chambers of Commerce and Industry operating in Nicosia, Limassol, Famagusta, Larnaca and Paphos. It is the union of Cypriot businessmen, whose interests it promotes by submitting to the government and to parliament the members' positions on relevant issues, while, through its participation in tripartite bodies and committees, it conveys and promotes the views of the business community. The membership of KEBE exceeds 8 000 enterprises from the whole spectrum of business activity, while affiliated to the Chamber are more than 120 professional associations from the trade, industry and services sectors. KEBE is a member of EUROCHAMBERS, the International Chamber of Commerce (ICC), and the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) among others.

([188]) A. Theophanous and Y. Tirkides 2006: 19–81.

The Pancyprian Workers' Federation (PEO) was established in 1946 as the successor to the Pancyprian Trade Union Committee. PEO is a member of the World Federation of Trade Unions (WFTU) and has recently expressed an interest in joining the European Trade Union Confederation (ETUC). It is affiliated with AKEL, the left-wing party of Cyprus, and members of its leadership also hold posts in the party.

The Cyprus Workers Confederation (SEK) was established in 1944. SEK is a member of the European Trade Union Confederation (ETUC), and the International Confederation of Free Trade Unions (ICFTU), which recently merged with the International Trade Union Confederation (ITUC) and the General Confederation of Greek Workers (GSEE). SEK has no specific political party affiliation.

In addition to the two main multi-sector trade unions, there are also two smaller unions: the Democratic Labour Federation of Cyprus (DEOK) and the Pancyprian Federation of Independent Trade Unions (POAS). DEOK was initially established in 1962 as a split union from SEK. However, it became active as a trade union after its re-establishment in April 1982, and it is now affiliated with the Socialist Party EDEK. POAS consists of workers from minor enterprises and from the British Sovereign Bases on the island. Both DEOK and POAS are members of the World Confederation of Labour (WCL).

There are numerous sectoral trade unions, the most important of which are: the Pancyprian Union of Public Servants (PASYDY), the Pancyprian Organisation of Greek Teachers (POED), the Organisation of Greek Secondary Education Teachers (OELMEK) and the Cyprus Union of Bank Employees (ETYK).

After the split of the trade union movement in the early 1940s, SEK and PEO, which jointly represent the substantial majority of workers in the private and semi-public sectors, worked out a modus operandi that gradually allowed them to work together in promoting the interests of their members. Cooperation between SEK and PEO also stemmed from the close working relationship that the leaders of the two trade unions (Michalakis Ioannou and Andreas Ziartides respectively) established in the period after 1960. There was a realisation at the time that consensus was important for promoting their members' interests. At the same time the nature of the heavily protected economy for the most part of the period after independence, was facilitated by close cooperation between the social partners.

Members of the security forces (the police force, the fire brigade and the national guard) are not permitted to form trade unions. The members of the police force and the fire brigade have, however, formed clubs that are registered under the Law on Social Clubs. Recently the government has submitted a bill to the House of Representatives that will enable members of the police and the national guard to form trade unions.

4. The industrial relations code

The system of industrial relations in Cyprus dates back to the period of British Colonial Administration, and it still retains some 'British' characteristics. As mentioned earlier, its most prominent features are tripartite cooperation and voluntarism. Collective agreements — concluded on the basis of cooperation between the social partners — are essentially gentlemen's agreements.

However, during the harmonisation process the social partners began to question the wisdom of a fully voluntary system of industrial relations and to place more weight on the benefits of statutory regulation. As a result, a number of terms and conditions of employment that were previously determined by collective agreements are now legally enforceable. Whilst this has not affected the significance and process of collective bargaining, it has nonetheless assisted in providing the minimum terms and conditions of employment for non-unionised employees and for employees in enterprises that are not signatories of collective agreements. Cooperation between the parties involved is still essential for the system's success.

The first social contract was the Basic Agreement signed in 1962. As mentioned earlier, this secured the right to organise, negotiate, sign collective agreements, and the right to strike, and also provided for a procedural framework dealing with industrial disputes. This social contract was replaced in 1977 with the Industrial Relations Code.

The Industrial Relations Code of 1977 is essentially a gentleman's agreement, which is considered to be a landmark in the development of an efficient system of industrial relations in Cyprus. It is a voluntary agreement, not legally enforceable, that lays out the procedures to be followed for arbitration and the settlement of labour disputes. The Code consists of two parts that contain substantive and procedural provisions. The first part that deals with the substantive provisions identifies the principles that should govern industrial relations. These include:

- the right to organise;
- the institution of collective bargaining as the basic way for the determination of the conditions of employment and remuneration;
- the obligation to negotiate in good faith;
- the existence of managerial prerogatives, consultative and negotiated issues;
- the commitment not to resort to strikes or lock-outs in disputes over rights and grievances;
- the understanding to observe faithfully the provisions of collective agreements;
- the obligation to respect and adhere to the Code.

The second part of the Code, dealing with the procedural provisions identifies the procedures to be followed in disputes over interests. Disputes over interests might arise during negotiations for renewing or concluding a new collective agreement, or during negotiations over a new claim. The settlement of disputes over interests is carried out through direct negotiations between the parties concerned, mediation by the Ministry of Labour and Social Insurance, voluntary arbitration and public inquiry, even though the latter are not frequently exercised. Disputes over interests can potentially lead to strikes or lock-outs.

Disputes over rights or grievances refer to disputes that may arise out of the interpretation and/or implementation of a collective agreement, out of existing conditions of employment, or out of a personal complaint, including a complaint over a dismissal. The procedures for resolving disputes over rights include: direct negotiations between the parties concerned, mediation by the Ministry of Labour and Social Insurance, and voluntary and compulsory arbitration. Strikes or lock-outs are prohibited in the case of disputes over rights. An exception to this rule is the case of a flagrant violation of an existing agreement in which case strikes and lock-outs are permitted.

The Industrial Relations Code does not apply to organisations that are not signatories, even though all social partners in the private and semi-public sectors abide by its provisions. In the public sector the right to negotiate, to consult and to settle disputes rests with four separate and independent bodies that are modelled on their British counterparts:

- The Joint Staff Committee (for civil servants);
- The Joint Labour Committee (for government industrial workers);
- The Joint Committee (for technical school teachers and teachers of basic and secondary education);
- The Joint Committee (for members of the police force).

All social partners acknowledge that the Industrial Relations Code has served Cyprus very well, but at the same time an update and critical revision was deemed necessary in view of harmonisation, as under the requirements of the *acquis communautaire* it was deemed more effective for labour and other social provisions to take a statutory form.

At the same time the Code failed to effectively address the issue of the resolution of differences, especially in the area of essential services. The resolution of differences in essential services was addressed with the Agreement on the Procedure for the Settlement of Labour Disputes in Essential Services signed in March 2004. The agreement was reached after a long period of consultation and negotiation among the social partners and it represented an extension to the Industrial Relations Code, even though the government insisted on a statutory resolution. The agreement secured the right to strike in essential services, while at the same time providing for skeleton staff to remain on duty. This procedure was enforced for the first time in July 2005 ([189]).

Regarding the more general problem of dispute resolution, one approach might be the introduction of compulsory arbitration enforceable by the Ministry of Labour and Social Insurance in cases of disputes over interests. Another relevant consideration is the application of practical time limits for the resolution of disputes. There are several other points that require clarification and implementation on the same issue. These include: (a) the need to identify the issues that are essentially employer privileges as opposed to those that must be mutually agreed, (b) the need also to introduce, in consultation with the other social partners, rules on arbitration, and (c) the need to enforce the practice of joint press releases during negotiations ([190]).

([189]) Ministry of Labour and Social Insurance Annual Report 2004: 209; SEK, 2002: 40–46.
([190]) Pavlikkas 2004: 14.

5. Collective bargaining: coverage and levels

Collective bargaining in Cyprus retains its voluntary nature. It is essentially a multi-level process that involves all the social partners at the sectoral and enterprise levels. As discussed earlier, the harmonisation process of the Cypriot legislation with the European *acquis* led to legislation of several terms and conditions of employment (which thus became legally binding). Collective agreements can still be reached over and above these legally binding conditions. More recently, following the accession of Cyprus to the EU, the issue of granting legal status to collective agreements is being considered.

The number of employees covered by collective agreements cannot be easily estimated given the lack of precision in trade union data regarding their membership. However, the reported data in the period 1993–2003 show that union membership ranges between 52 % and 54 % of the economically active population (Table 5). At the same time one has to take into consideration that most of the provisions of collective agreements are incorporated into personal contracts of employment and/or the internal rules and regulations of organisations that are not formally unionised. The legalisation of some clauses due to harmonisation has facilitated this process.

Table 5 — Trade union membership 1993–2003

	1993	1998	2003
SEK	55 000	61 000	65 000
PEO	66 000	64 000	64 000
DEOK	6 000.00	6 000.00	7 000.00
Others	32 000	36 000	39 000
Total	160 993	168 998	177 003
% to economically active	53.19	54.10	52.04

Source: Eiro online, Trade Union Membership 1993–2003.

Based on the most recent available data from the Industrial Relations Department of the Ministry of Labour and Social Insurance, there were 13 individual labour agreements in 2003 in the following sectors of private economic activity: financial services, leather goods, clothing, footwear, metal products, construction, construction companies, electrical installations, transports, hotels, catering, and oil service companies.

In the public and semi-public sectors the Ministry of Finance acts as the employer, negotiates with the trade unions directly and issues guidelines for the boards of semi-public organisations to follow. Most collective agreements are concluded at the company level, even though the majority of employees are also covered by some national collective agreements, such as those in construction, hotel and hospitality industries, the banking sector and the public and semi-public sectors ([191]).

([191]) Yannakourou and Soumeli 2004: 37–38.

6. Dispute resolution and enforcement of labour rights

As previously discussed, the Industrial Relations Code incorporates provisions for the resolution of disputes over interests that may arise during the negotiation of collective agreements, and disputes over rights or grievances that may arise out of the interpretation and/or implementation of collective agreements, out of existing conditions of employment, or out of personal complaints including complaints over dismissals. The Department of Labour Relations in the Ministry of Labour and Social Insurance is the competent authority for enforcing labour legislation and for mediating among the social partners in resolving disputes.

The Judiciary has a rather limited role in labour relations. More specifically, the Labour Court is responsible, among other issues, for hearing cases on dismissals and redundancies, gender equality, the establishment and operation of provident funds, parental leave, and the organisation of working time including part-time work ([192]). The District Courts are responsible for hearing civil cases that deal, for the most part, with cases of sexual harassment, whereas the Supreme Court is responsible for cases of employment and promotion in the public sector, as well as in public utilities and municipal authorities. The Supreme Court is also responsible for hearing appeals.

In 2005 the Department of Labour Relations received 221 labour disputes affecting 44 760 employees, out of which 108 were disputes over interests (issues raised during negotiations), and 113 were disputes over rights (covered by collective agreements). It also handled another 127 cases that had been pending since the previous year. Overall, in 2005 the Department handled 348 cases, as opposed to 220 which was the average caseload for the period 2000–04. Out of these, 98 cases remained pending at the end of 2005 ([193]).

In recent years the Department was able to handle more cases than in the past, but overall there is an overload of cases. This relates to the tendency of the social partners to register cases with the Department instead of trying to resolve them. It is also noted that in 2005 a total of 25 strikes were reported, affecting 14 637 employees and resulting in the loss of 15 339 workdays. The average workdays lost in Cyprus during strikes per 10 000 workers was estimated at 300 annually ([194]).

B. New ways of regulating work

1. The accession process and the harmonisation of labour law

The accession process and the eventual harmonisation of the legal and institutional framework of Cyprus with the *acquis communautaire* was a significant factor that influenced the evolution of labour relations in Cyprus in the period under examination. The process reinforced the rights and obligations of the social partners and to a large extent safeguarded the rights of the workers ([195]).

([192]) Kapartis 2004: 157.
([193]) Ministry of Labour and Social Insurance, Annual Report 2005: 208–209.
([194]) Ministry of Labour and Social Insurance, Annual Report 2005: 209–210.
([195]) A systematic analysis of labour law in Cyprus before harmonisation with the *acquis communautaire* can be found in Christodoulou (1992). Also Antoniou (2003) gives a detailed account of the most significant work carried out in the harmonisation process. Most of the legislation can now be found online on the website of the Ministry of Labour and Social Insurance (http://www.mlsi.gov.cy).

The process of accession negotiations started officially on 30 September 1998. Prior to that the government of the time had established 22 high level technical tripartite committees charged with the responsibility of screening the *acquis* in relation to existing legislation and suggesting ways of bridging the differences.

2. Terms and conditions of employment

In the field of labour law, harmonisation with the provisions of the *acquis communautaire* involved a great number of changes to the existing legal framework. Many legislative adjustments were deemed necessary in order to achieve full compliance. This involved both the upgrading of existing legal clauses as well the introduction of new legislation, which would supersede the existing collective agreements on many labour issues. Ultimately this would create a more sustainable system of social protection.

The legislation that had to be introduced and enforced in Cyprus, in order to harmonise the national legal framework with the terms and conditions of employment required under the relevant European directives, involved a number of areas. These can broadly be summarised as follows: information on individual employment conditions, transfer of undertakings, collective redundancies, employer insolvency, young people at work, working time, health and safety in fixed-term and temporary employment, European Works Councils, the posting of workers, part-time and fixed-term work.

Prior to the harmonisation process legislation covering the whole of the workforce in Cyprus had existed on the issues of collective redundancies, termination of employment, annual leave and the protection of young people at work. Apart from these limited areas that enjoyed universal coverage, the only other issues that were governed by statutory regulation concerned the minimum wage and maximum hours protection. However, these only covered specific groups of workers, such as sellers, clerks, school assistants, nurses and kindergarten staff. These groups were considered vulnerable either because they were not union organised, or because their unions were very weak, thus lacking the bargaining power that more densely unionised sectors enjoyed.

Clearly, in view of the limited scope of existing legislation due to extensive reliance on the system of collective agreements, the new legal framework had to introduce provisions on a wide range of issues including the following:

- Employer's obligation to inform employees of the particulars of their contract of employment or their employment relationship;
- The safeguarding and protection of employees' rights in the event of the transfer of undertakings, businesses or parts thereof;
- Collective redundancies;
- Protection of employees in the event of insolvency of their employer;
- Protection of young persons at work;
- The organisation of working time;

- The establishment of a European Works Council for the purpose of safeguarding the employees' right to information and consultation in Community-scale undertakings and Community-scale groups of undertakings;
- The elimination of unfavourable treatment in the case of part-time employees;
- The prohibition of discriminatory treatment in the case of fixed-term work employees.

As far as the issue of transfer of undertakings is concerned, a law providing for the protection of employees in the event of a transfer was introduced in the process of harmonisation with the *Acquis*. The law safeguards and preserves the rights of employees in cases of transfers of undertakings, businesses, or parts of undertakings and businesses to another employer.

In relation to collective redundancies, a new law also had to be introduced containing specific provisions as to an employer's obligations when he intends to proceed to collective redundancies. Such obligations should include consultation with the workers' representatives, with the aim of reaching an agreement, as well as providing them with all useful information during the consultations. Useful information in this regard would include the reasons for the intended redundancies, the period over which the redundancies will take effect and the criteria to be used for selecting the employees that are to be made redundant and, finally, the method for calculating possible compensation payments.

On the issue of employer insolvency the previously existing legislation — the Termination of Employment Law — had to be amended for reasons of full compliance. Such amendments had to do with the imposition of penal sanctions or other similar methods that could act as incentives for employers providing relevant information or consulting with the workers concerned. The Termination of Employment Law is discussed in more detail in Part C.

Legislative measures had to be introduced for the organisation of working time, for the posting of workers, as well as for the information and consultation of workers. At the same time, new laws also had to be introduced in relation to part-time and fixed-term work, for the elimination of unfavourable treatment, and for the prohibition of discriminatory treatment. Regarding workers with fixed duration or temporary employment contracts, legal measures covering provisions for their health and safety were introduced under the previously existing Health and Safety at Work Law, which is considered below. Under this Law, issues relating to the health and safety of young people at work also had to be included.

3. Health and safety

The legal framework in relation to Health and Safety prior to harmonisation displayed significant gaps vis-à-vis the *acquis communautaire*. The volume of legal provisions and laws that had to be introduced in order to satisfy the requirements of the various European health and safety directives was indeed very extensive. As a result, the harmonisation process brought about substantial improvements in the provisions regarding the area of health and safety at the workplace. New legislation either amended existing laws or introduced new ones.

An important achievement was the full alignment with the Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at

work. This directive introduced new approaches and a new philosophy for the prevention of accidents and diseases at the workplace. It laid down the basic principles and suggested new ways for handling and settling health and safety issues — mainly by encouraging social dialogue in this area, both at the national and company levels.

Prior to harmonisation the main legislation in Cyprus covering health and safety matters was the 1996 Health and Safety at Work Law 89(I)/96, which focused on the introduction of measures to encourage improvements in the safety and health of workers at work. Even though the 1996 Law took into account some of the provisions of the European Framework Directive 98/391/EEC, a number of improvements needed to be made to this in order to achieve full compliance. Moreover, existing national laws dealing with provisions regarding specific risks, especially asbestos exposure, needed upgrading. For the most part, however, new laws and regulations had to come into effect as the national regulatory framework was insufficient.

In this respect, the legislation that had to be enforced in Cyprus, in order to harmonise health and safety at work with the provisions required under the relevant European directives, involved a number of issue areas. These dealt with minimum requirements for the workplace and work equipment (including protective equipment), with minimum protection requirements in different sectors of activity — such as construction sites and extracting industries — and with the protection of workers dealing with specific risks — such as the manual handling of loads, display screen equipment, and exposure to carcinogens, asbestos, as well as chemical, biological and physical agents at work.

4. The national minimum wage

The national minimum wage is regulated annually by Order of the Council of Ministers. The Order provides for a minimum wage for particular occupations and affects mainly people working as shop assistants, clerks, nurses' aides and teachers' aides in nursery and primary schools. The minimum wage is generally observed in the sectors it applies to and there is no evidence that the system is abused.

In 2005 the minimum wage was revised to £362 per month, as compared to £345 in 2004 for newly recruited employees. The minimum wage for employees with more than six months working experience was revised to £385 in 2005, compared with £367 in 2004. The government objective is to raise the minimum wage to 50 % of the national median wage by 2008 ([196]).

([196]) Ministry of Labour and Social Insurance, Annual Report 2005: 213–214.

C. From job security to employability

1. The context of the EU employment strategy

Cyprus has been enjoying conditions of full employment for a long time, even though the unemployment rate began to creep modestly higher in more recent years. With a view to implementing the Lisbon Agenda, the First National Action Plan (NAP) for employment 2004–06 sets out the guidelines that Cyprus should follow. The NAP includes the following objectives: ensuring conditions of full employment, quality and productivity at work, cohesion, and an inclusive labour market. Its role in the implementation of the Lisbon objectives is undoubtedly of utmost importance. In this context the adaptability of both the workforce and the business enterprises to the new realities of the Lisbon Agenda is examined herewith.

2. Protection against dismissals

The Termination of Employment Law, which entered into force on 1 February 1968 — and subsequently amended to adopt the provisions of the relevant EU directive — provides for the conditions under which an employer can dismiss an employee and the procedure that has to be followed in each case. The Law was drafted is such a way so as to safeguard employment, while at the same time enabling an employer to dismiss an employee for a ‘just cause’ and with appropriate compensation.

The main objectives of the Termination of Employment Law are: (a) to protect all employed persons against arbitrary dismissals and redundancies with the payment of compensation, (b) to provide for a minimum period of notice in cases of termination of employment, and (c) to establish a Redundancy Fund to which employers pay contributions for the purpose of payment of compensations for reasons of redundancy. This last feature is very significant because it enables employers under specific conditions to reorganise their businesses and introduce new technology that sometimes may result in redundancies. Reorganisation plans, however, cannot be used as short-term excuses for making employees redundant. The Law stipulates strict procedures for dismissing employees as redundant and hiring new ones.

On top of the protection offered by the Termination of Employment Law to employees working under personal contracts of employment or covered by collective agreements, employees can use these instruments to defend their rights. The Termination of Employment Law recognises clauses that are more favourable to employees, as having precedence. For employees covered by collective agreements dismissals are enforced after consultation with the competent trade unions. Employees with personal contracts of employment can resort to the Department of Labour for protection and/or the Labour Court.

3. Measures to promote employability

The Joint Assessment Paper (JAP) agreed upon in 2001, included jobseekers' access to training programmes as an employment priority. According to the NAP the percentage of jobseekers who participated in educational and training activities increased from 4.2 % in 2000 to 8.8 % in 2003. However, vocational training is mainly oriented towards those in employment or those that can easily secure employment, rather than the unemployed ([197]).

The NAP for Employment 2004–06, also calls for greater emphasis on active and preventive policies in order to (a) reduce the duration of the unemployment period of specific target-groups, such as young and older people, (b) provide support for the promotion of the employment of women and persons with disabilities and (c) more closely link education to labour market needs ([198]).

4. Training and lifelong learning

Cyprus is a small and open economy with limited natural resources and thus has to rely on its human capital for sustained growth and development. Inevitably, education, training and lifelong learning constitute important national goals. The responsible body for implementing the training strategy of Cyprus is the Human Resource Development Authority (HRDA), which is a semi-public organisation. A 13-strong Board of Directors, comprising representatives from the government, the employers' organisations and trade unions, governs HRDA. The Minister of Labour and Social Insurance is by law the competent Minister.

The HRDA's activities focus on the formulation and implementation of an integrated training and human resource development strategy in accordance with the priorities of national socioeconomic policy objectives. On this basis, specific training programmes are promoted and corresponding costs are distributed. The Authority also subsidises the modernisation of the training system with the creation of the necessary infrastructure, the systematisation and certification of training, and the introduction of standards for vocational qualifications. Participation in training programmes financed by the HRDA is rapidly increasing ([199]).

5. Bridging the gap between school and labour market

Cyprus has long enjoyed a tradition of high educational levels, which is confirmed in the National Action Plan ([200]). Specifically, the percentage of persons between the ages of 20 and 24 that have completed secondary education is 79.5 %. This is higher than the EU average of 75.5 %, but lower than the European Employment Strategy (EES) target of 85 % by 2010. The net participation rate in education for young persons of 12–17 years is estimated at 90 %. In the academic year 2002–03 about 64 % of the secondary education graduates continued their studies in tertiary education (23 % in Cyprus, 41 % abroad). At the same time, the proportion of early school leavers was 17.4 %, which is slightly lower than the EU average of 18.8 %, but higher

([197]) Republic of Cyprus, NAP for employment 2004–06, 2003: 11.
([198]) Republic of Cyprus, NAP for employment 2004–06, 2003: 12.
([199]) Specifically, participation increased from 14 300 in 1993 to 27 804 in 1997 and to 34 389 in 2003; Human Resource Development Authority, Annual Report 2004: 35–37.
([200]) Republic of Cyprus, NAP for employment 2004–06, 2003: 20.

than the EES target of 10 %. The participation rate in secondary technical/vocational education is lower particularly amongst girls. The proportion of the labour force with higher education was 32.4 % in the academic year 2002–03 compared with the EU average of 24.2 % ([201]).

Efforts directed towards bridging the gap between school and the labour market are led by the competent Ministries of Education and Culture, and of Labour and Social Insurance respectively. A major reform programme of upper secondary education began in 2000 and was completed in 2002. Reform of technical/vocational education was targeted for completion by 2006. The main aim of this reform was to adjust to the growing demand for mobility and flexibility in the labour market. A programme for introducing information technology in education — both primary and secondary — was also initiated.

The focus of the reform effort is to prepare secondary education graduates to either continue at tertiary level or follow an apprentice course and gain the necessary professional skills for entering the labour market. The government is placing emphasis on the development of public and private tertiary education and vocational training through strengthening and upgrading the training infrastructure, modernising the Apprenticeship Scheme and expanding the training activities offered.

6. Active ageing

The retirement age in the private sector is 65 years for both men and women. However, employees can draw retirement pensions from the Social Insurance Fund from the age of 63. In this case they can continue working until the age of 65. During this period contributions to the Social Insurance Fund are compulsory. Additionally, with the consent of their employers, employees can continue working until the age of 68 while in receipt of pension. In this case, from the age of 65 to 68 contributions to the Social Insurance Fund are voluntary. Those who choose voluntary contributions will be receiving a higher pension at the end of the period. The retirement age for people working in the broader public and banking sectors is 60 years, or after 400 months of employment.

The burden on the system from people retiring early is putting pressure on the long-term viability of the Social Insurance Fund. The problem is further exacerbated by the low birth rate and the corresponding implications upon the demographic distribution of the population. The problem thus generated is currently being discussed in the context of a social dialogue between the social partners, with a view to extending the retirement age first to 63 years and later to 65 for the extended public and banking sectors, and to 67 for the private sector. At the same time, contributions to the Fund are likely to go up while the possibility of lowering benefits has not yet been considered.

It should be noted that more and more people choose to work in the private sector, mainly on a part-time basis beyond the normal retirement age. This is more pronounced among people retiring at 60, but the extent of this practice is not statistically recorded.

([201]) Republic of Cyprus, NAP for employment 2004–06, 2003: 20.

7. Categories of workers at risk of social exclusion

Social cohesion is a crucial contributor to both the stability of the socioeconomic system and to the sustainability of growth. Economic inequality, poverty and social exclusion may not in general be considered as acute problems in Cyprus. However, pockets of exclusion exist amongst the elderly, people with disabilities, single-parent families, and families whose head is of low educational level. Cyprus is gradually becoming a multi-cultural society where people from various countries converge in search of employment and a better life. There is a growing trend whereby people coming from less privileged countries face problems of social exclusion. The government is working with the trade unions to solve this problem.

In the drafting of the NAP 2004–06, an effort was made to include the less privileged and to take into consideration the changing social patterns and the demographic issue. As already mentioned, the ageing of the population is exerting considerable pressure on the Social Insurance System. At the same time the recipients of social security assistance are increasing, thus adding further pressures on the Fund. It is therefore important that measures are taken soon to ensure the long-term viability of the Social Insurance System ([202]).

D. Labour law and adaptability

In addition to the process of harmonisation, globalisation and technological change combine together to forge changes in the labour market. The need for labour market flexibility and adaptability is obvious and the social partners are incorporating these parameters in the process of collective bargaining.

As mentioned earlier, during the harmonisation process the two more pertinent directives on part-time work (97/81/EC) and on fixed-term contracts (97/71/EC) were incorporated into national law. Unfortunately, empirical data on their implementation and their extent of applicability is not available. Data gathering on part-time employment, temporary employment and persons holding second jobs was introduced in 2001 as part of the harmonisation process with the European *acquis*. Table 6 below summarises part-time employment by reason and sex for 2005 and 2001. Similarly Table 7 summarises temporary employment by age group, reason and sex, also for 2005 and 2001.

Part-time employment in 2005 consisted of 30 984 persons or 8.4 % of total employment. The corresponding ratios in the male and female employment populations were respectively 4.8 % and 13.1 %. Looking into the reasons for part-time as opposed to full-time employment, it is clear that the most common occurrences involve people who did not want a full-time job. Specifically, 50.4 % of men and 54 % of women on part-time employment in 2005 did not want a full-time job. At the same time 23.2 % of men and 30.1 % of women on part-time employment in the same year, could not find a full-time job.

The proportion of part-time employment in total employment crept higher in the period since 2001 when data gathering started. Part-time employment comprised 8.1 % of total employment

([202]) Republic of Cyprus, NAP 2004–2006, 2003: 31.

in 2001. Regarding the reasons cited, the proportion of those claiming they did not want a full-time job has been declining while the proportion of those claiming they could not find a full-time job was increasing.

Table 6 — Part-time employment by professional status, reason and sex

	2005			2001		
	Total	Men	Women	Total	Men	Women
Total Employment Full-Time	367 524	206 395	161 129	322 351	180 927	141 424
Part-Time Employment	30 984	9 888	21 096	26 049	8 883	17 166
As a Percentage of Total Employment (%)	8.43	4.79	13.09	8.08	4.91	12.14
Reason for Part-Time Employment						
In education or training	1 049	565	484	1 191	557	634
Own illness or inability	1 983	1 326	657	1 493	1 168	325
Could not find a full-time job	8 649	2 293	6 356	4 512	2 040	2 472
Did not want a full-time job	16 390	4 984	11 406	15 856	4 004	11 852
Other reason given	1 207	665	542	2 181	984	1 197
No reason given	55	55	0	194	130	64
Looking after children or adults	1 651	0	1 651	622	0	622
Reason for Part-Time Employment (% of total)						
In education or training	3.39	5.71	2.29	4.57	6.27	3.69
Own illness or inability	6.40	13.41	3.11	5.73	13.15	1.89
Could not find a full-time job	27.91	23.19	30.13	17.32	22.97	14.40
Did not want a full-time job	52.90	50.40	54.07	60.87	45.07	69.04
Other reason given	3.90	6.73	2.57	8.37	11.08	6.97
No reason given	0.18	0.56	0.00	0.74	1.46	0.37
Looking after children or adults	5.33	0.00	7.83	2.39	0.00	3.62

Source: Republic of Cyprus, Statistical Service, Labour Force Survey 2005 and 2003.

Regarding temporary employment the corresponding proportion in total employment was increasing more steeply in the period under consideration (2001–05) than the proportion of part-time employment. In 2005, temporary employment represented 10.1 % of total employment or 37 316 persons, compared with 7.9 % in 2001 or 25 402 persons. Also noted is the fact that women are consistently twice as likely to hold temporary employment as men. In 2005 women on temporary employment accounted for 15.3 % of the female employment population. At the same time, men on temporary employment accounted for 6.1 % of the male employment population. By far the main reason cited for holding a temporary job was that they 'could not find a permanent job'. In 2005 for instance 90.7 % of those in temporary employment said they 'could not find a permanent job'. A considerably smaller proportion (5.7 %) said they were on 'contract for training' (Table 7).

Table 7 — temporary employment by age group, reason and sex

	2005			2001		
	Total	Men	Women	Total	Men	Women
Total Employment Full-Time	367 524	206 395	161 129	322 351	180 927	141 424
Temporary Employment	37 316	12 676	24 640	25 402	8 767	16 635
As a Percentage of Total Employment (%)	10.15	6.14	15.29	7.88	4.85	11.76
Reason for Temporary Employment- % to total						
Contract for training	5.69	8.50	4.25	5.24	4.29	5.75
Could not find a permanent job	90.66	85.04	93.55	80.24	70.83	85.20
Did not want a permanent job	1.38	1.96	1.08	4.87	7.68	3.39
No reason given	0.98	1.90	0.50	3.67	9.31	0.70
Probationary period	1.28	2.59	0.61	5.98	7.89	4.97
Temporary Employment by Age Group- % to Total						
15–24	17.27	19.19	16.28	18.06	19.24	17.43
25–34	39.61	49.60	34.47	40.21	41.42	39.58
35–44	27.47	17.62	32.54	25.49	24.17	26.19
45–54	11.73	7.97	13.66	11.03	8.13	12.56
55–64	3.52	4.53	3.00	4.55	5.81	3.88
65+	0.41	1.10	0.06	0.66	1.23	0.35

Source: Republic of Cyprus, Statistical Service, Labour Force Survey 2005 and 2003.

At the same time, a considerable number of employees have second jobs. In 2005, for instance, 4.7 % of all employees had a second job. Of these 84 % were men and the remaining 16 % were women. The biggest percentage of the second jobholders, 62.2 % of the total, concerned the primary sectors (Table 8).

Table 8 — Persons in employment having a second job by economic activity and sex

	2005			2001		
	Total	Men	Women	Total	Men	Women
Total Employment Full-Time	367.524	206.395	161.129	322.351	180.927	141.424
Persons in employment having a second job	17.239	14.543	2.696	13.201	10.397	2.804
As a Percentage of Total Employment (%)	4.69	7.05	1.67	4.10	5.75	1.98
		0.84				
Economic Activity of 2nd Job						
Primary sectors	10.692	9.742	950	6.317	5.694	623
Secondary sectors	579	331	248	855	731	124
Tertiary sectors	5.968	4.470	1.498	6.029	3.972	2.057
Economic Activity of 2nd Job — % distribution						
Primary sectors	62.02	66.99	35.24	47.85	54.77	22.22
Secondary sectors	3.36	2.28	9.20	6.48	7.03	4.42
Tertiary sectors	34.62	30.74	55.56	45.67	38.20	73.36

Source: Republic of Cyprus, Statistical Service, Labour Force Survey 2005 and 2003.

In sectors of the economy where labour unions are strong, there is reluctance to accept new forms of employment not covered by collective agreements. More recently, collective agreement negotiations in the hotel and hospitality industry, as well as in the construction industry, almost broke down on the issue of introducing new forms of employment. In the banking sector labour concessions in the form of work flexibility were compensated by additional benefits, in the form of higher pay and fewer hours of work.

Beyond the unionised sectors of the economy there is only anecdotal evidence regarding the forms and extent of atypical employment. The available statistical data on atypical forms of employment, as presented above, is limited, since data gathering was initiated after the harmonisation process had started and includes only data on part-time and temporary work, and people holding second jobs. Finally, due to budget constraints, the need to contain the ever expanding civil service sectors, and the extended period of time it takes to complete the filling of a permanent post, the government is experimenting with alternative forms of employment and legal structures.

In practice, most personal contracts of employment are of indefinite duration. Fixed-term contracts are used only in cases of projects with specific timetables. In recent years the government has initiated a practice of hiring temporary employees, some of them on renewable fixed-term contracts of varying duration, and some of them on contracts of indefinite duration. A number of these jobs are temporary in nature, but most of them are not. There is strong pressure on the government to reform this practice focusing on short-term requirements only.

There is little, if any, experience with alternative forms of employment relations such as temporary agency work, pools of workers (multisalariat), company networks and on call work. There is casual work mostly in housecleaning and maintenance activities, construction, catering and agriculture. On call work in Cyprus is usually associated with full-time employees in essential services in the government, the health sector, the police force, the fire department and the security forces, who are on call for emergency cases and they have to report to work. Some private companies also have people on call in order to serve customers in the case of an emergency outside normal working hours.

Subcontracting/outsourcing is a form of employment used extensively in Cyprus, mainly in construction and, to a lesser extent, in the hotel and hospitality industry. The practice is for former employees to be ‘offered’ the opportunity to work for themselves — in practice carrying on their normal duties as usual — but on different terms. In most cases, these employment relations lead to economically dependent workers without the benefits of job security and protection. The trade unions, however, are against this practice.

Telework is a rare form of employment in Cyprus, given the short distances between towns, even though anecdotal evidence suggests that in more recent years an increasing number of people choose to work through this medium. It is a form of employment which is compatible with people working in sectors of the knowledge economy and who prefer work flexibility. It is also compatible with work on international projects.

E. Promoting equal opportunities

Issues of equality and equal treatment of men and women and discrimination based on race or national origin gained attention in Cyprus in the late 1980s and were gradually addressed at all levels. In the field of gender equality in particular, harmonisation with the *acquis communautaire* involved, as in other cases, a great number of changes to the previously existing legal framework.

Prior to harmonisation the national regulatory framework in this field was quite extensive but lacked considerably with regard to the full set of *acquis* provisions. More explicitly, Article 28 of the 1960 Constitution outlined the principle of equal treatment. In addition, relevant legislation in Cyprus also developed by adopting international agreements and conventions of the International Labour Organisation regarding discrimination against women, equal pay, and human rights. The government had ratified these agreements over the years endorsing them with Article 169 of the Constitution.

At the same time national legislation concerning issues of gender equality, prior to harmonisation with the *acquis*, covered aspects of social security, maternity protection, protection of pregnant women and equal pay. In 1994 the government established the 'National Mechanism for Women's Rights' as a consultative body under the guidance of the Ministry of Justice and Public Order with the aim of promoting equality and women's rights in all spheres of public and private life. Members of this body consisted of civil servants, representatives of labour unions and women's organisations and other NGOs.

Despite the regulatory provisions that already existed, a number of statutory adjustments were necessary in order to comply with the full set of the *acquis* requirements. In this respect, the legislation that had to be introduced in Cyprus, in order to harmonise gender equality provisions required under the relevant European directives involved a number of issue areas. These can be summarised as follows ([203]):

- Equal pay for men and women;
- Access to employment, vocational training and promotion, and working conditions;
- Equal treatment for men and women engaged in an activity, in a self-employed capacity and on the protection of self-employed women during pregnancy and motherhood;
- Health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding;
- Parental leave;
- Burden of proof in cases of discrimination based on sex;
- Equal treatment in matters of social security;
- Equal treatment in occupational social security schemes.

The harmonisation process acted as a catalyst on the process of promoting gender equality at work. The legal framework introduced safeguards for equality of treatment in terms of salary and benefits, social security, occupational social security schemes and other plans. It provides for equal treatment of men and women in employment and vocational training, and also contains provisions for the protection of maternity, for parental leave, and leave on grounds of *force majeure*. The legal framework also protects workers from discrimination based on religion, beliefs, special needs, age, national origin, race and sexual preferences.

In spite of these regulatory changes, discrimination against women at work is still an issue. Gender discrimination is reflected in the number of people per level of occupation and the

([203]) Annex B for Cyprus, for Gender Equality directives transposed into national law.

difference in salaries paid for similar work and level of responsibility. According to the Ministry of Labour and Social Insurance, women in 2005 accounted for 43.3 % of total employment and 35.4 % of total employment in jobs requiring higher education. Interestingly there was an equal number of men and women with tertiary education in 2005 (Table 9). Their average monthly remuneration was 74.9 % of the corresponding remuneration for men. Statistics for previous years are similar ([204]). Women also experience higher levels of unemployment. This phenomenon, as already noted, is more acute among young women.

Table 9 — Labour force by educational attainment and sex

	2005			% Distribution to total		
	Total	Men	Women	Total	Men	Women
Less than upper secondary	107 816	65 938	41 878	29.34	31.95	25.99
Upper secondary	145 520	83 285	62 235	39.59	40.35	38.62
Tertiary	114 188	57 172	57 016	31.07	27.70	35.39
of which: ages 25–44	72 150	35 492	36 658	19.63	17.20	22.75
ages 45–64	31 267	18 504	12 763	8.51	8.97	7.92
Total	367 524	206 395	161 129	100.00	100.00	100.00

Source: Republic of Cyprus, Statistical Service, Labour Force Survey 2005.

The government has introduced measures for reconciling work and family life, thus enhancing employment opportunities for women. As stated in the National Action Plan, 'Particular attention is paid to women who continue to have the main responsibilities for the care of children and other family dependants (such as older persons and persons with disabilities). The Public Assistance and Services Laws and their implementation policies favour women, since they deal with the support of single-parent families and cover special needs such as the care of dependants (children, the elderly and people with disabilities).' ([205])

F. Overview and comments

The period 1995–2005 was particularly important for Cyprus since during this period accession negotiations with the EU were initiated and completed. Harmonisation with the *acquis communautaire* affected labour law and industrial relations both directly and indirectly. In itself, harmonisation and the implementation of the *acquis* transformed and enriched the country's labour law in fundamental ways. At the same time it brought into question the very nature of industrial relations. The twin forces of harmonisation and globalisation forced upon the full liberalisation of the domestic economy enhancing the competitive forces in all areas.

Through the harmonisation process, a number of terms and conditions of employment that were in the past secured by collective agreements and/or personal contracts have now acquired a statutory form and are therefore legally enforceable. This shift strengthens the individual protection of workers' rights but at the some time it diminishes the capability of trade unions to offer collective protection and services to their members.

One of the major shifts in industrial relations in recent years, which is reinforced by the new legal framework, is that organisations use personal contracts, as opposed to collective agreements, in establishing the legal employment relation between the organisation and the

([204]) Ministry of Labour and Social Insurance, Annual Report, 2005.
([205]) Republic of Cyprus, NAP 2004–06, 2003: 27.

particular employee. This shift further erodes the collective power of employees and of trade unions. At the same time, the two contractual parties assume rights and responsibilities that are legally enforceable.

New forms of atypical employment are slowly introduced into the labour market, as employers test the limits of the labour market's flexibility and more workers are either forced or choose to enter into new forms of employment. Unfortunately, there is little national experience on the implications of these new forms of atypical employment on the workers and their long-term interests. The existing legal framework in this area has yet to prove its potential. The statistical data available on the issue is limited, and does not really distinguish among different forms of atypical employment.

The accession of Cyprus to the EU and the new labour law framework has forced upon the trade union movement a formidable challenge they have been avoiding for years. Traditionally, the Anglo-Saxon tradition of voluntarism and the understanding of collective agreements as 'gentlemen's agreements' had guided the labour movement in Cyprus. It thus played down the importance of the statutory nature of labour relations that is more popular in continental Europe.

The labour market in Cyprus is faced with a number of issues that directly affect the effective functioning of the economy. These include the viability of the Social Insurance Fund, the age of retirement for private and public sector employees, the restructuring of the broader public sector with particular reference to work schedules and the refocusing and fine tuning of education, lifelong learning and training systems, so that their objectives are compatible with the needs of the economy. Moreover, the labour movement finds itself at the crossroads of formidable challenges, threats and opportunities. For example, it has yet to find ways of fully addressing the needs of knowledge workers and professionals.

This new and more dynamic environment in which Cyprus finds itself should not in principle further erode the traditional consensus and social dialogue among the social partners. At the same time, the social partners should find ways to further strengthen the partnership through the establishment of a local Economic and Social Committee. It is not enough for them to participate at the European level and not be willing to do so at the local level.

Last but not least, the resolution of the long-standing Cyprus problem and the reunification of the island remains the highest priority. The eventual resolution of the problem and reunification of the economy will open the issue of implementing the *acquis* across the whole country.

Chapter II
Country Study on Malta

Introduction

This report traces the evolution of labour law in Malta during the period 1995–2005. Particularly in the past four years there has been an increase in labour legislation, mainly due to two separate reasons: the need to update the existing laws to reflect and respond to emerging realities in the work environment, and the need to align national legislation with EU directives in view of EU membership. This has led to the widening and enhancement of workers' rights and added new emphasis on the improvement of the work-life balance.

A. Historical background and the institutional framework

1. Historical background: labour law in Malta

The very first endeavours at securing good conditions of work date back to pre-independence days, namely the 1939 'Stevedores and Port Workers Ordinance' and the 1940 'Factories Ordinance'. By 1945, these mandates were accompanied by the 'Health, Safety and General Welfare Regulations'. The General Workers' Union, set up in 1943, was instrumental in pushing forward a string of labour legislation that was to secure the rights of workers in various areas ([206]). The Trade Unions and Trade Disputes Ordinance of 1945 installed a legal code of procedures for unions, even though they had been officially registered since 1919. Trade Unions were not liable to actions of tort in events associated with trade disputes.

The Health, Safety and General Welfare Regulations of 1945 continued to strengthen the position of workers. The election of the first Labour government solidified the position of workers and led to the 'Conciliation and Arbitration Act' in 1948 that set up the institutional framework for the settlement of disputes, which included an Arbitration Tribunal and a Court of Inquiry. However, military and civil service employees were excluded. This exclusion has been retained to date and has been incorporated in the Employment and Industrial Relations Act (EIRA) of 2002. The 'Essential Supplies and Services Regulations' of 1952 guaranteed that trade unions did not abuse their power and hinder the provision of essential goods and services. The Dock Safety Regulations of 1953, which derived from the Factories Ordinance, focused on safety conditions on any dock, wharf, quay, or harbour, in Malta.

The 'Conditions of Employment Regulation Act' of 1952 (CERA) was the main framework of labour legislation, which lasted 50 years and provided the basis for the relationship between employers and employees. It was the key means of protection in terms of wages, leave, overtime, and security of job tenure. The Act also provided for Wages Councils, which set the working conditions for different sectors, and the Labour Board, which acted as a consultative board,

([206]) For example these included the Night Work by Women Regulations of 1952, the Woodworking Machinery Regulations of 1949, and the Steam and Hot Water Boilers Regulations of 1976.

offering advice to the Minister on various issues. The Act further gave the then Department of Labour more power in terms of duties to inspect and enforce regulations. Therefore the Wages Councils and the Labour Board can be considered as the first attempt at social dialogue, incorporating the three main stakeholders in the working relationship. In 1955, the Employment Service Act saw the introduction of a National Employment Board with an obligation to register the unemployed workers.

The 'Industrial Relations Act' of 1976 (IRA) set the stage for collective labour conditions. It merged and expanded the previous acts, the Trade Unions and Trade Disputes Ordinance (1945) and the Conciliation and Arbitration Act (1948), to reflect changes in the working environment. These included an Industrial Tribunal, a distinction between trade unions and employers' associations, union recognition and the possibility of reinstatements following unfair dismissals. The last amendment came in 2001 with Act 6. Therefore, while the legal situation continued to develop and get upgraded due to work environment changes, there was, at the same time, a need to overhaul the legislative framework — both to present a more coherent and consolidated version and to sustain the alignment to EU law.

In 2002, after about ten years of discussions, EIRA consolidated CERA and IRA, whilst ensuring increased protection for new types of working relationships based on the relevant EU Labour directives. EIRA, which replaced CERA, is now Title I of the Act, and deals with employment relations. IRA, which is now Title II regards industrial relations. Title III includes supplementary provisions.

Title I is subdivided into seven sections: the legal status of the Employment Relations Board; the recognised conditions of employment; protection of wages; protection against discrimination in employment; termination of contracts of service; enforcement and non-compliance in employment; and administration related to employment. Title II regulates the industrial relations environment and is subdivided into three parts: organisation of workers and employees, dealing with the status, registration and conduct of both trade unions and employers' associations, the restrictions in legal liability and proceedings and on union membership; voluntary settlement of disputes; and the Industrial Tribunal. Title III has three articles: the exemption of certain provisions for government employees; the expenses related with the operation of the provisions of the Act; and the legal recognition of regulations, orders and subsidiary legislation which had emanated from CERA and IRA (even though these were both repealed by EIRA) ([207]).

Other work-related legislation dealt with the employers' duties in terms of compulsory employee insurance protection. Act 13 of 1983 amended Act 16 of 1974, Employers' Liability (Compulsory Insurance) Act. The Social Security Act 10 of 1987 was amended several times, to reflect changes in the social and work environment, the more recent being through Legal Notices 100 and 101 of 2006.

Act 31 of 1976, later amended by Act 13 of 1983, set up the Employment Commission. Act 30 of 1975 dealt with National Holidays and Other Public Holidays. This Act was amended recently

([207]) EIRA Act and subsidiary legislation is available at: http://gov.mt/frame.asp?l=2&url=http://www.education.gov.mt

through Act 2 of 2005, which at the time caused a heated debate in national fora, and in some respects it is still a contested issue ([208]).

Act 4 of 1970, Public Transport Regulation of Employment Act, later amended by Act 23 of 2000, deals with public transport workers. Act 14 of 1962, Port Workers Act, later amended by Act 17 of 1991, deals with port workers.

The 1964 Constitution was the first constitution of Malta as an independent country. It was later significantly amended in 1974, and on several occasions thereafter. Chapters II, IV and XI of the Constitution contain elements related to employment issues. Chapter II is a declaration of various principles including the following: the upholding of the right to work; the state's duty to protect work; the maximum number of working hours; workers' entitlement to a day of rest per week and to annual vacation leave; the promotion of gender equality; the minimum working age; the safeguarding of the labour of minors; the minimum wage; unemployment benefits; social insurance policy; and the entitlement of the disabled and persons unable to work to educational opportunities. Although these provisions are not enforceable in court, it is the state's duty to apply the principles when enacting laws.

Chapter IV, which deals with the Fundamental Rights and Freedoms of the Individual, has several work-related articles. Article 32 is a declaration of the fundamental rights and freedoms of the individual irrespective of 'race, place of origin, political opinions, colour, creed or sex'. Article 35 refers to the protection from forced labour, except in cases in which it is related to a court sentence, or in cases of public emergencies. Article 42 refers to the protection of the freedom of assembly and association.

Chapter XI includes Article 20 dealing with the Employment Commission. The article, among others, refers to the configuration of the Commission, made up of a chairman and four members — two from government and two from the opposition. The role of the Commission is to ensure equality and non-discrimination, especially in relation to political affiliations.

This brief exposition clearly shows that the groundwork for labour law was laid down over half a century ago. Later amendments have strengthened this base, and more recent labour law provisions have been adopted, mostly due to the need to align legislation with the EU *acquis* ([209]). The following section takes a closer look at industrial relations, by presenting details on the employers' associations and trade unions.

2. Employers' associations and trade unions

Title II of EIRA regulates the industrial relations scenario. It is the organisation of both the employers' associations and the trade unions. The Department of Industrial and Employment Relations (DIER) has the role of keeping an updated register of these organisations.

([208]) National holidays coinciding with weekend days used to be added to the leave entitlement. However, the amendment did away with this practice with the consequence that in 2005 workers felt they were deprived of four additional leave days.

([209]) For further information see Baldacchino 2002 and Bronstein 2003.

Employers' Associations

At the end of June 2005, 23 employers' associations were registered in Malta. Together these had a membership of 8 789 ([210]). Out of these 23 associations, the five main ones are the Malta Employers Association (MEA), the General Retailers and Traders Union (GRTU), the Malta Hotels and Restaurants Association (MHRA), the Malta Chamber of Commerce and Enterprise (MCCE) and the Malta Federation of Industry (FOI). All five of these associations are represented in the Malta Council for Economic and Social Development (MCESD), although the latter two do not feature in the official list presented by the Department of Industrial and Employment Relations (DIER) ([211]).

MEA was set up in 1965, after it had joined the Association of Employers ([212]) (1958) and the Malta Employers Confederation (1960). At the end of June 2005 a membership of 260 was recorded. The main aims of MEA are the protection of members' interests within a healthy industrial relations environment, and the maintenance of a viable competitive environment. MEA has ten sector groups and members are included under one of the groups, which practically cover all areas of business ([213]).

GRTU started operating in 1948 under the name of General Retailers Union to safeguard the interests of what they referred to as the 'neglected class'. Today, the GRTU ([214]) has 6 934 members hailing from 12 000 different small business companies. In fact, it represents the widest cross section of proprietor-managed business enterprises ([215]).

MHRA was established in 1958 and represents 70 % of all hotels and 35 % of the restaurants which together account for about 20 000 employees. Its main objective is to promote Malta's tourist industry. It provides information seminars and collects data for statistical analyses. At the end of June 2005, its membership totalled 280 (down from 385 a year earlier) ([216]).

MCCE was founded in 1948 and it is a voluntary organisation open to all those involved in different types of commerce, shipping, insurance, tourism and merchandizing. It acts as arbitrator in disputes related mostly to areas within its competences. Apart from providing various services to its members, it represents them in national and international fora and also reviews their opinions on certain policies. It has 839 members representing 1 137 companies, which produce or provide 1 615 products or services ([217]). The Chamber also offers a wide range of business training programmes.

([210]) Department of Industrial and Employment Relations, 2005.
([211]) Of the 23 employers' associations, the remaining are small, serving the interests of specific sectors.
([212]) This was initially registered as the Union of Employers.
([213]) The website of the association provides a range of documents and position papers on various topics.
([214]) GRTU is seen as the 'voice of the private initiative', and it is also referred to as the Malta Chamber of Small and Medium Enterprises.
([215]) Entrepreneurs can join the GRTU under one of its six divisions: supply of household and personal goods; construction, civil engineering and development; supply of hospitality and leisure services; supply of nutrition and health goods; supply of general services and small manufacturing enterprises. Members are divided into a number of Trade Sections, which act as mini assemblies bringing together entrepreneurs from different fields of activity, who can coordinate their activities to strengthen their specific business sector as one interest group.
([216]) See Department of Industrial and Employment Relations, 2006.
([217]) MCCE website.

FOI was founded in 1946 and is the ‘defender of the interests of local industry’. It acts as a consultation body between its members and governmental organisations and, in cooperation with the social partners, endeavours to create a better climate for industry to develop. FOI organises numerous seminars and information sessions to keep its members updated with developments and events. It further disseminates information about possible joint ventures with other businesses abroad and offers the possibility for meetings within its premises. Furthermore it issues Certificates of Origin and Authentication of Trade Documents.

MCCE and FOI cooperated in opening a joint office — the Malta Business Bureau (MBB) — in 1996 in Brussels to deal with the issues related to Malta’s accession to the EU ([218]). The role of the MBB is to liaise with the relevant institutions in Brussels on matters that directly affect the interested parties in Malta and to provide assistance in accessing funding possibilities to organise seminars for the members.

Unions and union membership

According to the Department of Industrial and Employment Relations, by the end of June 2005 there were 33 registered trade unions accounting for 85 679 members ([219]). There is an ongoing debate on the actual number of unionised workers, as some people may still be considered members even if they are not actually paying their membership fees. Furthermore, due to the increase in atypical work and the decrease in manufacturing and government employment which are highly unionised sectors, the ‘recruitment policy of the general unions… is… ineffective’ and may lead to a downward trend in unionised workers ([220]).

Trade union membership in Malta started to decline in more recent years. Trade union density ([221]) declined from 63.1 % in 2000 to 57.8 % in 2005. Certain sectors such as the police force and the armed forces are precluded from being members of a union. The decline in union members in recent years is mainly due to a restructuring in both the manufacturing sector and the privatised public entities (both had been traditionally highly unionised sectors).

([218]) MHRA also joined them in their Brussels office-networking project in 2004.
([219]) DIER, Annual Report 2006.
([220]) Zammit and Rizzo 2003:147.
([221]) Trade union density is defined as, trade union membership as a percentage of the gainfully employed.

Table 1 — Trade union membership and density 1990–2005

Year	No of Unions	No of Union Members	Union Density (%)
1990	25	69 200	56.9
1991	30	70 704	57.2
1992	30	71 471	57.0
1993	35	73 970	58.5
1994	37	76 795	60.3
1995	39	78 126	59.4
1996	38	79 217	59.4
1997	37	80 972	60.6
1998	34	81 983	61.2
1999	36	84 132	62.4
2000	38	86 107	63.1
2001	33	87 332	63.0
2002	35	86 501	62.8
2003	33	86 061	62.5
2004	33	86 156	58.0
2005	33	85 679	57.8

Sources: EIRO and DIER, Registrar of Trade Unions.

Trade union membership is strongest in the public sector (including parastatal organisations) with a unionisation rate of about 90 %. These employees are covered by collective agreements. Within the private sector it is mainly manufacturing that has the highest union density, while the primary sector (agriculture, fishing, quarrying) and the services sector have low densities. This is mainly due to the small size and family oriented business entities in these sectors. Overall, industrial action is somewhat stable. Higher demands are targeted in the public sector, which appears immune to competitiveness, as opposed to the private sector where unions realise that a loss in competitiveness will dramatically result in job losses for their members.

According to EIRA, at least seven persons are needed in order to register a union. A breakdown of union membership in 2005, as shown in Table 2 below, indicates that the size of unions varies a lot. Figures show that five unions have over 1 000 members, while the greater part of unions has a lower level of members.

Table 2 — Number of unions and their membership grouped by size (2005)

Union Membership	Up to 50	51–100	101–500	500–1000	Over 1000
No of Unions	13	7	7	1	5

Source: DIER, Register of Trade Unions

Membership is rather gender biased, since about 72 % are male, except in traditional female employment sectors such as teaching and nursing. This is due to the low female participation in Malta, which hovers around 34 %. Unions have generally maintained their bargaining power, although in recent years they have been displaying a more moderate attitude during negotiations. Table 3 shows the five biggest unions by membership in 2005. There may have been some shedding of members in the later years due to economic restructuring as mentioned earlier.

Table 3 — Main unions and their membership

Union	Members in 2005
General Workers' Union	45 901
Union Haddiema Maghqudin*	26 018
Malta Union of Teachers	6 667
Malta Union of Bank Employees	3 027
Malta Union of Midwives and Nurses	2 301
Others	1 765
Total	85 679

Source: DIER, Registrar of Trade Unions.
* Union of United Workers.

Employees in the public sector and large companies in the private sector are generally covered by collective agreements. Collective agreements must incorporate the requirements under EIRA. If an agreement falls short of the conditions of EIRA, even if agreed by the two parties, it becomes null and void. Some agreements may also include other aspects specifically pertaining to the company or the sector in question. Collective agreements have to be registered at the Department of Industrial and Employment Relations within 15 days from their signature.

3. Dispute resolution and other adjudication bodies

The Department of Industrial and Employment Relations endeavours to intervene in order to solve industrial disputes. Title II (Part II) of EIRA refers to the Voluntary Settlement of Disputes and deals with the appointment of a Conciliation Panel, made up of five conciliators, appointed by the Minister in consultation with the Malta Council for Economic and Social Development (MCESD). A trade dispute may thus either be referred to the Director or to a conciliator. If unsuccessful, then the Director refers the case to the Ministry, which either appoints a court of inquiry or refers the matter to the Industrial Tribunal. The latter is an administrative Tribunal consisting of a chairman and two members, representing workers and employers, unless the case to be adjudicated deals with unfair dismissal, in which case only the chairman reviews the case ([222]).

Another adjudication body is the National Employment Authority (NEA). The unemployment register at the Employment and Training Corporation (ETC) is divided into three parts: Part I includes those who are ready to work immediately and who can apply for unemployment benefit (the registered unemployed); Part II incorporates those who have left their job willingly or due to misconduct or who for some reason have been relegated to the Part II section; Part III includes those who are looking for an alternative or a temporary job. Complaints emanating from the unemployed in Part II, who feel they should be in Part I, may appeal for adjudication by the NEA, whose role is to ascertain fairness in this regard. The NEA derives its legal status from the Employment and Training Services Act 28 of 1995 and consists of seven members (three independent, two representing employers and two representing the workers.)

([222]) The jurisdiction of the Industrial Tribunal is governed by Title II (Part III) of EIRA.

4. Social dialogue

Two entities may be viewed as working towards forms of social dialogue, although no official social pact is currently in place in Malta. The first is the Employment Relations Board (ERB), whose legal status derives from EIRA ([223]). ERB is made up of 13 members: an independent chairperson; the Director of DIER (who acts as deputy chairperson); four members representing the unions and four members of the employers' associations ([224]); and three other persons appointed by the Minister. The role of ERB is advisory, as with regard to conditions of employment. Through ERB the stakeholders have ownership of the legislative process, through consultation during the development process, since EIRA provides the possibility of continuous updating of the legislation, through legal notices (LN).

The process of enactment of a legal notice is tripartite, and it is regulated by EIRA ([225]). ERB recommends to the Minister draft legislations to existing regulations that are national standard orders and sectoral regulation orders. The Minister may enact the legislation or make amendments and refer to ERB. It is returned to the Ministry for the final review prior to being presented in parliament.

The second body is the Malta Council for Economic and Social Development (MCESD). MCESD — established by Act 15 of 2001 —a consultative and advisory body made up of 14 members that represent the government, the employers and the unions. Under its umbrella three Working Committees were set up, each focusing on a specific issue: competitiveness, the role of the government in the economy, and the public health sector. A Civil Society Committee is also included to account for the views from civil society at large. MCESD also had the role to agree on a Social Pact ([226]). However, due to internal disagreements on certain clauses it never came into being. Nonetheless, the government has passed legislation to validate various points in the Social Pact, thus taking on board aspects of issues set out in the draft.

5. Malta's employment situation

Following the mid-term review of the Lisbon Agenda, which aimed to make the Community the most competitive economy in the world by 2010, the Commission launched a three-year programme (2005–08) to provide guidance to the Member States in their endeavour to reach the goals set out in the original Agenda. The Council Decision of 12 July 2005 provides guidelines 17 to 24 dealing with Employment policies. Guidelines 17 to 20 aim to increase the labour supply by attracting and retaining more people and to provide sustainable social protection systems. Guidelines 21 and 22 are meant to improve the adaptability of both workers and enterprises. Lastly, Guidelines 23 and 24 aim to increase investment in human capital through the provision of better education and skills training.

In the case of Malta, as stated in its National Reform Programme (NRP), Guidelines 19 and 22 were not 'tackled', as the other guidelines were seen to be more of a priority. The NRP lists five

([223]) Title I, Part I.
([224]) These eight are nominated by the MCESD.
([225]) Title I, Part I, Articles 3 and 4.
([226]) A draft was completed on 15 December 2004 to run for three years.

priority areas: sustainability of public finances, competitiveness, employment, education and training, and environment.

According to the Labour Force Survey of 2005, the employment rate for January/March 2005 was only 54.6 % (up 0.2 % from a year earlier). The corresponding male rate was 74.5 % while the female rate was only 34.5 %. This translated into 102 777 male and 46 959 female workers, bringing the total employed to 149 736 ([227]).

The number of unemployed was 10 838 or 6.7 % of the total workforce (which is lower than the 11 528 (7.2 %) of a year earlier). Of these 6 806 were males while 4 032 were females. Almost half (48.1 %) are in the 15–24 age group while 22.1 % are in the over 40 age bracket (45–54). Only 23.2 % of all unemployed are actually registering for work and receiving some type of financial assistance. Furthermore, 57.7 % had been in employment before becoming unemployed, while 49.1 % had been searching for a job for over a year ([228]).

The number of males in full-time employment was 98 873, while the corresponding figure for females was 36 346 bringing the total figure for January/March 2005 for full-time employees to 135 219 (a year earlier the figure had been marginally higher at 135 468). For the three-month period October/December 2005, this figure continued to decrease to 133 841 ([229]).

In terms of part-time work, for January/March 2005 the figure stood at 14 517 (3 904 males and 10 613 females) ([230]). The figure marginally decreased for the period October/December 2005 to 14 388 (4 946 males and 9 442 females) ([231]). This indicates that while full-time employment declined part-time employment increased marginally though not with a magnitude to counterbalance the lost full-time jobs. The result was a decline in the number of gainfully employed.

B. New ways of regulating work

1. Main acts and subsidiary law

The major changes in labour law since the 1990s have been in connection with the necessity to update the existing legislation and align national law to the *acquis communautaire*. New work-related legislative acts — apart from the amendments mentioned above — are listed below in chronological order with the latest amendments in brackets:

Act 28 of 1990 — Employment and Training Services Act (Act 7 of 2006)
Act 24 of 1994 — Professional Secrecy Act (Act 10 of 2004)
Act 14 of 1996 — Periti Act (LN 248 of 2004)
Act 17 of 1996 — Security Services Act (Act 16 of 1997)
Act 8 of 1997 — Tribunal for the Investigation of Injustices Act (Act 16 of 1997)
Act 18 of 1998 — Insurance Brokers and other Intermediaries Act (Act 17 of 2002)
Act 1 of 2000 — Equal Opportunities (Disabled) Act

([227]) Labour Force Survey 2005.
([228]) Labour Force Survey 2005.
([229]) Labour Force Survey 2005.
([230]) This figure experienced an increase from the previous year, when the total was 13 187.
([231]) Labour Force Survey 2005.

Act 28 of 2000 — Occupation Health and Safety Act
Act 15 of 2001 — Malta Council for Economic and Social Development Act
Act 30 of 2001 — Cooperative Societies Act
Act 18 of 2002 — Mutual Recognition of Qualifications Act (LN 248 of 2004)
Act 22 of 2002 — Employment and Industrial Relations Act (Act 3 of 2004)
Act 1 of 2003 — Equality for Men and Women Act
Act 9 of 2003 — Data Protection Act (LN 186 of 2006)
Act 12 of 2003 — Health Care Professions Act (LN 147 of 2006)
Act 17 of 2003 — Social Work Profession Act
Act 10 of 2004 — Psychology Profession Act

One of the main legislative acts was Act 28 of 1990, which set up the Employment and Training Corporation (ETC) ([232]). Act 28 of 2000 set up the Occupational Health and Safety Authority and an Occupation Health and Safety Appeals Board, which aimed to provide a regulatory function in terms of health and safety issues at work. Act 1 of 2000 and Act 1 of 2003 both deal with the elimination of discrimination. The former deals with the non-discrimination of disabled people whilst the latter deals with equality between men and women. The major work-related legislation was incorporated in Act 22 of 2002 (EIRA). This practically merged CERA and IRA and also strengthened work issues, such as: recognition of full-time employees with reduced hours; specific references to health and safety and protection from victimisation and discrimination; longer probation and notice periods; explicit reference to collective agreements; providing stronger powers to the Industrial Tribunal. Legal notices related to the Employment and Industrial Relations Act are noted in Table 4 below ([233]).

Table 4 — Legal notices under the Employment and Industrial Relations Act

2002	
LN 426	Parental Leave Entitlement
LN 427	Part-Time Employees
LN 428	Collective Redundancies (Protection of Employment)
LN 429	Contracts of Service for a Fixed Term
LN 430	Posting of Workers in Malta
LN 431	Information to Employees
LN 432	Guarantee Fund
LN 433	Transfer of Business (Protection of Employment)
2003	
LN 224	European Works Council (Information and Consultation)
LN 225	Parental Leave Entitlement
LN 247	Organisation of Working Time
LN 296	Urgent Family Leave
LN 297	Employment and Industrial Relations Interpretation Order
LN 306	Organisation of Working Time (Civil Aviation)
LN 413	European Works Council (Information and Consultation)
LN 439	Protection of Maternity (Employment)
LN 440	Young Persons (Employment)
2004	
LN 3	Protection of Maternity (Employment)
LN 324	European Works Council
LN 442	Collective Redundancies
LN 443	Posting of Workers in Malta
LN 444	Guarantee Fund
LN 452	Employee Involvement
LN 461	Equal Treatment
2006	
LN 10	Employee (Information and Consultation)

([232]) ETC took over from the work of the previous Labour Department including the unemployment register and the inspectorate role. Act 28 also replaced the National Employment Board with the National Employment Authority.
([233]) Annex A provides a list of legal notices and the corresponding directives.

Act 15 of 2001 refers to the Malta Council for Economic and Social Development. This is an advisory body, which incorporates all the social partners — the government, employers' and employees' representatives. Its main role is to ensure dialogue in order to reach consensus on issues that impact on economic and social development.

The remaining acts concern specific groups of workers and the regulation of their profession or work organisation. These are the main acts of law that are directly or indirectly related to work. Subsidiary law, emanating from these acts, is enacted through legal notices that are discussed in parliament and published in the government Gazette ([234]).
There are other means of regulating labour conditions including:

- the collective agreements negotiated by the unions on behalf of their members ([235]);
- the Public Service Management Code ([236]) which spells out the conditions of employment of public officers;
- the arbitration awards emanating from the Industrial Tribunal;
- judicial decisions which seek to regulate events in industrial relations practice.

2. The minimum wage

In 2004 the statutory minimum wage in Malta was Lm53.88 (125.54 euros) per week. This legislation is accompanied by Wage Regulation Orders (of which there are 31), covering the working conditions of certain sectors of the economy. Employees covered by the Wage Orders do not fall under the statutory minimum wage. The government establishes these orders after consultation with the various Wages Councils ([237]). Therefore the statutory minimum wage applies to all employees except for the 31 sectors for which the Wage Orders apply.

There is no distinction made between an employee being more qualified or experienced, except in the sectors covered under the Wage Orders. However, employees under the age of 18 may be allocated reduced rates. In fact employees aged 17 get 94.6 % of the minimum wage while those under 17 receive 92.34 %. The government adjusts statutory minimum wages annually. Such adjustments depend on changes in the cost of living, based on the inflationary process in the previous 12 months, and after consultation with the Employment Relations Board. The Department for Employment and Industrial Relations is responsible for supervision and enforcement of the minimum wage legislation ([238]).
This legislation for the national minimum wage was enacted in 1974 as a means of social protection. Most unions agree with this type of rationale. However, employers tend to regard the law as restricting because it increases their overall labour costs without linkage to productivity gains. For this reason, given the rather restricted labour market in Malta, removal of the minimum wage legislation may well result in a race to the bottom, with the main casualty being the low wage earner.

([234]) For example, EIRA grants the Minister of Employment and Industrial Relations the power to prescribe various types of regulations after consulting with the Employment Relations Board. These regulations take the form of legal notices and are enforceable by law.
([235]) As far as they respect the minimum parameters established by EIRA, any additional provisions in the agreements are legally binding.
([236]) Previously EstaCode.
([237]) Annex B presents a list of these Orders and the sectors they refer to.
([238]) Non-compliance can result in fines ranging from Lm100 (233 euros) for the first infringement to Lm1000 (2330 euros) for a second infringement.

3. Health and safety

The main health and safety legislation is the Occupational Health and Safety Authority Act (2000), which has led to a number of related legal notices which are listed in Table 5 below.

Table 5 — Legal notices emanating from the Occupational Health and Safety Authority Act

Legal Notice	Regulations
2000	
LN 91	Protection of Young Persons at Work Places
LN 92	Protection of Maternity at Work Places
2002	
LN 10	Occupational Health and Safety Appeals Board (Procedural)
LN 11	Work Place (First Aid)
LN 43	Minimum Health and Safety Regulations for Work with Display Screen Equipment
LN 44	Workplace (Minimum Health and Safety Requirements)
LN 45	Workplace (Provision of Health and/or Safety Signs)
2003	
LN 34	Factories (Night Work by Women)
LN 35	Protection against Risks of Back Injury at Workplaces
LN 36	General Provisions for Health and Safety at Workplaces
LN 37	Control of Major Accident Hazard
LN 120	Indicative Occupational Exposure Limit Values on the Protection of the Health and Safety of Workers from Risks related to Chemical Agents at Work
LN 121	Minimum Requirements for the Use of Personal Protective Equipment at Work
LN 122	Protection of Workers from the Risks Related to Exposure to Carcinogens or Mutagens at Work
LN 123	Protection of Workers from the Risks related to Exposure to Asbestos at Work
LN 227	Protection of the Health and Safety of Workers from the Risks related to Chemical Agents at Work
	Protection of Workers from Risks related to Exposure to Biological Agents at Work
LN 228	Protection of Workers in the Mineral Extracting Industries through Drilling and of Workers in Surface and
LN 379	Underground Mineral-extracting Industries
2004	
LN 41	Workplace (Minimum Requirements for Work Confined Spaces and Spaces having Explosive Atmospheres)
	Workplace (Minimum Health and Safety Requirements for the Protection of Workers from Risks arising from
LN 185	Exposure to Noise)
LN 281	Workplace (Minimum Health and Safety Requirements for Work at Construction Sites)
LN 282	Work Equipment (Minimum Safety and Health Requirements)
LN 283	Protection of Young Persons at Work Places (Amendment)
2005	
LN 6	Control of Major Accident Hazards (Amendment)
LN 371	Work Place (Minimum Health and Safety Requirements for the Protection of Workers from Risks resulting from Exposure to Vibration)
2006	
LN 158	Work Place (Minimum Health and Safety Requirements for the Protection of Workers from Risks resulting from Exposure to Noise)

Source: Occupational Health and Safety Authority (OHSA).

The Occupational Health and Safety Authority (OHSA) is the institutional body responsible for health and safety issues related to the work environment. Its responsibilities include: advising the Minister regarding necessary regulations and preparing legislation; monitoring compliance with these regulations; promoting the dissemination of information and providing training programmes; gathering and analysing data; keeping records of expert personnel on health and safety issues; registering plant and equipment utilised in workplaces and vetting certificates; carrying out investigations; and undertaking scientific research to ameliorate working conditions

in terms of health and safety. In the 12 months prior to September 2005, OHSA had conducted 1 364 workplace visits, organised 48 courses, vetted 2 907 equipment certificates, replied to 2 419 telephone requests for information and had 1 987 participants at its training programmes ([239]).

C. From job security to employability

1. The EU context

Employability is becoming a key issue in countries that want to retain their competitive advantage. This has led to claims for the need of lifelong learning and the ability of workers to be equipped with skills so that in the event of a job loss they are capable of finding alternative work. However, this has also meant that there are tensions between the idea of job security and jobs for life. It is important to guarantee that while workers should be encouraged to seek to update their skill base, they are not at the mercy of the employers and thus have protection against unfair dismissals. A term that has gained coinage in EU circles is the idea of flexicurity, defined as: 'a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, the work organisation and labour relations on the one hand, and to enhance security — employment security and social security — notably for weaker groups in and outside the labour market on the other hand.' ([240])

2. Protection against dismissals

Traditionally, employment in Malta has been characterised by the idea of jobs for life. Relevant surveys over time have ascertained the overriding 'job security' concern in Malta ([241]). With over one third of employed in government jobs, job security has always been a much cherished characteristic. However, in recent years, job security is weakening. This is particularly true especially in the private sector, which has witnessed an increase in definite contract workers, as well as in part-time and temporary workers. Even the role of trade unions was focused primarily on job security. This was done mainly through collective agreements with a substantial number of employees in both the private and public sectors still being regulated by them. Although most collective agreements tend to reproduce the formal legal structure, some elements may still be specific to the particular employer/employee relationship.

In Malta employment may be terminated either by operation of law, by the employer, or the employee. The operation of law is basically the expiry of the term according to the contract signed between the two parties. The employee may leave during the probation period or by resigning afterwards ([242]). Similarly, the employer may dismiss an employee both during the probation period and afterwards. The grounds for dismissal are three: redundancy; a sufficient cause if on an indefinite term contract; and for whatever reason in the case of a fixed-term

([239]) OHSA Activity Report 2005.
([240]) Wilthagen and Rogowski 2002: 250.
([241]) See Zammit 1994.
([242]) In the case of managerial or technical grades, who earn more than double the minimum wage, the probation period is one year.

contract. Even if the employer does not include the probation period in the contract, EIRA safeguards this, and it is stated that the probation period is generally six months.

Articles 36 to 39 of EIRA deal with termination of employment, collective redundancies and transfer of business. These apply to all employees, except public sector employees. There are two other exceptions: in the case of police officers who are provided for under Article 123 of the Police Act of 1961; and seamen who fall under the provisions of the Merchant Shipping Act of 1973.

3. Individual dismissals

Regulations under LN 431/2002 are the transposition of Council Directive 91/533/EEC regarding information on individual employment contracts, although such provisions for information date back to 1952. It applies to all employees except those employed for a period of less than one month; less than eight hours a week; or for a 'specific defined task'. The latter is more restrictive than the phrase 'of a casual and/or specific nature' found in the directive ([243]). Except for the date of contract and some changes to the grade and type of work, the transposition of the directive has been effected. The LN also applies to outworkers and employees required to work outside the country for more than one month.

The fines for an employer that breaches this LN can range from Lm50 (116.50 euros) to Lm500 (1 165 euros). However, this amount is insufficient to act as a deterrent against unfair dismissal. DIER handles inspections and enforcement. Although the incidence of contraventions can be high, it is the general impression that the inspectorate tries to resolve the issue without resorting to legal action, especially since these are more likely to occur in small enterprises. Larger companies however tend to comply with the regulations.

4. Collective redundancies

In a globally competitive work environment, companies may be forced to close shop if they cannot cope with competition and this may lead to collective redundancies. LN 442/2004 (which amended LN 428/2002) adopted the provisions of Council Directive 98/59/EC. Prior to harmonisation, Maltese law did not incorporate a definition of collective redundancy and thus the Industrial Tribunal used to make references to ILO recommendations. Following harmonisation, the regulations defined collective redundancies as about 10 % of the employed, depending on company size. However, there is a second criterion for definition in the directive, which is the fact that such dismissals must occur over a period of 30 days, and this definition is absent from the Maltese transposed regulations. As a result of this, complications may arise especially in the case where the situation signifies collective redundancies under the EU directive but not under the Maltese Regulations ([244]).

([243]) The individual must receive within eight days of signing the contract a copy of such agreement, or a letter of engagement if the contract does not include all relevant information that should be passed on to the employee. Such information must include details of the contracting parties, place of work, date of beginning of employment, grade and type of work, duration of contract if fixed term, leave entitlement, notice period, remuneration, working hours, probation period and fines applicable.

([244]) The exclusion clause provided for by the directive has been used by Malta with the result that the Regulations do not apply to terminations

The Maltese Regulations stipulate that within seven working days of having notified redundancies, the employer has to provide all relevant information in written form, stating reasons for such action and termination details. This time limit clause is not included in the directive. The employer is not allowed to shirk from the duty of consultation and information under the excuse that the redundancies derive from a decision of the parent company. The law also conditions the employer to inform the Director for Employment and Industrial Relations, unless the redundancies result from a judicial decision. The fine for breaching is to be no less than Lm500 (1 165 euros) per employee made redundant.

The Employee Information and Consultation Regulations (LN10/2006) is based on Council Directive 2002/14/EC and provides for a framework for consultation and the provision of information to employees. Currently, the Regulations are applicable only to undertakings with 150 employees and over ([245]).

Table 6 — Number of business units and employees by sector 2005

Sector	No of Enterprises	No of Persons Employed
Agriculture and Fishing	4 423	5 684
Mining and Quarrying	92	401
Manufacturing	4 074	29 942
Construction	4 872	12 917
Wholesale and Retail	15 377	28 268
Hotels and Restaurants	3 543	18 861
Services	22 004	73 611
TOTAL	54 385	169 684

Source: NSO, the Business Register.

Table 6 presents the number of business units and the number of employees per company by sector, for 2005. Table 7 provides the number of enterprises by company size and number of persons employed in the manufacturing sector. The Regulations apply to 18 companies, which increase to 25 and 40 in the following two years.

The employer is obliged to inform the employees or their representatives on the economic situation of the company, on the probable development of employment, and on the possible changes in work organisation that impinge on the employees. Employees that are not represented by a union have the right to elect one of them to act as their representative and the employer is obliged to ensure that the correct procedure for representation is followed ([246]).

under fixed-term contracts, for specific tasks or to seamen.

([245]) In 2007, they will be applicable also to enterprises employing between 100 and 149 employees, while in 2008 companies with 50 employees and over will also be included. In an economy characterised by SMEs, this LN may not be effective in encouraging information and consultation to employees in small companies.

([246]) Fines regarding non-compliance with this can range from Lm10 (23.30 euros) to Lm50 (116.50 euros) for every employee. Fines for any other offence are higher and may range from Lm500 (1 165 euros) to Lm5000 (11 650 euros).

Table 7 — Manufacturing enterprises by size of firm and number of employees 2001

	Micro	Micro	Small	Small	Medium	Medium	Large	TOTAL
	Less than 5	6 to 9	10 –19	20 — 49	50 — 99	100–149	250 and more	
No of Enterprises	2 519	219	147	112	40	25	18	3 080
No of persons employed	3 874	1 589	2 008	3 450	3 761	2 741	13 234	30 657

Source: NSO.

These Regulations may help to avert collective redundancies, as the employees have the chance to be informed (firsthand) about the company's situation and thus work towards keeping up with time stipulations in contracts, ensure work of quality, and other elements in order to ensure the production of a competitive good, thus safeguarding their employment.

5. Measures to encourage employability

The shift from job security to employability entails a culture shift in Malta, mainly due to the idea that a lifelong job has not traditionally been associated with lifelong learning. However, the increase in fixed-term contracts, part-time work and the impression that the government cannot afford to increase its employment level have led to an impetus to make use of the increased opportunities for learning, in order to increase the personal knowledge base. The focus from the government agency, the Employment and Training Corporation (ETC), is on the unemployed or categories at risk ([247]). However, there are other opportunities for workers and these derive from both public and private institutions.

The Employment and Training Placement Scheme (ETPS) provides training to newly employed personnel drawn from the registered unemployed ([248]). The programme caters for specific clusters of people, such as: those who have been registering for over 12 months; for the age-group 25–39 who have been registering for at least six months; for the disadvantaged registering as unemployed such as single parents with child custody, ex-convicts or ex-substance abusers — all considered as categories of possible workers but at risk of social exclusion. For the duration of the training period, the working conditions are those stipulated under the main legislative framework (EIRA).

The Job Experience Scheme (JES) targets new labour market entrants, essentially school leavers, to provide them with a degree of work experience. The programme provides for a combination of in-house training and work experience, although it does not oblige the employer to offer the trainee a future job. Young people aged 16 and over are eligible to apply for a placement ([249]). Sponsors may come from all sectors of economic life. The aim is to provide a bridge between school and the labour market. The Work Start Scheme (WSS) is similar but is geared towards adults who have been inactive for some time and need training to re-integrate into the labour market. However, the same conditions as for JES apply; participants must be over 25 years. The underlying idea is to provide for the upgrading of skills for the older prospective workers.

([247]) The ETC has several employment schemes that together with training programmes help the unemployed find a job. At present the schemes are the following: Employment and Training Placement Scheme (ETPS); Job Experience Scheme (JES); Redeployment Scheme (RS); Work Start Scheme (WSS); and Active Youths Scheme (AYS).

([248]) The ETC provides 50 % of the minimum wage for the training for a maximum of 52 weeks.

([249]) This may last for a maximum of 13 weeks providing for a 20-hour working week.

The Redeployment Scheme (RS) provides for training to newly appointed workers who had been made redundant or to persons whose employment is at risk, to enable the individual to re-integrate into the labour market. Again the ETC provides for 50 % of the minimum wage for a maximum of 13 weeks. The Active Youths Scheme (AYS) is directed towards young people, and it aims to help them realise new or hidden talents by practically providing their services in community work ([250]). Young people between 16 and 24 years of age, who have been registering for at least six months, are eligible to apply. The sponsoring organisation must be a Non-Governmental Organisation (NGO), politically neutral.

On the individual level, the number of employed who are choosing to follow courses at private institutions or at the tertiary level have been increasing in recent years. This can be confirmed when one investigates the increasing number of part-time (normally evening) courses being offered, at every level, from certificate courses to new master's degrees. The evening courses provide full-time workers with the possibility to follow courses after their working hours, while providing them with a wider skill base for promotions, or in the event of changing jobs.

Furthermore, the government is working towards increasing the number of young people that continue with their education after the age of 16 ([251]). Table 8 provides data on the number of graduates from the University of Malta between 2000 and 2005. Figures show that the female population is increasing at a faster rate than the male population; however, the figure of 2 594 is still a low percentage of the 16+ age group compared to other European countries. Furthermore, the figures include also post-graduates, who are not of school-leaving age. Recent years have seen the provision of tertiary education services by private institutions in collaboration with external universities; however, data not available.

Table 8 — Degrees and diplomas conferred by the University of Malta 2000–2005

	Males	Females	Total
2000	645	660	1 305
2001	943	1 029	1 972
2002	937	1 096	2 033
2003	965	1 248	2 213
2004	1 067	1 643	2 710
2005	845	1 113	1 958*

Source: University of Malta.
*excludes 636 diplomas and post-graduate certificates for which a breakdown by sex was unavailable. Total should read 2 594.

The government has its own staff development schemes, both external sponsorships and internal training sessions. The internal courses tend to be of a short duration (one to five half days) in specific areas related to public service, such as management development, the EU, information technology, and finance. The Staff Development Organisation organises other courses, in collaboration with external agencies, such as foreign language courses, which may be of a longer duration. External courses include sponsorships for a two year part-time Diploma Course in Public Administration and another Diploma in Social Studies (Gender and Development). The

([250]) ETC provides a remuneration of Lm30 (about 70 euros) per week for a period of six months, working a 20-hour week.
([251]) 5–16 is the compulsory education age.

government also provides financial assistance and scholarships for post-graduate training, although a limited number of these are offered.

Other government agencies, such as the diverse Foundations, the Central Bank, and the University of Malta, also provide for the training needs of their employees. For example, the Foundation for Human Resource Development (FHRD) is a national non-government organisation with input from the private and public sectors. It was established in 1990 with the main role of developing human resources. The foundation offers a broad range of services, from short courses, to degrees (in collaboration with universities on a distance learning basis). The input of the FHRD, which also organises conferences, appears to be a valid contribution to the continuous learning of employees.

The private sector is however less inclined to invest in the training needs of its employees. In-house training is provided for new employees, but the percentage of the budget allocated for ongoing training is usually negligible. The private sector demands qualified personnel in order to be in a position to upgrade its productive capacity but somehow appears unwilling to loosen the purse strings to do so, and expects the government and the general taxpayers to provide for such expertise. There is a need for more coordination between the private and public sector, and for financial commitment from the end users of such knowledge gain (that is, the employers and the employees themselves). A training fund with input from the employers had been one of the items on the draft Social Pact but this item never materialised.

6. Training and lifelong learning

The main institution, for work-related issues, is the ETC. At six-month intervals it issues the 'Employment Barometer' that provides the prospects for employment through short-run indicators. Its aim is to identify the general employment needs where gaps and shortages exist, and thus act as a labour forecasting tool. It is essential for the educational institutions to provide the adequate training in order to meet the needs of the economy.

The survey reviewed consisted of 1 104 company respondents (or 70 % of the original sample), which together accounted for 63 348 full-time and part-time employees. This figure represented 58.3 % employees in entities employing more than four persons ([252]). The following table presents the structure of the respondents according to company size.

Table 9 — Respondents of ETC's employment prospects survey

Company size	Number of employers	Respondents as percentage of all companies of similar size
5–49 employees	1 248	70 %
50 and over employees	331	68.6 %

Source: ETC Employment Barometer, Summer/Autumn 2005.
NB: The original population sample was 1 579 employers, representing a total workforce of 106 615 persons. Employers with four or less employees were not included in the sample even though they constitute 21.4 % of all workers.

([252]) The sample is considered as representative as it was stratified according to economic activity and company size and gleaned information from both public and private sector, although the latter responded more.

The top ten full-time occupations in demand by the employers for the months June/November 2005 were: unskilled labourers; clerks; accountants; crane drivers/operators; plumbers and pipe fitters; mechanical technicians; sales representatives; machine operators and assemblers; waiters/waitresses and stackers for supermarkets. This is mainly because the sectors that felt they would improve their operations and would require new workers were in the machinery and electrical appliances manufacturing sector; banks and financial institutions; community and business; and hotels, catering and other personal services. The majority of jobs therefore do not require extensive training programmes in order to meet the needs of the market.

In terms of part-time work, the top ten requests by employers for the same period were: waiters/waitresses; animators; cleaners; teaching professionals (special education); housekeepers and related workers; chambermaids, clerks; skilled labourers; chefs; and kitchen hands. The seasonal aspect is very much evident. Due to the tourist industry, the summer period provides for temporary workers in ancillary services, including the teaching of English to foreigners, for which demand increases during the summer. The training needs are therefore those associated with catering establishments and do not constitute a higher rank type of educational expertise as they deal mostly with elementary occupations.

Nonetheless the expectations of the employers can be high. According to the summer/autumn 2005 Employment Barometer, 'Employers demand a balanced mix of basic and soft skills as well as sound academic qualifications from prospective job candidates.' Of the prospective job seekers, employers expect 25 % of them to be of 'O' level standard (essentially of secondary school leaving level), 11 % to possess secondary level vocational qualifications, and 18 % to derive from a tertiary level educational background. For 22 % of applicants, the employers do not require any type of qualifications, although the applicants are nonetheless required to state them during the interviews. The employers do not specifically require qualifications for certain jobs, but would prefer previous work experience (19 %), flexibility (12 %), literacy (11 %), motivation (11 %), work ethic (11 %), interpersonal skills (6 %) and communication skills (4 %). Considering that the prospective jobs availability for full-time workers, (except for accountants) were in vocational and low-skilled jobs, the emphasis on basic skills is not surprising. Furthermore, if the employer can pay a lower wage for a more qualified employee it is a bonus for him/her, though not for the individual involved.

In the case of part-time work the prerequisites-mix is somewhat different: 'O' level standard (26 %), 'A' level standard (post secondary but not tertiary level) (21 %); post-secondary vocational qualifications (8 %); tourism related training at secondary (6 %) and tertiary (4 %) levels. In 26 % of the cases, no specific official qualifications were required but the employer emphasised other attributes: work experience (22 %); interpersonal skills (13 %); language skills (11 %); flexibility (8 %); work ethic (8 %); communication skills (7 %); and motivation (4 %). Since most of the part-time jobs anticipated for the coming six months were seasonal and tourism related, the skills requested did not require a high level of educational achievement but were more basic and related to interpersonal communicative skills.

When shortages in the skills pool occurred, 10.4 % of employers solved the problems by internal redistribution of work, outsourcing, or recruitment of foreigners and casuals. The remaining 89.6 % that did not solve the shortages, stated that this was due to the lack of necessary skills and

because the available workers were not suitable or were too expensive to employ. It is remarkable to note that the employers did not suggest the introduction of training as a top priority, to assuage their needs. This sustains the assertion made earlier, that employers want a ready-made pool of available skills but appear unwilling to pay for their needs as they prefer to enjoy a free ride.

This rings rather hollow if one considers that the effect of shortages led to an increase in the working hours of their employees (31.4 %), a reduction in output (3 %) or a downright turning down of orders (3.7 %), outsourcing of activities (0.7 %), postponement of expansion plans (1.1 %), and even serious consideration of moving production abroad (0.4 %). However, on the positive side, this also triggered in some employers a need for training activities. The overtime cost increased the human resource wage bill by 26.6 %, which prompted 16.1 % of employers to commence their own training programmes, while a further 16.8 % enhanced their existing training provisions.

The Survey of the Employment Prospects found employers agreeing on the need for staff training, although only 17.3 % agreed that the skill mix has to be of academic/vocational and soft skills. The request to upgrade the skills base varied: some calling for basic academic secondary level training, while others for secondary level vocational skills, but only 7.1 % of employers would prefer their employees to reach the tertiary level. In order to build a more advanced human resource base, therefore one first needs to promote basic education; however, it does not augur well that employers do not prefer a more educated and skilled workforce. While 25.7 % did not specify the level of training or qualifications deemed as useful to acquire, soft skills were seen as essential to develop. These included: work experience (15.4 %); communication skills (11.5 %); interpersonal skills (10.2 %); motivation (8.1 %); work ethics (7.6 %); IT literacy (6.8 %); team building (5.8 %); literacy/numeracy (2.9 %); and flexibility (2.1 %).

The employers within certain industries showed a higher interest in the training needs of their employees across all occupational grades. These included employers in the community and business sector (18.3 %); hotels and catering (12 %); machinery and electrical appliance manufacturing (9.4 %) and wholesale, retail and warehousing (8.9 %).

From the sides of the social partners and constituted bodies, there was a 50 % response rate for the survey. The respondents also agreed that there was a need to continue developing a variety of skills for the employees. For front-line employees in the hospitality industry, there was a need for personal and social soft skills. Employees who have been on the job for a long time, need retraining in people management and customer care. The legal and accounting professions needed more technical support of qualified personnel, especially in the financial sector, where skills in certain types of new products were still weak. In general, there is agreement on the need for an increased training base in IT skills. Due to the general indication that the pharmaceutical industry might be given an investment boost, training for chemical and biological researchers is also seen as appropriate.

Regulation 14 of the Business Promotion Act (BPA) (1998, last amended by LN 42 of 2004) provides financial assistance for training purposes and the ETC is responsible for its administration. It promotes lifelong learning, by offering training to new employees, upgrading

of skills to workers and training grants to employers. Therefore, assistance is available for those employers who would like to upgrade the skill base of their personnel, since they are offered training grants, depending on the size of the company. Assistance can vary from 35 % to 80 % of the training costs entailed. The private sector should be obliged to partially provide compensation for the upgrading of the skill base, for example, by paying a percentage of annual profit into a special training fund, as was originally included in the draft Social Pact.

In the case of employees based in micro-enterprises (defined for this purpose as enterprises with less than 20 employees) or are self-employed, the ETC provides for training grants (reimbursable after the training has been successfully concluded) under the Training Subsidy Scheme. This scheme forms part of the National Action Plan for Employment and can only be used once. Employees or apprentices who have been in employment for at least six months can apply, as long as the course leads to 'transferable vocational skills' and the training institution is approved by the ETC. The grant constitutes 75 % of the cost up to a maximum of Lm200 (466 euros), excluding ancillary costs such as equipment and fees for test taking or certification.

7. Bridging the gaps

In order to ascertain a better functioning of the economy, there is an urgent need for more coordination by the different stakeholders and the social partners. There are diverse gaps to bridge but especially between school and the labour market; between skills and available jobs; and between job seekers and job providers.

In order to bridge the gap between school and work, an apprenticeship scheme is one method of providing the prospective worker with academic training coupled with on-the-job training to provide work experience. ETC offers various apprenticeship schemes. These schemes include the Technician Apprenticeship Scheme (TAS) and the Extended Skill Training Scheme (ESTS). These require the support or sponsorship of employers that can herald from both private and public entities. The training schemes, which are of three years duration, are varied and cover a large number of occupations. The benefits are multi-fold, such as smoothing the process from school to the workplace, providing practical experience to the apprentices, while giving the employers an opportunity to get involved in the training needs of the country in order to provide a more qualified workforce ([253]).

ETC conducted a survey involving apprentices and employers, to gain information on the reasons for applying for the scheme, why some prefer to discontinue the programme and the experiences of the employers on these schemes. The reasons for applying were varied but the common feature appeared to be the fact that applicants' fathers were employed in elementary jobs such as machine operators or shop assistants. The career guidance support offered by the educational system through guidance teachers did not appear fruitful. Furthermore, the applicants also had a low level of education, not going beyond the secondary level and most had attended state schools, rather than private ones. There was also a gender bias, in that the few female

([253]) Most of the apprenticeship conditions are on a pro-rata basis, such as vacation leave, sick leave entitlement and bonuses, and are guaranteed by law. The Government pays a maintenance grant of Lm40 (93.20 euros) per month for the first two years, plus a one-time grant of Lm140 (326.2 euros) for educational needs such as books. Apprentices, who successfully complete the training, are awarded a Journeyman's Certificate, for TAS at the Technician level, and at the Craftsman level for ESTS.

apprentices chose soft options such as hairdressing, while the males were more inclined towards the mechanical or electrical fields.

Applicants were mainly attracted to the scheme because of the expectation of a future job. Although information regarding entry requirements was very good, the applicants felt that details on the actual on-the-job experience were somewhat lacking, although the majority admitted to not attending the information session conducted before the application process.

Both employers and apprentices appreciate and value the scheme as recommendable. It appears therefore that while the schemes appear interesting, there is a need for more involvement both of the guidance teachers and the prospective employers. A compulsory information session, as a prerequisite for application may prove beneficial. Furthermore, there was a need for better coordination between the actual academic training at the institute and the work training on the job, with enhanced monitoring of working conditions of apprentices. Overall apprenticeship does provide employment opportunities; however, self-employment or further studies do not feature as a result. A push towards entrepreneurial possibilities and opportunities for higher-grade studies should be encouraged as a post-apprenticeship assessment.

MCAST (Malta College for Arts, Science and Technology) commenced operations in 2001 ([254]). It houses nine institutes: Art and Design, Building and Construction Engineering, Community Services, ICT, Mechanical Engineering, Business and Commerce, Electrical and Electronics Engineering, Maritime, and the Gozo Centre. Both full-time and part-time courses are offered. With the partial financing from the European Social Fund (ESF) MCAST is also offering retraining and upgrading courses to those over 25 years of age, through six specific courses: mechanical engineering; electronics; building and construction; preservation of traditional Maltese crafts; caring for the elderly; and employability skills for women returning to the workforce.

The University of Malta offers a myriad of courses on a full-time and part-time basis to cater for the needs of a workforce that continually needs to adapt to a changing working environment. Part-time evening courses are proving particularly attractive to those who do not wish to take a career break to study and such courses are well attended. From the university's side, it has also encouraged a new breed of courses that cater for particular niches of the Maltese economy. Courses vary from short certificate courses to two/three year master's degrees.

According to the Employment Prospects (Summer/Autumn 2005), the social partners suggested ways in which employers could themselves work towards bridging the skills gaps: within the financial sector, there was a need for more training initiatives and avenues for the design and development of new types of financial products; employers also need to take a more active role in the provision of training programmes and not rely entirely on the Government to provide training in order to better coordinate the link between training and job needs; part-time workers and seasonal or temporary workers, especially in the hospitality industry, should also be provided with in-house supervised training; and finally there should be more synergy between the educational system and the needs of the labour market.

([254]) It amalgamated under one building and under one management the various trade and technical schools that had operated prior to this date.

It appears that the effort to bridge the gaps is being taken seriously and the number of persons attending further retraining is on the increase. The effects of the transferability of such new skills or their relevance in the workplace must however be treated with caution, since there is a need for further research in this area. One must be careful not to judge the issue of training on its own but rather the implications this may have on the capabilities of the employees and their capacity to utilise such capabilities, that is, not to treat training as an end in itself but merely as a means to increase the potential for employability and the ability to transmit these new skills on the job.

D. Labour law and adaptability

This part looks at different types of working conditions that are considered as atypical but which have become an important aspect of the modern working environment. It thus considers the need for labour law to reflect such changes and the adaptability of the labour structures to mirror the changes in the economy and in the labour market. The shift has occurred from lifelong jobs to jobs of a more temporary nature, from fixed to more flexible arrangements. These include fixed-term contracts, part-time work, temporary agency work, apprenticeship, telework and the working time legal structure underpinning all types of jobs. Table 10 provides data regarding this type of atypical work.

Table 10 — Work in Malta and EU15, classified by type 2002

Type of work	Malta (%)	EU 15 Average (%)
Indefinite contract	85	82
Fixed-term contract	7	10
Temporary Agency contract	6	2
Apprenticeship	1	2
Other	1	4

Source: European Foundation for the Improvement of Living and Working Conditions (2003).

1. Fixed-term contracts

One form of atypical work is the increasing number of fixed-term contracts ([255]). This type of contract provides the employer with more flexibility and the possibility to employ certain skills only when actually needed. Such contracts are more common in the case of top organisational positions and also in the case of seasonal employment. The influence of trade unions is consequently somewhat diminished, since the negotiating of the conditions of work is on a one-to-one basis. For the lower types of jobs it may be reasonable to assume that, unless regulated, it may result in a watering down of the conditions of work, unless legally safeguarded.

According to the Labour Force Survey (LFS), 5 392 employees (3.6 % of the working population) were on a fixed-term contract in 2004, the majority (about 80 %) working in the services sector. Of these 2 868 were men while 2 524 were women. This figure is much lower than that shown in Table 10 for 2002.

([255]) These stipulate the exact beginning and end of a working contract, which, however, must be distinguished from those contracts that have a particular task to accomplish.

The Contracts of Service for Fixed Term Regulations (LN429/2002) is the transposition of Directive 99/70/EC. The LN defines the phrase 'contracts of service for a fixed term' as contracts where 'the end of the contract is determined by reaching a specific date, by completing a specific task or through the occurrence of a specific event.' The Regulations follow the directive's spirit in that such contracts must not be less favourable than those offered to indefinite period workers. However, at times it is difficult to find a comparator in order to ascertain that treatment is the same, since the LN states that the persons have to be employed by the same company, need to be on different types of contracts and must be engaged in a similar type of work. If the employee feels that there has been unfavourable treatment, she/he may make a complaint to the Industrial Tribunal, before the lapse of three months from such treatment. The onus of justifying such treatment shifts on to the employer ([256]).

The LN permits differential treatment under two conditions. The first is if the individuals have different qualifications, experience or length of service or 'other such differences justified on objective grounds', which rather allows a huge leeway for interpretation. The second is when the job is specific and differentiation is thus justified.

If upon expiration of the contract the employer decides to retain the employee, notice of a new contract must be given within 12 working days. Otherwise the employee begins to benefit from the status of a worker on an indefinite contract. Furthermore, if a vacancy of an indefinite duration becomes available the employer is duty bound to inform the definite contract worker, although to satisfy this obligation, such information may just be posted on a notice board at the location of work. The LN also puts the onus on the employer to facilitate training, enhance the worker's skills, career development and occupational mobility ([257]).

2. Part-time work

The number of part-time workers has increased in the past years. This is primarily due to three reasons: the attraction of reduced hours of work particularly for women; the additional job after a full-time one; and the availability of a part-time job instead of a full-time one, although the latter would be preferred. This type of work has its advantages for those who would prefer to balance home and work life; however, it may also be a means of exploitation by employers. For the government, part-time jobs may be a means of alleviating unemployment and redistributing working hours in an economy that is not creating enough new jobs to replace those lost. The advantage of part-time work is that it facilitates the entry of new and young workers and also female workers. Table 11 provides a breakdown by age of the part-time employed persons in the last three months of 2005.

Figures confirm that females are more likely to work on a part-time basis; in fact they constitute almost double the number of men. In the case of men, half of the part-timers are in the lower age group between 15 and 24. This may be due to the unavailability of full-time jobs, or to the

([256]) The fine for contraventions is Lm500 (1 165 euros). Similar to the EU directive, the provisions of the LN do not apply to initial vocational trainees or apprenticeship schemes.

([257]) The LN (Article 7) decrees that a person who has been 'continuously employed' (i.e. contracts renewed within six months from their termination) or on a fixed term for a period exceeding four years is deemed to have become an employee on an indefinite term. Until the publication of this paper, Government employees in the wider public sector were exempted from this clause [Article 7 (5)]. This situation may need to be remedied in the future, as it is discriminatory. The LN aims to defend employees from the possible abuse of the misuse of successive fixed-term employment contracts.

holding of a part-time job while undergoing training or educational programmes. The least affected are those between 35 and 54 years of age, possibly because at this age, part-time jobs are not the main job but in addition to the full-time job. In the case of females, the allocation appears to be on an equal basis in the different age groups, except those over 55 years of age. The main reasons may be due to family considerations since those working on reduced hours are also included. However, the reasons may also be the unavailability of full-time jobs and the increased incidence of females in temporary and seasonal jobs.

Table 11 — Part-time workers October–December 2005

	Males		Females		Total	
Age group	No	%	No	%	No	%
15–24	2 361	47.7	2378	25.2	4 739	32,9
25–34	695	14.1	2057	21.8	2 752	19,1
35–44	403	8.1	2496	26.4	2 899	20,1
45–54	205	4.1	2209	23.4	2 414	16,8
55–64	799	16.2	302	3.2	1 101	7,7
65 +	483	9.8	—	—	483	3.4
Total	4 946	100.0	9442	100.0	14388	100.0

Source: NSO, Labour Force Survey 2005.

The Legal Notice 427 of 2002 is the transposition of Directive 97/81EC. This LN also replaced LN 61 of 1996 (Part-Time Employment National Standard Order), which regulated in a more loose form, aspects of part-time employment. If the conditions in the collective agreement benefit the employee more then it finds precedence over the LN.

One distinction between the directive and the LN is the term ‘workers’ used by the directive, but replaced by the word ‘employees’ in the LN. While the directive appears to exclude the self-employed, the Maltese version clearly excludes this category since it specifically states, ‘excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service’ (LN 427/2002).

The LN both acts as a guarantee of non-discrimination towards part-timers but also helps to facilitate the development of this type of atypical work by providing a more flexible work environment, while taking into account both the needs of the employee and the employer.

The ILO defines part-time worker as ‘an employed person whose normal hours of work are less than those of comparable full-time workers.’. The definition used by the LN is similar in that it also utilises the hours of work, calculated in comparison with full-timers, as a means of definition. In Malta, the standard weekly hours worked are 40, therefore a part-timer is one that within one week works less than 40 hours. The LN asserts that part-timers are not to be treated less favourably than full-timers, although one proviso does affirm that differential treatment may be undertaken on objective grounds, without actually defining what such grounds may be. It is then up to the Industrial Tribunal to decide on this. An employee that’s allegedly subjected to differential treatment has the right to request in writing the reason for this from the employer, who is obliged to reply in writing within 21 days. In terms of overtime, the part-timer must first work the number of hours comparable to a full-timer, in order to request a wage similar to a full-

timer. As such, it does not constitute unfavourable treatment and the LN does not afford protection to the employee concerned in such circumstances.

According to Article 6, if the part-time work is the individual's principal employment (i.e., for which Social Security contributions are paid), and she/he works over 20 hours, then the conditions of work of the employee are on a pro-rata basis. Part-timers are entitled to public holidays and types of leave (vacation, sick, bereavement, marriage, injury) in proportion to the number of hours worked and calculated as a percentage of the full-time comparable worker. Bonuses or other income supplements are also estimated on a pro-rata basis. In cases 'where the maximum number of hours permissible in terms of the recognised conditions of employment for a part-time employee is less than 20 hours a week', such protection is also guaranteed provided that the individual works at least 14 hours and that the job is the principal employment for the individual. The EIRA makes no mention of this distinction between the principal and non-principal employment, therefore it would appear that such conditions also apply regardless of whether it is the principal job or not. The LN also regulates wages, based on the hourly rate. The LN further provides for part-timers to partake of vocational training programmes if they work at least 20 hours or 50 % of the normal working week, whichever is the lesser.

Another distinction between the directive and the LN is the fact that the directive stipulates that the employer must take into consideration requests for transfers between full-time and part-time work, though not necessarily complying with such requests. This is not included in the LN. However, it obliges the employer to inform about the availability of full-time and part-time employment and ascertain that this is done in a timely manner to allow interested employees ample time to apply for such posts. If the employee does not prefer to move from one state to another, this does not provide a reason for dismissal. Neither does the fact that the employee had brought proceedings against the employer. The LN incorporates an umbrella clause, which allows for a non-exhaustive list of unfair dismissal grounds. This provides for ample protection of the employee. However, if the employee's allegations of unfair dismissal prove to be unfounded then the action does not constitute unfair dismissal. The burden of proving or otherwise is on the employer. The employee has to resort to the Industrial Tribunal before the lapse of three months of such unfavourable treatment.

The LN applies to all part-timers except those in any political position, including Members of parliament and local councillors, apprentices, or those in ETC employment schemes, members on public sector boards, commissions or governmental authorities, and holders of judicial posts.

3. Telework

The Employment and Training Corporation has commissioned a study on the actual role teleworking has in the Maltese work environment and the results are very disappointing by its near absence. There are some companies that have tried to introduce it, however, out of 1 118 employers that replied, only 43 mentioned use of some type of telework; that is a mere 3.8 %. The NSO also issued a report on ICT Usage in Enterprises, which concluded ‘teleworking does not seem to be popular with only 11 per cent of surveyed enterprises responding positively to this practice.’ The highest usage is in two sectors: real estate and energy. However, the report fails to provide a definition of telework, therefore the figure of 11.3 % may not reflect the actual usage of telework in Malta.

The benefits from telework are many, not only affecting employees and employers but also having social and environmental implications. From a social perspective, telework helps women who have small children participate in the workforce; from an environmental perspective it helps to lessen the time spent in traffic jams.

By September 2006, there were 127 200 Internet users in Malta, that is 33 % of the population, indicating a 218 % increase between 2000 and 2006 ([258]). Although by EU standards this percentage is still considered low, the increase in IT penetration in the Maltese islands should work in favour of teleworking. There is, however, a need for a culture shift, especially from the employers’ side, from one based on rigorous control to one more inclined towards trust and flexibility. The importance of telework should be stressed, especially at a time when the government is trying to entice more women to work, to partially attain one of the Lisbon Agenda goals, since the level of female employment is very low.

An example of telework is a pilot project employed by the Malta Information Technology and Training Services (MITTS Ltd), which provides its services to the government of Malta. In 2001 it started a pilot hybrid programme, involving three days’ work from home and two days in the office. It is presented as a success story by the ETC. Information regarding the actual number of employees making use of this programme, however, was not available.

A study by the ETC (2006) on the IT Market in Malta showed that there is more penetration in IT related work by men rather than women. In fact only 10 % of persons working in IT careers are women. This is due to the misguided perceptions that the jobs are more men-based and that it is more difficult for the woman to balance work and home life. Telework in this case would be the ideal solution to create the necessary balance. Women, who outnumber men at the University of Malta, nonetheless tend to be underrepresented (only 28 %) in courses related with IT and computing. Encouraging more females to participate in these courses is likely to provide them with a significant tool to participate in jobs while managing the home as well, provided employers utilise such knowledge and make available the possibility of telework.

([258]) For details refer to, http://www.internetworldstats.com/stats9.htm

4. Working time

Working time includes the actual hours worked, annual leave entitlement, maximum weekly hours worked, minimum daily rest period and night work. LN 247 of 2003 transposed Council Directive 2003/88/EC and included the main areas dealing with the organisation of work and need to be seen as the minimum requirements to safeguard the health and safety of the workers. Similar to the directive, such regulations do not apply to seafarers or in cases where other specific conditions are already in force for certain sectors of the economy.

For example, while the directive stipulates that the night time is to include at least the hours between midnight and 5.00 a.m., the LN extends this time from 10.00 p.m. to 6.00 a.m. Section 8 (6) (a) of the LN, stipulates that in the case of a regular worker, when a public or national holiday falls on the worker's normal resting day (normally taken to be Saturday and Sunday), then the 'lost' day is added on to the worker's annual leave entitlement. However, this clause was subsequently revoked by Act 2 of 2005 leading to a loss of four days in the same year.

The rest period is to be of not less than 15 minutes at a stretch if the working day is longer than six hours. However the specific time for such allocation is according to the arrangement in collective agreements or other agreements between employer and employee. An employee is entitled to an uninterrupted rest period of 24 hours in a seven-day week. However, if the employer can prove that for 'technical or work organisation conditions', this is not possible then the Director of DIER can permit 'a minimum rest period of 24 hours for each seven day period', which is somewhat more loosely formulated. Furthermore the employer may decide if the weekly period entitlement of rest can be calculated on a 14-day time frame. In this case the employee has two options, either two 24-hour rest periods, or one 48-hour rest period, with each being preceded by a daily rest period. This is always within the provision that the weekly working hours cannot exceed 48 hours.

In the case of annual leave entitlement the directive provides for a minimum of four weeks, while the LN provides for four weeks and four days, which, except in the case of urgent leave, need to be 'availed of as whole working days' unless decided differently under a collective agreement or by 'mutual consent'. Unavailed of annual leave entitlement can be carried forward to the next year, at least up to 50 % of it, and needs to be utilised first in the second year.

However, regulations dealing with minimum rest periods, maximum working hours, night work and shift work do not apply in cases where it is not possible to measure the actual working time, such as in the case of family workers, managing executives or persons working in religious communities. The list is not exhaustive and other such workers may be included. There is also a longer list of activities where such regulations do not apply: the place of work and residence are far from each other (including offshore work); the actual presence of the person is required (security posts); there may be a need for continuity in the service (airports, hospitals, prisons, postal services, refuse collection, electricity and water services, manufacturing activity that needs to be ongoing for technical reasons, agriculture, etc); there is a 'foreseeable surge of activity' (agriculture, tourism); there are employees in railway transport (even though there are no railway lines in Malta); and the workers may be affected by an accident or event beyond the control of the employer. The list appears to incorporate every type of working activity. Nonetheless the

employer is obliged to safeguard the health and safety of the employee by offering alternatives, or a means of compensation, provided this does not include financial compensation, e.g. for unavailed of leave or rest periods. Furthermore, a collective agreement may modify or change such conditions provided that an equivalent type of safeguard for the employee is retained. Non-compliance with the regulations can invoke a minimum fine of Lm200 (466 euros).

E. Promoting equal opportunities

Fostering equality at the place of work is very important, and this has been strengthened with the enactment of related legislation. These include the non-discrimination towards young workers, part-timers, women and the disabled. The first two have already been discussed; therefore this section reviews the latter two.

EIRA defines 'discriminatory treatment' as, 'any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.'

LN 461/2004 on Equal Treatment gives effect to Directives 2000/78/EC and 2000/43/EC and deals with the elimination of discriminatory treatment in employment 'on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin.' In order to be more in conformity with EU law, the word 'sex' was replaced with the term 'sexual orientation'. The regulations however, do not apply to differences based on nationality and to armed forces personnel on the grounds of disability and age. Apart from the above conditions, harassment, the violation of a person's dignity, and creating a hostile or humiliating environment, are also treated as discriminatory treatment. The employers are also liable to prosecution if they incite others towards such treatment or if they fail to suppress such behaviour in their organisation.

Furthermore, employers' and employees' organisations may not inhibit membership, or access to benefits. Employment agencies cannot refuse services to anyone, unless the person applying for a job is deemed to have fewer requisites than another person and therefore is not seen as appropriate for the job.

When there are allegations of misconduct, the employer or person responsible is informed in writing and has to reply in writing to such accusations within ten days, unless proceedings have already commenced before the Industrial Tribunal or a court. The employee must inform of the breach of conduct before the lapse of four months from the event. The onus is on the employer to disprove such accusations. Any provisions in individual or collective agreements that are considered discriminatory are deemed invalid ([259]).

A study conducted by the ETC, shows that 'the employment of persons with disabilities can be an overall positive experience.'. Nonetheless, some negative issues are also present. The study found that these persons are normally employed in low status jobs although they are capable of

([259]) If the offender is found guilty, she/he can be fined a sum not exceeding Lm1000 (2 330 euros) or serve a prison sentence of not more than six months, or a combination of both.

retaining a job and working the same number of hours as any other employee. Yet those unemployed were finding it hard to obtain a job, while some of the employed would have preferred more assistance on the job, such as having a mentor. Those unable to find a job have a low level of education and they lacked work experience.

The study also pinpointed a distinction based on age and gender. Women were less able to find a job. The younger group (ages 15–24) was also finding it more difficult to secure a job compared to older job seekers. The ETC's new Supported Employment Scheme (funded by the ESF) is intended to provide more synergy between training and work experience in order to provide a better foundation for disabled people to find a job, apart from financial assistance to employers. The worrying feature is the fact that a number of respondents saw their work experience as a negative one, since they had bad working conditions, were abused by their work colleagues or were obliged to work informally if they wanted the job. This suggests the need to have a more adequate inspectorate service. While employers seem ready to make the necessary adaptations in the place of work in order to facilitate the integration of disabled persons, they are however not willing to pay for such adaptations.

Working towards gender equality is a major commitment, not only to guarantee the treatment of women on the same footing within the working environment, but also to encourage more women to become productive members of the workforce and contribute to the economic growth of the country. The main recent legislative framework in Malta is the Equality for Men and Women Act of 2003 (EMWA). A year later the National Commission for the Promotion of Equality for Men and Women in 2004 strengthened this. Moreover, in 1991, Malta ratified the UN Convention on the Elimination of all forms of Discrimination against Women and as a member of the ILO, Malta also falls under the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Malta has also signed two gender specific ILO Conventions: No 100 on equal remuneration; and No 111 on discrimination.

EIRA envisages the promotion of female employment through family-friendly approaches, which include: equal pay for work of equal value; protection against discrimination (on the basis of marital status, pregnancy or potential pregnancy); and minimum employment conditions for employees on reduced hours. The annual budget presented by the government in November 2006, also included various family-friendly measures. The 2003 EMWA endeavours to strengthen this by inhibiting discrimination in: employment and employment procedures; advertisements; by banks and financial institutions; and educational and vocational guidance, while including provisions against sexual harassment. Other related legislation dealing with creating the optimal conditions for women to engage in paid work include: Urgent Family Leave Regulations (LN 296 of 2003); Parental Leave Entitlement Regulations (LN 225 of 2003); Protection of Maternity Regulations (LN 439 of 2003); and Equal Treatment in Employment Regulations (LN 461 of 2004).

In order to create an environment that provides equal treatment, women, being the child bearers, need special consideration in terms of maternity leave and other types of family or care leave. The year 1981 saw the introduction of maternity leave, with a paid period of 13 weeks. In 2004, another week was added, although during the 14th week the woman is considered as being on unpaid leave. It is the government that strives to create an environment for equality; however, the

private sector tends to lag behind on certain issues. There is a need for more monitoring in this area.

Equality can also be accommodated through flexible arrangements in working times, working on reduced hours and access to career breaks, or special leave for family reasons such as parental leave. In Malta, employees within the public sector may avail themselves of parental leave within the first eight years of a child's life. Unpaid leave may take up to four years but can only be used once. Both women and men can utilise this option.

A study carried out by the Department of Women in Society in 2003, on the impact of parental leave, career breaks and responsibility leave in the Maltese public sector, found that it is largely dominated by women (98.4 %) against the uptake by men (1.6 %). Positively speaking, few women who make use of this option leave their job, thus increasing the probability that they will retain their job in the long term. Where family-friendly measures and flexibility options such as working reduced hours were put into place, job retention was facilitated.

A study looking at parental leave and the attitude of fathers to it was conducted in four European countries (Lithuania, Iceland, Denmark and Malta) and coordinated by the Centre for Equality Advancement in Vilnius (2005). The study revealed some very interesting details from the perspective of different people involved: the man, family and friends, and the employer. Men made use of such leave mainly for two reasons: either if the spouse or partner had a higher paid job; or if the individual wanted to take time out from the working environment or a career break. In Malta, men were traditionally seen as the main breadwinners; therefore few men actually take parental leave. The reactions from family, friends and colleagues, though generally positive, differed from 'mild but non-judgmental surprise to verbally expressed disdain' *(*ibid. p.37) while some negative reactions were also expressed, mainly from the man's parents due to fears of job loss, colleagues who had to take over the workload, and friends who considered childrearing a woman's job. Employers tried to persuade the men to opt for reduced hours or to accept being called back if necessary, in order for their application to be processed.

The suggestions to improve the terms of parental leave included: financial support during the leave period; increase the age limit of child when leave can be taken; allow workers to choose the reduced hours option when the child becomes older; parental leave years should be counted as time in service so as not to detract from the individual's career prospects; change the law so that parental leave can be availed of not in one go, but possibly broken down to allow it to be staggered depending on the number of children.

The latest data shows that the employment gap between men and women in Malta is the highest compared to the other 24 EU Member States, standing at 42.4 %, with the EU25 average at 15.2 %, and Sweden at 3.1 % having the smallest gap (European Foundation for the Improvement of Living and Working Conditions 2006:41). This indicates that the Maltese authorities need to provide more incentives to entice women to become active in the labour market. Although incentives such as flexible hours, telework and part-time work may be a sound beginning, there are other issues involved, such as reasonable prices for day-care centres and tax incentives. In 2005, the government had introduced a scheme whereby women returning to work after five years were given tax credits. The effect of this measure has not been analysed in detail

yet. The traditional extended family type in Malta has made it possible for working mothers to have grandmothers and relatives look after children when not at school, and this has meant that childcare centres were not very much in demand. However, the fact that grandmothers and relatives are being encouraged to participate in the labour market puts more pressure on the provision of safe childcare centres, in order to prolong the working life of women.

F. Overview and comments

This chapter has presented the labour law situation in Malta and its evolution over the years. The more recent changes have been necessary due to two main reasons: the need to upgrade legislation to better accommodate a changing working environment and to align national law with EU labour law directives. The main legislation is EIRA 2002, and the legal notices emanating from it. Other important work related laws include the Employment and Training Services Act (1990), the Equality for Men and Women Act (2003), the Occupational Health and Safety Authority Act (2000), and the Malta Council for Economic and Social Development Act (2001).

The transposition of the relevant directives into national law has overall been effected; however, slight differences exist. It is perhaps more important to strengthen the supervision and enforcement of such regulations, as the general impression is that this is where the main problem lies. The enforcement sections of ETC and DIER may themselves need to be reinforced.

Certain elements are evident in the Maltese labour market, but most important is the fact that more people need to be enticed to participate in the economy, while ensuring that the skills base is kept updated. The three main issues that stand out are: low female participation; low uptake of training possibilities; and a need for more proactive participation of all social partners.

The very low female activity reflects the traditional view of the family, with the male as the main breadwinner and the female as the home carer, which is more evident in the lower strata of the society. However, even within the higher educated strata, measures can be taken to encourage women to retain their jobs and careers after they have given birth. This is possible if adequate support structures and services are in place, such as reasonable fees for childcare centres, lower income tax rates and/or tax rebates.

As far as vocational training, is concerned, this is unfortunately at low levels. Labour statistics (NSO 2003) show that only 6.1 % of employed persons undertook any type of training or educational courses, with 78 % of these being in the services sector. The younger workers were more likely to undergo training, in fact 69.3 % were under 40 years of age. Furthermore, the higher educated workers were more inclined to take up further training, but the figures remain very low. A more proactive approach by the private sector would, in the long run, prove beneficial both for the employee and the businessman.

The draft Social Pact proposed in 2004 included various measures that could have contributed to a better working environment for the social partners. Although it failed to materialise, the government did introduce some of the measures. However, other crucial measures, especially

commitments from the employers' side, are still lacking. Although MCESD has the official role of being the main national forum for social and economic dialogue, the general public impression is that it is used more as a sounding board, and its input is not very powerful. There is therefore a need to strengthen this Council and to make it more representative of all stakeholders within the country. There is a need for more commitment and a wider involvement in the process of consultation.

Although, in the labour law field, the work accomplished so far in Malta is commendable, there is a need for a more coordinated effort by a wider representation of society. While flexicurity can provide the framework for future working relationships, there is arguably a need to balance the idea that flexibility is not a prerogative of the employer just as much as lifelong job security is not the privilege of the worker. If enforced fairly, the legal structure can provide the basis for this compromise.

Chapter III
Conclusion

The period 1995–2005 has witnessed major changes in the labour law regulatory frameworks of the two small Mediterranean islands of Cyprus and Malta. Both countries acceded to the EU in the enlargement phase of 1 May 2004. In this respect, the period under examination was marked, for its greatest part, by an evolutionary process of harmonising existing laws and regulations in many policy fields with the provisions of the *acquis communautaire*. In this context, labour law evolution constituted an aspect of this adjustment course, which this report has sought to examine.

Both countries are former British colonies and members of the British Commonwealth, and they both gained their independence in the early 1960s (Cyprus in 1960 and Malta in 1964). In the case of Cyprus, however, following the Turkish invasion of 1974 and the occupation of 38 % of the country's territory, the political problem of the country remains unresolved. Technically the occupied northern part of the island is exempted from the application of the *acquis communautaire.*

In terms of labour law evolution in the two countries one can point out that the adoption of the relevant *acquis* was completed successfully in the period under examination. In both countries there has been an unchallenged trend toward the prevalence of the statutory norm as a way of regulating labour issues. The insurmountable pressure that EU harmonisation provisions exerted heralded a major shift in labour law regulation and acted as a catalyst for major adjustments in the field.

Against this background, a sine qua non in the process of understanding the evolutionary framework of this adjustment course is the study of the historical development of labour law — and industrial relations in general — in the two national settings. Traditional means of regulation in this field vary in the two countries, and in this respect the adjustment trajectories followed bear some distinctive features.

One major difference between the two countries is the way industrial relations have traditionally been structured and carried out. Malta has been characterised by a higher level of statutory control over industrial relations, which is much closer to the continental system. On the other hand, a primary attribute of the traditional system of industrial relations in Cyprus has been its voluntary nature, which has relied upon tripartite consensus building between the social partners and the government. This had its roots in the British tradition of free collective bargaining. The Industrial Relations Code has traditionally exemplified the voluntary nature of industrial relations in Cyprus. Signed by the social partners in 1977, the Industrial Relations Code represented a 'gentlemen's agreement' that was considered to be a landmark in the development of the industrial relations system in Cyprus. The Code laid out the procedures for the settlement of labour disputes over rights and interests, and this was in contrast to the Maltese traditional system that supported collective bargaining and dispute resolution with statutory institutions and processes.

Nonetheless, the harmonisation process has shifted the balance of industrial relations in Cyprus, giving more weight to 'hard law' statutory means of regulation of labour issues, as opposed to 'soft law' alternatives. Even though collective agreements are still used as a regulatory instrument, making provisions over and above statutory requirements, emphasis on the latter is the primary form of regulation. As a result, EU adjustment requirements have turned the spotlight on legislative measures of control and an ever-increasing reliance upon the mechanisms of statutory regulation. As in the case of Malta, the social partners can now rely more on a legislative base, as the basic means of regulating labour law matters.

In both countries there has been an observably strong desire to ensure compliance with EU obligations in the labour law field, and the social policy area more generally. The accession process and the harmonisation of the national legal framework of both Cyprus and Malta with the requirements of the European *acquis* was the most pertinent factor that influenced the evolution of labour relations in the period under examination. The process of adjustment, although strenuous and lengthy, has proved essential and useful, as it reinforced, and even secured, the rights of the workers in a number of domains that directly impact upon their well-being. In this aspect, matters such as the terms and conditions of employment, health and safety at work, equal opportunities (including gender equality) have acquired a stronger legal base. The latter is important considering especially that women and young people in both countries experience higher levels of unemployment.

It is stressed that in recent years both Cyprus and Malta have been experiencing atypical forms of employment and experimenting with ways to introduce more flexibility in their labour markets. The overall aim is to increase employment while at the same time taking into consideration issues of equality between men and women, family and work balance, and promotion of employability of young people, especially young women.

The real challenge for both countries is to strengthen the supervision and enforcement of the new legal framework. In the case of Malta, the enforcement sections of ETC and DIER may need to be reinforced, and the Inspectorate section of DIER may consider taking a tougher approach towards labour law compliance. In the case of Cyprus, more expertise could be sought on the highly technical aspects of labour law enforcement, whereas the Ministry of Labour and Social Insurance could strengthen even more the departments that handle the enforcement of labour law in areas such as industrial relations and health and safety at work.

A key issue in countries that want to retain their competitive advantage is that of employability. This has led to claims for the need of lifelong learning and skill equipment for workers. It is important however, to guarantee that while workers should continuously be encouraged to update their skill base, their employers should not leave them unprotected against unfair dismissals. In the framework of the Lisbon Agenda, both countries have in fact — through their respective National Action Plans for employment — set overreaching goals that call for full employment, quality and productivity at work, as well as cohesion and an inclusive labour market.

The shift from job security to employability entails a cultural shift for both countries, mainly due to the idea that a lifelong job has not traditionally been associated with lifelong learning.

However, the changes in the economies and labour markets of the two countries have forced them both to focus on the need to formulate training and employment policies and establish appropriate institutions to deal with these new demands.

In the case of Malta this task had been entrusted to ETC, which — with training programmes — helps the unemployed find a job. As outlined in the report, current schemes include the Employment and Training Placement Scheme (ETPS), the Job Experience Scheme (JES), the Redeployment Scheme (RS), the Work Start Scheme (WSS) and the Active Youth Scheme (AYS). In the case of Cyprus, the responsible body for implementing the training strategy is the Human Resource Development Authority (HRDA), which has the mandate to provide education, training and lifelong learning.

In order to ensure, however, a better functioning of the economy, there is an urgent need for more coordination of the different stakeholders and the social partners. There are diverse gaps to bridge, especially between school and labour market, between skills and available jobs, as well as between job seekers and job providers. In both countries these issues are being addressed, either through apprenticeship and post-secondary education programmes in the case of Malta, or through the Apprenticeship Scheme, training activities, and reforms of upper secondary education aimed at adjusting to the growing demand for mobility and flexibility in the labour market in the case of Cyprus.

As already outlined, atypical forms of employment are only gradually evolving in the two countries. This creates the need for labour law to reflect such changes, and the adaptability of the labour structures to mirror the changes in the economy and in the labour market. The shift has occurred from lifelong jobs to jobs of a more temporary nature, from fixed to more flexible arrangements. These include fixed-term contracts, part-time work, temporary agency work, apprenticeship, telework and the legal working time structure underpinning all types of jobs. These forms of employment — mainly part-time and temporary contract work, but also fixed-term contract employment to an extent — are more likely to apply among younger age groups and women. People mostly choose to work part-time in order to balance work and family life, to secure additional income, or because other more permanent types of jobs are not readily available. As far as other forms of employment relations are concerned, there is little, if any, experience with temporary agency work, pools of workers (multisalariat), company networks, and on call work. Given also the size of the two countries and the short distances between places, telework has an arguably limited scope for expansion.

With regard to equal opportunities both Cyprus and Malta — being relatively small island societies — have traditionally shared a rather conservative background. Nonetheless, the traditional roles of men as the sole providers and breadwinners and that of women as house carers are shifting, as the pressures for additional income, affluence and improvement of living standards require women to enter the labour force. This shift has serious economic and social implications in expanding the economy, creating more jobs, as well as establishing the proper childcare facilities and infrastructures, as women are no longer the sole traditional 'housekeepers'.

In the light of the Lisbon Agenda and the targets that must be met by 2010, both countries adopted, in 2004, National Action Plans for employment. The Plans seek to address the issues of enabling people (irrespective of gender, age, religion or other personal characteristics and abilities) to enter the labour market and pursue career development through educational and training programmes. The plans make special provisions for sensitive groups, such as women, young people and mature people who are faced with career changes and explore atypical forms of employment in an effort to introduce flexibility in the labour market and increase employment.

In conclusion, one should note that, in spite of formidable challenges that are continuously exerting pressure towards the strong social bases of many countries, both Cyprus and Malta have responded effectively to the requirements of the European *acquis* in the social sphere in general and in the labour law area in particular. The real challenge now is the full implementation of the *acquis* — and it is still early to make conclusive judgements on this performance. Nonetheless, the harmonisation process in general has proved positive for both countries, as it has forced them to improve, and even enhance, their legal framework and give more strength to 'hard law' statutory regulation means. Whatever the degree of future success it cannot be denied that the process of adjustment has constituted a great step towards the direction of advancement in the labour law field.

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General Workers Union, http://www.gwu.org.mt/

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Malta Business Bureau, http://www.mbb.org.mt/

Malta Chamber of Commerce and Enterprise, http://www.chamber.org.mt/

Malta College of Arts, Science and Technology, http://www.mcast.edu.mt/

Malta Council for Economic and Social Development, http://www.mcesd.org.mt/

Malta Employer's Association, http://www.maltaemployers.com/

Malta Hotels and Restaurants Association, http://www.mhra.org.mt/

Malta Union of Bank Employees, http://www.mube.org/

Malta Union of Teachers, http://www.mut.org.mt/

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National Statistics Office, Malta, http://www.nso.gov.mt/

Occupational Health and Safety Authority, http://www.ohsa.org.mt/

Staff Development Organisation, http://www.sdo.gov.mt/

Unjoni Haddiema Maghqudin, https://www.uhm.org.mt/home.aspx

University of Malta, http://www.um.edu.mt/

Annex A for Cyprus
Labour Law Directives transcribed into National Law

Topic	EU Directive	National Law Reference
Part-Time Work	98/23/EC	N. 76(I)/2002
Collective Redundancies	98/59/EC	N. 28(I)/2001
Fixed-Term Contracts	1999/70/EC	N. 98(I)/2003
Posting of Workers	96/71/EC	N. 137(I)/2002
Information to Employees	91/533/EEC	N. 100(I)/2000
Transfer of Business	2001/23/EC	N. 104(I)/2000
European Works Council (Information and Consultation)	94/45/EC	N. 68(I)/2002
Organisation of Working Time	93/104/EC	N. 63(I)/2002
Young People at Work	94/33/EC	N. 48(I)/2001
Protection of Employees in the event of Insolvency	80/987/EEC	N. 25(I)/2001

Annex B for Cyprus
Gender Equality Directives transcribed into National Law

Topic	EU Directive	National Law Reference
Equal Pay for Men and Women	75/117/EEC	N. 177(I)/2002
Equal Treatment for Men and Women (Employment and Vocational Training)	76/207/EEC	N. 205(I)/2002
Protection of Maternity	86/613/EEC	N. 64(I)/2002
Parental Leave	96/34/EC	N. 69(I)/2002
Equal Treatment in Matters of Social Security	79/7/EEC	N. 51(I)/2001
Equal Treatment in Occupational Social Security Schemes	86/378/EEC	N. 133(I)/2002

Annex A for Malta
List of Legal Notices and Corresponding Directives

Legal Notice	Amendment of previous LN	Topic	Transposition of Council Directive
Year 2002			
427		Part-Time Work	98/23/EC
428		Collective Redundancies	98/59/EC
429		Fixed-Term Contracts	1999/70/EC
430		Posting of Workers in Malta	96/71/EC
431		Information to Employees	91/533/EEC
432		Guarantee Fund	2002/74/EC
433		Transfer of Business	2001/23/EC
Year 2003			
224		European Works Council (Information and Consultation)	94/45/EC
225		Parental Leave Entitlement	96/34/EC
247		Organisation of Working Time	2003/88/EC
296		Urgent Family Leave	96/34/EC
306		Organisation of Working Time (Civil Aviation)	2000/79/EC
439		Protection of Maternity	92/85/EEC
440		Young Persons (Employment)	94/33/EC
Year 2004			
3	439 of 2003	Protection of Maternity	92/85/EEC
324		European Works Council	97/74/EC
442	428 of 2002	Collective Redundancies	98/59/EC
443	430 of 2002	Posting of Workers in Malta	96/71/EC
444	432 of 2002	Guarantee Fund	2002/74/EC
452		Employee Involvement	2001/86/EC
461		Equal Treatment in Employment	2000/78/EC and 2000/43/EC
Year 2005			
413	432 of 2002	Guarantee Fund	2002/74/EC
Year 2006			
10		Employee (Information and Consultation)	2002/14/EC

Source: Compiled from Ministry of Education (Malta) and EC Employment and Social Affairs.

Annex B for Malta
List of Orders

Agriculture & Allied Industries LN 99 of 1977
Beverages Industries LN 29 of 1980
Canning Industries LN 51 of 1977
Cargo Clearance and Forwarding Agents (Burdnara) LN 45 of 1976
Cinemas and Theatres LN 130 of 1976
Clay and Glass Products LN 98 of 1977
Construction LN 27 of 1980
Domestic Workers LN 7 of 1976
Electronics LN 55 of 1977
Food Manufacture Industry LN 68 of 1991
Hire Cars and Private Buses LN 124 of 1977
Hospitals and Clinics LN 115 of 1977
Hotels and Clubs LN 43 of 1990
Jewellery and Watches LN 118 of 1997
Laundries LN 111 of 1997
Leather Goods and Shoes Industry LN 116 of 1991
Paper, Plastics, Chemicals and Petroleum LN 97 of 1973
Printing and Publishing LN 88 of 1977
Private Cleaning Services LN 15 of 2001
Private Schools LN 60 of 1977
Private Security Services LN 264 of 2000
Professional Offices LN 127 of 1975
Public Transport LN 34 of 1969
Seamen LN 100 of 1977
Sextons and Custodians LN 6 of 1996
Textiles and Allied Industries LN 117 of 1977
Tobacco Industry LN 115 of 1991
Transport Equipment, Metal and Allied Trades LN 101 of 1977
Travel and Insurance Agencies LN 22 of 1978
Wholesale and Retail LN 32 of 1989
Woodworks LN 50 of 1977

The evolution of labour law in Latvia

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Summary

The main legislation regulating individual and collective employment and industrial relations in Latvia is the Labour Act 2001 ([260]). Until 1 June 2002, the date of entry into force of the Act, employment relations were regulated by the 1972 Labour Code. The Code has been substantially amended to accommodate market economy realities following the restoration of independence in 1991. However, even after extensive amendments the Code, adopted during the Soviet regime, was unable to meet the realities of changing economic and social transformations. Simply, the outdated normative and legal rationale of the Code failed to correspond to existing employment relations on the labour market.

The 1972 Code was finally repealed and the new 2001 act was adopted by the Latvian Parliament on 20 June 2001. The Labour Act 2001 attempted to regulate labour market relations taking into consideration the new realities of the labour market, the provisions of relevant EU directives, international conventions, and the European Social Charter. Furthermore, two main social partners, FTUCL and ECL, were also involved in drafting the Act. Consequently, the Labour Act 2001 can largely be regarded as a compromise between the interests of Latvian employers and employees.

Social dialogue at the *national level* has considerably developed during the last 10 years. As a result of establishing a legislative framework and an organisational structure promoting social dialogue, all important initiatives at the state level now involve social partners. These are involved both at the consultation stage prior to adoption of any legal act and at the implementation stage of adopted legislation. Thus, social partners are now involved at all stages of the policy cycle at national level.

However, at the *sectoral and regional level* social dialogue is weak and underdeveloped. In spite of recent legislative initiatives, employers' organisations are still lacking in many economic sectors. Furthermore, even established sectoral employers' organisations rarely employ more than 50 % of the employees in a particular sector. According to the Labour Act 2001, only a sectoral collective agreement concluded by organisations covering more than 50 % of employees may be extended to the whole sector. Due to inability to meet the threshold, the majority of sectoral collective agreements do not extend to all employers in a particular sector.

Social dialogueat the *level of undertakings* is crippled by the low percentage of unionisation. As a general practice, collective agreements are concluded only at the company level if a trade union is present in a particular undertaking. Considering that only 17 % of employees are trade union members, a relatively small proportion of employees are actually covered by collective agreements, whether at sectoral level or at the level of the undertaking.

A national social model acknowledging the need to search for a proper balance between job flexibility and job security is only emerging in Latvia. This process is shaped by the demands of the emerging European social model and Lisbon targets, enhanced by the accession of Latvia to the European Union. Regrettably, only starting from 2004 have structured and coherent policy initiatives and implementing programmes been elaborated to promote *job flexibility and employability*. Thus, in 2005 and 2006, implementation began of policy initiatives on lifelong learning and facilitation of a more inclusive labour market focusing on various risk groups. However, further initiatives are necessary to promote employability of young and ageing workers, and to target gender and ethnic origin/language discrimination as well as various forms

([260]) In this report legislation as it stands up to 1 December 2006.

of multiple discrimination. Further research and long-term policy planning by the state are necessary to address issues of education and entry of young people to the labour market, as well as development of professional education that would enable graduates to meet the demands of the labour market, of job training and lifelong learning.

At the same time, provisions contributing to employee *job security* are firmly regulated by the Labour Act 2001. Under the Labour Act 2001, an employment contract may be terminated on the initiative of an employee; on the initiative of an employer; by mutual agreement of the parties; and in other cases. Due to the critical stance of the trade unions towards any reduction of employees' rights and guarantees, legislative changes relaxing grounds for termination of employment contracts are highly unlikely in the near future. The critical stance of trade unions is conditioned by comparatively low wages, along with weak state initiatives for social support and labour market reintegration schemes.

New forms of employment are introduced through the Labour Act 2001. However, practical labour market utilisation of new forms of employment is only developing. Currently, government is analysing possibilities to promote fixed-term employment contracts and provide a regulatory framework establishing temporary work agencies.

Working time regulations have seen no substantial changes during the last 10 years. The standard working day is eight hours, the standard working week 40 hours. Working time regulations have been gradually amended to provide for gender-sensitive adjustments and allow for an appropriate balance between work and family life.

Following accession to the EU, the Latvian labour force took advantage of free movement rights, with substantial employee numbers moving to other EU countries for work. *In-country mobility* is very low. New solutions to promote in-country mobility need developing and promoting by the government.

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List of abbreviations

ECL — Employers' Confederation of Latvia (Employers' Confederation)
FTUCL — Free Trade Union Confederation of Latvia (Trade Union Confederation)
LAEA — Latvian Adult Education Association
NTCC — the National Tripartite Cooperation Council
STA — the State Employment Agency

Introduction

This report aims to give a comprehensive overview of the evolution of labour law in Latvia in the period between 1995 and 2005. The report analyses the emergence of the legislative and policy framework regulating employment relations in Latvia in the context of new economic realities and membership in the European Union. The report is organised as follows: Chapter 1 analyses new approaches to working regulations, including legislation, collective bargaining, and beyond. Chapter 2 addresses issues related to job security and employability. Chapter 3 discusses adaptability of the labour law, including regulation of new forms of employment relations, working time, human resource development, and mobility of the labour force.

1. New approaches to working regulations: legislation, collective bargaining and beyond

(1) Role of social partnership and consultation

(a) Legislative framework

Social partnership is becoming an increasingly effective tool for discussion in employment-related matters in Latvia. During the 1990s, Latvia established an institutional system and normative basis for tripartite and bipartite consultations. Important legislative acts have been adopted. These include the Trade Unions Act 1990 ([261]), the Strikes Act 1998 ([262]), and the Employers' Organisations and their Associations Act 1999 ([263]). Importantly, in 2001 social partners were involved in drafting the new Labour Protection Act ([264]) and the Labour Act ([265]). Furthermore, in 2002 social partners coordinated their positions with regard to the Labour Disputes Act ([266]). Additionally, to implement Council Directive 94/45/EC ([267]), the Information and Consultation in Community-Scale Undertakings and Groups of Undertakings Act 2001 ([268]) was adopted. Similarly, the European Companies Act 2005 ([269]) was adopted to implement Council Directive 2001/86/EC ([270]). Gradual adoption of basic legislative acts regulating industrial relations, begun in the 1990s, has contributed to necessary adjustment of the legal regulatory framework to economic realities and modernisation of the regulatory framework.

(b) Main organisations

The main social partners involved in social dialogue at the national level are:

- *The Free Trade Union Confederation of Latvia* (the FTUCL). This is the largest non-governmental organisation in Latvia, uniting 165 000 members from 24 sectoral trade unions ([271]). According to FTUCL data, Latvian trade unions unite 17 % of the total workforce. Unlike in Estonia and Lithuania, only right-wing parties have formed the ruling majority since the restoration of independence in Latvia. However, the trade union movement is more developed in Latvia than in the other Baltic countries.
- *The Employers' Confederation of Latvia* (ECL). This represents private- and state-owned enterprises in almost all employment sectors. According to ECL information, it unites 26 branch and regional associations and federations featuring significantly in the Latvian

([261]) The Trade Unions Act 1990 (Likums par arodbiedrībām), adopted 1990.12.13, published in *Ziņotājs* No 3/ 1991.01.31.
([262]) The Strikes Act 1998 (Streiku likums), adopted on 1998.04.23, published in Latvijas Vēstnesis No 130/131, 1998.05.12.
([263]) The Employers' Organisations and their Associations Act 1999 (Darba devēju organizāciju un to apvienību likums), adopted on 1999.04.29., published in *Latvijas Vēstnesis* No 161/162, on 1999.05.19.
([264]) The Labour Protection Act 2001 (Darba aizsardzības likums), adopted on 2001.06.20, published in *Latvijas Vēstnesis* No 105, on 2001.07.06.
([265]) The Labour Act 2001 (Darba likums), adopted on 2001.06.20, published in *Latvijas Vēstnesis* No 105, on 2001.07.06.
([266]) The Labour Disputes Act 2002 (Darba strīdu likums), adopted on 2002.09.26, published in *Latvijas Vēstnesis* No 149, 2002.10.16.
([267]) Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.
([268]) Information and Consultation in Community-Scale Undertakings and Groups of Undertakings Act 2001 (Par Eiropas Kopienas komercsabiedrību un Eiropas kopienas komercsabiedrību grupu darbinieku informēšanu un konsultēšanos ar šiem darbiniekiem), adopted on 2001.03.29, published in *Latvijas Vēstnesis* No 60, on 2001.04.18.
([269]) European Companies Act (Eiropas Komercsabiedrību likums), adopted on 2005.03.10, published in Latvijas Vēstnesis No 49, on 2005.03.24.
([270]) Council Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees, was implemented.
([271]) Information available at the website http://www.lbas.lv/, last visited on 2006.11.21.

economy, as well as undertakings employing over 50 people. Members of the Employers' Confederation employ around 25 % of the total workforce ([272]).

(c) Institutional framework

Social dialogue at the national level. The NTCC.

In addition to establishing a normative framework, the role of social partners and consultations was enhanced by the *Concept Paper on Necessity and Basic Principles of Tripartite Cooperation,* adopted by the Government in 1993. As a result of the Concept Paper, at the end of the same year the Tripartite Consultative Council (TCC) of employers, the state, and trade unions was established ([273]).

The system introduced by the 1993 Concept Paper was further reformed in 1998, when the government adopted the *Concept on Tripartite Cooperation at the National Level* ([274]). As a result of the 1998 Concept, at the beginning of 1999 the National Tripartite Cooperation Council (NTCC) was established, in lieu of the Tripartite Consultative Council ([275]). The NTCC, in operation from 1999, coordinates and organises social dialogue among employers' organisations, state institutions, and trade unions. The NTCC is structured in sub-councils, the most significant of which are sub-councils of 1) Labour Affairs, 2) Social Security 3) Vocational Education and Employment and 4) Health Care. The aim of the NTCC is to facilitate achievement of interests of organisations involved regarding social and economic issues, thereby contributing to social stability in Latvia. NTCC meetings take place once every two months, with ad hoc meetings organised if needed.

In order to facilitate and further strengthen tripartite dialogue *on the national level,* in 2004 a Tripartite Agreement 'on socioeconomic partnership' was signed between the government, the Employers' Confederation, and the Trade Union Confederation ([276]). The 2004 Tripartite Agreement promotes consultation on national domestic policy issues and importantly also on implementation of EU policy and legislation. The parties to the agreement acknowledged its importance and agreed to coordinate their positions and carry out consultations concerning the following issues: diminishing poverty and social exclusion, increasing the minimum salary, eliminating illegal employment, developing and adjusting the system of vocational education to the realities of the labour market, and improving the system of work safety and social guarantees ([277]).

([272]) Information available at the website http://www.lddk.lv, last visited on 2006.11.26.

([273]) By 1994 three tripartite cooperation councils had been established and started work.

([274]) Available at: www.mk.gov.lv/lv/mp/vaditas-padomes/ntsp, last visited on 2006.11.29.

([275]) In Latvian — *Nacionālās trīspusējās sadarbības padome*. The government is represented on the NTCC by the Ministry of Welfare, employees by the Trade Union Confederation, and employers by the Employers' confederation.

([276]) A 'tripartite agreement on socioeconomic partnership' was signed by: Prime Minister Indulis Emsis, representing the government; Pēteris Krīgers, the chair of the Free Trade Union Confederation of Latvia (Latvijas Brīvo Arodbiedrību savienība) and Vitālijs Gavrilovs, president of the Latvian Employers' Confederation (Latvijas Darba Devēju konfederācija).

([277]) Clause 4 of the Tripartite Agreement on Socioeconomic Partnership, as of 2004.10.01.; for analysis please also see Karnite, Raita 'Tripartite dialogue renewed', European Industrial Relations observatory online, 2004.

Social dialogue at the regional level

Similarly to developments regarding consultations on the national level, a cooperation agreement was signed in May 2006 to promote dialogue *on the local and regional level* between the Employers' Confederation, the Trade Union Confederation, and the Latvian Association of Local and Regional Governments ([278]).

Social dialogue at the level of undertakings

The Latvian government considers that tripartite social dialogue has successfully developed at the national level ([279]), while at the sectoral level social dialogue is still underdeveloped, with the exception of some sectors, and at the level of undertakings ([280]).

(d) Resolution of labour disputes

Further, the legislative framework promoting social dialogue was enhanced by the adoption of the *Labour Disputes Act 2002*. This legislation introduced conciliation and mediation proceedings ([281]). Thus, the act distinguishes between three types of labour disputes:

- *Collective rights disputes* — occur at the time of concluding, amending, terminating, or executing a collective agreement, as well as on applying or interpreting statutory regulations, collective agreements or working procedure regulations. These disputes should be settled by a reconciliation commission, or by a court of by arbitration ([282]).
- *Collective interest disputes* — occur in relation to the collective bargaining process defining new labour conditions or regulations. These disputes should be settled by a reconciliation commission, mediation, or arbitration ([283]). If for the settlement of a collective interest dispute the representatives of employees or the employees (a group of employees) use a strike as a final means, the employer, employers (a group of employers) or an organisation of employers, or an association of such organisations may resort to response action to protect their economic interests — i.e., to a lockout ([284]).
- *Individual rights disputes* — occur upon concluding, amending, terminating, or executing an employment contract, as well as on applying or interpreting regulations, collective agreements, or regulations regarding the labour procedure. These disputes should be settled by negotiation, by a labour dispute commission, or by a court ([285]).

([278]) Cooperation Agreement, as of 2006.05.31.
([279]) Informative Report 'On Necessary Suggestions in order to Secure Flexibility and Security in Employment Legal Relationship' prepared by the Ministry of Welfare, approved by the Cabinet of Ministers on 2006.08.22(Iinformatīvais ziņojums 'Par nepieciešajamiem priekšlikumiem, lai nodrošinātu elastību un drošību darba tiesiskajās attiecībās'), available in Latvian at: http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=4855, last visited on 2006.11.25.
([280]) For criticism of slow development of social dialog, see also Karnite, Rita 'Unions and employers want to strengthen national tripartite dialogue', European Industrial Relations Observatory online, 2005.
([281]) The Labour Disputes Act 2002, entered into force in January 2003 n. 6 supra.
([282]) Section 9 of the Law on Labour Disputes.
([283]) Section 13 of the Labour Disputes Act 2002.
([284]) Section 21 of the Labour Disputes Act 2002.
([285]) Section 4 of the Labour Disputes Act 2002.

(2) Relationship between statutory law and collective bargaining

(a) Avenues for social dialogue at the level of undertakings

The *Labour Act 2001* and the *Labour Protection Act 2001* aim to promote development of social *dialogue at the level of undertakings*. As a general rule, the Labour Act 2001 is worded as 'a minimum requirement rule'. Thus, the Labour Act provides only for minimum legislative requirements that employers and employees must comply with on commencing or terminating employment and during the period of employment. Through the 'minimum requirement rule', the Labour Act 2001 encourages development of bipartite social dialogue between employer and employees. Consequently, the act aims to promote the establishment of a flexible employment relationship model adjustable to the needs of a particular sector or undertaking.

However, in practice the situation only partly corresponds to the expectations of the authors of the Labour Act 2001. Many sectors have no employers' organisations; and in sectors where employers' organisations are established they are nevertheless mainly concerned with professional questions and not with employment-related matters. Therefore, in spite of available legislative avenues, social dialogue at the level of undertakings is weak and underdeveloped. Consequently, further initiatives from all parties involved are necessary to strengthen and promote social dialogue at this level.

(b) Collective agreements binding on all member organisations

A collective agreement at the sectoral or territory level entered into by an organisation of employers or an association of organisations of employers is binding on members of the organisation or the association of organisations. This provision was included in the amended Labour Code and remained in the Labour Act 2001.

(c) Extending application of collective agreements to non-members of employers' organisations

Until 2002 it was not possible to extend the application of sectoral collective agreements to non-members of the particular employers' organisation that concluded the agreement ([286]). However, the Labour Act 2001 changed this practice from 2002, so that if members of an organisation of employers or an association of organisations of employers employ more than 60 % of the employees in a particular sector, a sectoral collective agreement entered into between the organisation of employers or the association of organisations of employers and an employee trade union or an association (union) of employee trade unions is binding on all employers of the relevant sector and must apply to all employees employed by those employers ([287]). Thus, the application of a collective agreement was extended to non-union employers and employees, provided that more than 60 % of the employees in a particular sector are subject to the agreement.

The threshold of employing 60 % of all employees in a particular sector has proved in practice to be very difficult. Thus, although the Labour Act 2001 introduced legislative change,

([286]) Collective Agreements Act 1991 (Likums par koplīgumiem), as of 1991.03.26, published in *Ziņotājs* No 21, on 1991.06.06.
([287]) Section 18, part 4 of the Labour Law.

the situation hardly changed in reality. Acknowledging the existing practical difficulty of achieving the threshold of employing 60 % of all employees in a particular sector, in September 2006 the threshold was decreased to 50 % ([288]). Latvian construction workers were strong supporters and promoters of lowering the threshold. Employers in the construction sector had already concluded a sectoral collective agreement. However, it was not covering the whole sector ([289]).

An extended sectoral collective agreement becomes binding from the day of publication in the official Gazette *Latvijas Vēstnesis* ([290]) A sectoral agreement is published on the basis of joint application by the parties to the agreement ([291]). A register of collective agreements is not kept. The Labour Act includes the obligation to publish a sectoral collective agreement only if it is an extended sectoral collective agreement. In practice, information on sectoral collective agreements can be obtained on request from the FTUCL or the ECL. However, disclosure of the contents of sectoral collective agreements to third parties is at the full discretion of the parties to it.

(d) Individual relationships *vs.* collective bargaining

Collective bargaining does not take place in all undertakings. Thus, the individual employment contract is the predominant form of regulating employment relations in Latvia. Collective agreements are most often concluded in undertakings where a trade union is present. Considering that only approximately 17 % of employees belong to trade unions, roughly 25 % of all employees are covered by collective agreements. Collective bargaining mainly takes place in state and local government enterprises, former state-owned service enterprises and industry, and in large and medium-sized enterprises. In the private sector, collective agreements are less common.

(e) Requirements applicable to collective agreements

A collective agreement must not diminish employee rights in comparison with the minimum requirements provided by the Labour Act 2001. According to the Act, the provisions of a collective agreement, working procedure regulations, or of an employment contract and orders of an employer that contravene the law and diminish the legal status of an employee, are not valid ([292]).

Under the Labour Act 2001, a collective agreement must be in writing and signed ([293]). Provisions of a collective agreement apply to the employer and all employees unless it provides otherwise. An employee and an employer may derogate from a collective agreement only if the relevant provision of the employment contract is more favourable to the employee ([294]).

([288]) Amendments to the Labour Act 2001 as of 2006.09.21, published in Latvijas Vēstnesis No 162, 2006.10.11.
([289]) I. Tāre, 'Reviewed Amendments Correspond to requirements and practice in the EU' ('Caurlūkotie grozījumi atbilstīgi ES prasībām un praksei'), Komersanta Vēstnesis, 2006.10.18.
([290]) Ibid., Section 18, part 4.
([291]) Ibid.
([292]) Section 6, part 1 of the Labour Act 2001.
([293]) Section 17, part 3 of the Labour Act 2001.
([294]) Section 6, part 2 of the Labour Act 2001.

(3) Types of collective agreement

(a) Legislative definition of types of collective agreement

Under the Labour Act 2001, two types of collective agreements are distinguished:

- A *Collective Agreement in an Undertaking* is entered into by an employer and an employee trade union or by authorised employee representatives if the employees have not formed a trade union ([295]);
- A *Sectoral Collective Agreement* is a collective agreement in a sector or territory entered into by an employer, a group of employers, an organisation of employers or an association of organisations of employers, and an employee trade union or an association (union) of employee trade unions if the parties to the sectoral collective agreement have relevant authorisation or if the right to enter into a sectoral collective agreement is provided for by the articles of association of such associations (unions) ([296]).

(b) Forms of employee representation: trade unions and authorised representatives

Within the meaning of the Labour Act 2001, employees may be legally represented by:

- An *employee trade union* represented by a trade union institution or an official authorised by the articles of association of the trade union; or
- *Authorised employee representatives* elected in accordance with the specific procedure set by the Labour Act 2001 ([297]).

In practice, authorised employee representatives are rather an exceptional form ([298]). Thus, if there is no a trade union organisation in an undertaking then it is also highly unlikely that employees have elected their authorised representatives. Consequently, the interests of employees are predominantly represented only by the trade unions.

(c) Collective agreements at the level of undertakings

At the level of undertakings, collective agreements include provisions regarding pay, working time, the preparation of employment contracts, and employment termination; rights of trade unions and their committees, and other matters. As of January 2005, according to information from the FTUCL, at the level of undertakings 2405 collective and similar agreements had been concluded by FTUCL member organisations ([299]).

(d) Sectoral collective agreements

The content of sectoral collective agreements considerably differs according to sector. In some sectors, collective agreements regulate only the amount of minimum wage. In other sectors, these are broader and also regulate working conditions, including the length of the working day,

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([295]) Section 18, part 1 of the Labour Act 2001.

([296]) Section 18, part 2 of the Labour Act 2001.

([297]) Section 10, part 1 of the Labour Act 2001.

([298]) The Labour Act 2001 provides for two forms of employee representation and addresses the situation when both forms of employee representation exist in an undertaking.

([299]) According to the information available on the website of the Trade Union confederation. Available at: http://www.lbas.lv/soc_uznem.php, last visited on 2006.11.26.

vocational training, and additional holidays ([300]). Sectoral collective agreements are mainly concluded in the public sector, for example, in the education and health sectors. Overall, employers and trade unions are stronger and better organised in the public sector. In the private sector, sectoral collective agreements are concluded in recently-privatised larger former state enterprises, for example in the energy and transport sectors. The construction sector provides a good example of a successful private sectoral collective agreement. The construction sectoral collective agreement provides for a minimum wage considerably higher than the state minimum wage ([301]).

(4) Relationship between levels of bargaining

Social dialogue at the sectoral, regional level and the level of undertakings is poorly developed. Tripartite cooperation based on the territorial (regional) principle in Latvia faces significant difficulties. Regional dialogue is hampered by unequal economic development of different regions and an unclear perspective on planned administrative territorial reform. As of 2006, according to FTUCL data, 59 regional agreements had been concluded by FTUCL members with local municipalities ([302]).

The results of tripartite social dialogue at the national level are usually implemented through national legislation. This then provides a framework for social dialogue at the sectoral level and at the level of undertakings. For example, a number of amendments to the Labour Act 2001 have been introduced as a result of social dialogue consultations. At the same time, sectoral agreements are often generally worded and lack binding norms. This minimises the impact of sectoral collective agreements on collective agreements at the lower level.

(5) Individualisation of employment relationships

The ‘minimum requirement rule’ of the Labour Act 2001 allows a wide discretion for social partners to agree on conditions arranged for a specific undertaking. For example, the act provides a general rule on working time: eight hours a day and 40 hours a week ([303]). However, the act allows an employer to establish aggregated working time, after consultation with employee representatives, if the nature of the work excludes compliance with the length of the regular daily or weekly working time ([304]).

Thus, on the one hand the Labour Act 2001 allows ‘flexible’ arrangements and on the other presupposes the existence of authorised employees’ representatives able to use the relevant provisions of the Labour Act to the advantage of employees. In practice, the weak presence of trade unions or employee representatives at the level of undertakings mean that the Act’s flexible provisions are implemented at the unilateral discretion of employers. The working time provision is interpreted by employers as requiring consultation with employee representatives only if those

([300]) Information available at the website of the Trade Union Confederation. Available at: http://www.lbas.lv/soc_nozares.php, last visited on 26 November 2006.
([301]) Liene Pilsētniece, ‘What circumstances affect work remuneration’, (‘Kas ietekmē darba algu?’), Komersanta Vēstnesis, 2006.10.04.
([302]) According to the information available at the website of the Trade Union Confederation. Available at: http://www.lbas.lv/soc_regioni.php, last visited on 26 November 2006.
([303]) Section 131, part 1 of the Labour Act 2001.
([304]) Section 140, part 1 of the Labour Act 2001.

representatives are present in an undertaking. Consequently, if neither trade union nor employee representatives are selected at the level of an undertaking, then it is at the full discretion of the employer to unilaterally set provisions on aggregated working time.

Similarly, the Labour Act 2001 regulates cases of collective redundancies. The act requires an employer who intends to carry out collective redundancy to commence consultations with employee representatives in good time ([305]). However, if the particular undertaking has no employee representatives, as is often the case in practice, then employees cannot benefit from this consultation procedure.

In conclusion, the individual employment contract is the main form of regulating the relationship between employee and employer. The flexible provisions of the act are often implemented unilaterally at the discretion of the employer, due to lack of authorised employee representatives.

(6) Sources of regulation other than statutory law and collective bargaining

Employee representatives have a right under the Labour Act 2001 to receive information in good time and consult with the employer before the employer takes decisions that may affect employee interests, in particular decisions that affect remuneration, working conditions, and employment in the undertaking ([306]). Consultations between employer and employees' representatives may lead to unconventional agreements, for example enabling loans from the employer at lower interest rates, or other employee benefits to counterbalance the negative aspects of a particular employer decision.

In addition to statutory law and collective agreements, the jurisprudence of the Senate of the Supreme Court of Latvia substantially contributes to interpretation and development of statutory provisions regulating employment relations. The authoritative interpretations of statutory regulations by the Supreme Court are closely monitored and followed in practice. Importantly, in 2004 the Supreme Court published an overview of case law on termination or amendments to employment contracts. Although for information only, this overview is taken into consideration by employers, employees, the courts, and labour dispute resolution bodies in resolving employment disputes ([307]).

([305]) Section 106, part 1 of the Labour Act 2001.

([306]) Section 11, part 1 of the Labour Act 2001.

([307]) Overview of case law 'On application of law when solving disputes related to termination or amendments of employment contract' (Tiesu prakses apkopojums 'Par likumu piemērošanu, izšķirot strīdus, kas saistīti ar darba līguma izbeigšanu vai grozīšanu'), available at the website of the Supreme Court Senate of Latvia: http://www.at.gov.lv, last visited on 2006.11.29.

2. From job security to employability

(1) Protection against dismissal

(a) Termination of employment contract in case of prolonged illness

A national social model acknowledging the need to search for a proper balance between job flexibility and job security is only emerging in Latvia. This process is shaped by the demands of the emerging European social model and Lisbon targets and enhanced by the accession of Latvia to the European Union.

Legislative provisions on termination of employment are very rigid. In fact, in comparative terms the Labour Act 2001 provides greater protection to employees than the repealed Labour Code ([308]). Thus, under the Labour Act 2001 employers now have fewer possibilities to dismiss employees due to prolonged illness ([309]). The Labour Code that regulated employment relations until 2002 allowed an employer to terminate an employment contract if an employee was absent from work due to sickness for more than four consecutive months ([310]). Under the Labour Act 2001, prolonged incapacity to work for health reasons cannot be used as a valid legal ground for terminating an employment contract. Employees absent from work due to prolonged sickness can be legally dismissed only upon return to work and if they cannot continue working in their previous positions for health reasons ([311]). Moreover, even if an employee is unable for health reasons to continue work in a previously held position, then before terminating the employment contract the employer must examine the possibility to offer another position in the same undertaking suitable to the employee's health condition ([312]). Furthermore, the Labour Act 2001 requires an employer to allow enough time for an employee who has been issued a notice of termination ([313]) to search for other employment ([314]). Time for searching for employment must be set aside by the employer within the scope of working time under the employment contract.

(b) Fixed-term employment contracts

If the term of an employment contract is not specified, it is considered to have been entered into for an unspecified term ([315]). Other types of employment contract are permitted ([316]) including fixed-term contracts for completion of a specific task ([317]) or part-time contracts ([318]). However, under the Labour Act 2001 the duration and grounds for entering into fixed-term employment

([308]) Labour Code of Latvia (in Latvian — *Darba likumu kodekss*), as of 1972.10.01, published in Ziņotājs No 16, on 1972.01.01.
([309]) Section 101, part 1, clause 7 of the Labour Act 2001 vs. Section 33, part 5 of the Labour Code.
([310]) Ibid.
([311]) Section 101, part 1, clause 7.
([312]) Section 101, part 4 of the Labour Act 2001.
([313]) When the employment contract is terminated on the basis of Section 101, part 1, clauses 6–10, as discussed below in this report.
([314]) Section 111 of the Labour Act 2001.
([315]) Section 43 of the Labour Act 2001. For further discussion on various forms of employment relations, please see Section 3(1) of the current report.
([316]) Limited possibilities exist to conclude other types of work performance contracts. However, other legal forms of regulating work performance are not regulated by the Labour Act 2001. Importantly, for the protection of an employee the employment contract is understood broadly. Thus, if a dispute as to the form of agreement arises then if the agreement is characterised by elements of an employment contract (one person performs specific work under the guidance of another person for agreed remuneration), then the contract will be regarded as an employment contract. Under the Labour Act 2001, if none of the parties has requested termination of a fixed-term employment contract by its expiry and the employment relationship in fact continues, then the contract is considered to be extended for an indefinite term (Section 44, part 4 of the Labour Act 2001).
([317]) Section 44 of the Labour Act 2001.
([318]) Section 134 of the Labour Act 2001.

contracts must be explicitly provided ([319]). The Latvian Labour Code did not require justification for entering into a fixed-term employment contract and contained only two restrictions: the maximum term of a fixed-term contract and the presumption that if a fixed-term employment contract is concluded for a third consecutive term, then it automatically becomes a contract for an unspecified term ([320]). A number of legislative initiatives are planned to contribute to more flexible regulation of employment relations. These include extending the list of permitted grounds for concluding fixed-term employment contracts, and establishing a normative basis regulating temporary work agencies ([321]). However, it still remains unclear whether trade unions will have a critical stance on the reduction of employee job security guarantees or will agree on the need to make employment relationships more flexible.

(c) Termination of employment contract — general remarks

Under the Labour Act 2001, an employment contract may be terminated on the initiative of an employee ([322]); on the initiative of an employer ([323]); by mutual agreement of the parties ([324]); and in other cases ([325]).

Thus, an employment contract for an indefinite period may be terminated either by mutual agreement or on one of the exhaustive grounds provided by the Labour Act 2001. Exceptionally, the employer may apply to the court for permission to dismiss an employee for 'a relevant reason' not specifically listed in the act. This states that any condition based on considerations of morality and fairness that does not allow continuation of employment is regarded as a 'relevant reason'. The courts interpret whether a particular ground for dismissal not specifically listed by the act may be considered a 'relevant reason' for dismissal ([326]). In practice, no case law has emerged on interpretation of what may be considered a 'relevant reason' within the meaning of the act. Thus, presumably the 'relevant reason' provision is rarely, if at all, used in practice.

(d) Termination of employment contract on employer's initiative

On the initiative of an employer, an employment contract may be terminated only on the basis of circumstances related to employee conduct or abilities, or on the basis of economic, organisational, technological or similar measures in the company as prescribed by the Labour Act 2001 ([327]). The exhaustive list of cases when employment may be terminated on the initiative of an employer is as follows:

1) the employee without justifiable cause significantly violates the employment contract or specified working procedures;
2) the employee, when working, acts illegally and therefore loses the trust of the employer;

([319]) Amendments to the Labour Act 2001 came into force aiming to improve flexibility of employment relations, for example extension of the maximum period for which fixed-term employment contracts can be entered into.

([320]) Section 16 of the Latvian Labour Code.

([321]) Informative Report 'On Necessary Suggestions in order to Secure Flexibility and Security in Employment Legal Relationship' prepared by the Ministry of Welfare, approved by the Cabinet of Ministers on 2006.08.22 (*in Latvian — informatīvais ziņojums 'Par nepieciešajamiem priekšlikumiem, lai nodrošinātu elastību un drošību darba tiesiskajās attiecībās')*, available in Latvian at: http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=4855, last visited on 2006.11.25.

([322]) Section 100 of the Labour Act 2001.

([323]) Section 101 of the Labour Act 2001.

([324]) Section 114 of the Labour Act 2001.

([325]) Section 115 of the Labour Act 2001.

([326]) Section 101, part 5 of the Labour Act 2001.

([327]) Section 101, part 1 of the Labour Act 2001.

3) the employee, when working, acts contrary to moral principles and this is incompatible with continuation of employment;
4) the employee, when working, is under the influence of alcohol, narcotic or toxic substances;
5) the employee grossly violates labour protection regulations and jeopardises the safety and health of others;
6) the employee lacks adequate occupational competence for doing their job;
7) the employee is unable to do the job due to their state of health as certified by a doctor's opinion;
8) an employee who previously did the same job is reinstated;
9) the number of employees is being reduced (reduction in the number of employees is a notice of termination of an employment contract for reasons not related to the conduct of an employee or their abilities, but is adequately substantiated on the basis of performance or urgent economic, organisational, technological or similar measures in the undertaking) ([328]);
10) the employer — legal person or partnership — is being liquidated.

Unless otherwise provided by collective agreement or the employment contract specifies a longer period for notice of termination, an employer is obliged to comply with the following periods when giving notice. The general rule under the Labour Act 2001 is that an employer must give notice of dismissal to an employee in writing:

- *without delay* if notice is based on the cases at points 2) and 4) above;
- *ten days* in the cases at points 1), 3), 5) and 7); and
- *one month* in the cases at points 6), 8), 9) and 10) ([329]).

A collective agreement or employment contract may provide for a longer notification requirement.

If an employment contract is terminated due to the employee's behaviour, the employer must first require and consider the employee's written explanation. An employer's decision to terminate employment must take into account the gravity of the violation, the employee's previous work record, and their personality ([330]). Dismissal on the ground of employee behaviour must take place within one month of discovery of the violation, and, in any event, no later than six months after the violation was committed ([331]).

Within one month of receiving the termination notice, an employee may challenge the termination notice through the courts. The burden of proof is on the employer, who has to justify the legality of the dismissal. Generally, if a court finds the dismissal unjustified either on procedural or substantive grounds, then the employer must reinstate the employee (unless the employee requests otherwise) to the position held before and pay average remuneration for the forced absence from work.

The Labour Act 2001 introduced the concept of collective redundancies, thus implementing Directive 98/59/EC on collective redundancies.

(e) Termination of employment contract during probation period

During the probation period (the maximum length of which cannot exceed three months) a contract may be terminated by written notice submitted three days in advance by either party.

([328]) The definition of a reduction in the number of employees is included in Section 104, part 1 of the Labour Act 2001.
([329]) Section 103 of the Labour Act 2001.
([330]) Section 101, part 2 of the Labour Act 2001
([331]) Section 101, part 3 of the Labour Act 2001.

The law does not require that reasons be given for terminating an employment contract during the probation period ([332]). If a probation period has expired and the employee continues to do their job, this implies that he/she has passed the probation period ([333]). If an employer violates the prohibition of differential treatment when giving notice of termination during the probation period, the employee may file court proceedings within one month from the date of receiving notice of termination ([334]).

(f) Termination of employment contract when employee a trade union member

The law does not provide for any information or consultation procedures on termination of individual employment contracts. However, special rules apply in cases of employer-initiated termination where the employee is a member of a trade union. Before issuing notice to terminate, the employer must establish whether the particular employee is a member of a trade union.

Subject to very few exceptions ([335]) under the Labour Act 2001, an employer may not terminate an employment contract with a trade union member without prior consent of the relevant trade union. Thus, an employer must persuade the trade union that dismissal is justified. A trade union need not give reasons for refusing to grant consent for dismissal. The 2006 amendments to the Labour Act 2001 introduced a presumption that failure of an employee's trade union to respond to an employer request to grant consent amounts to union consent to terminate ([336]). Within one month, an employer may issue a court challenge against refusal by a trade union to grant its consent to dismiss an employee. Provided the employer has a legitimate ground for doing so, a court terminates an employment contract even if the relevant trade union has expressly objected.

(2) Promoting employability

(a) Statistical indicators

Comparative data from the European Commission on employment levels in EU Member States suggest that Latvia's employment increase of 5.8 % since 2000 is the second fastest among all Member States ([337]). *Eurobarometer* data suggest that most Latvian inhabitants, 87 % of all respondents, are confident that they will not lose their job within the next few months ([338]). Importantly, the government has decided to distribute 6.33 % of resources available through EU funds in 2007 to 2013 to employment-related issues ([339]).

([332]) Section 47 part 1 of the Labour Act 2001.
([333]) Section 47 part 2 of the Labour Act 2001.
([334]) Section 48 of the Labour Act 2001.
([335]) For example, during probation period.
([336]) Amendments to the Labour Act 2001, as of 2006.09.21, published in Latvijas Vēstnesis No 162, on 2006.10.11.
([337]) 'Figures and Facts' ('Skaitļi un fakti'), Latvijas Vēstnesis Plus, 2006.11.10.
([338]) As reported in Latvijas Vēstnesis Plus, 2006.11.10. In 2006, this parameter in comparison with the previous survey increased by 12 %.
([339]) 'Distribution of the EU fund for the years 2007 to 2013', ('ES fondu sadalījums 2007.-2013.gadam'), information from the Ministry of Finance, published in Komersanta Vēstnesis on 2006.04.26. Human resources and employment is one of three operational programmes for acquiring EU structural funds.

(b) Policy and programming documents

The national programme for implementing Lisbon targets (the national Lisbon programme) for 2005 to 2008 provides key points on developing employment policy in Latvia. The key points identified in the programme address the main problems related to regional differences, including:

- high unemployment rate in regions situated far from the capital, with simultaneous shortage in the capital of employees with certain qualifications;
- comparatively high level of illegal employment in several economic sectors (building, manufacturing, agriculture, and transport);
- greater unemployment risk among the young, persons after childcare leave, inhabitants with insufficient knowledge of the Latvian language, and other socially-excluded groups ([340]).

Under the national Lisbon programme, Latvian employment policy priorities are:

- to promote inclusiveness in the labour market by extending active employment measures through improved cooperation between the State Employment Agency and employers to increase the competitiveness of the unemployed, especially groups at risk of social exclusion, including persons with insufficient knowledge of Latvian;
- to promote economic activities in underdeveloped regions by improving the business environment, promoting development of commercial activities and self-employment, and by providing state support to diminish regional differences;
- to deal with illegal employment, and stimulate people to operate in the formal economy by increasing net salary for low salaried workers, increasing the minimum (and untaxed minimum) salary, and strengthening the capacity of state-controlled institutions and associations of social partners;
- to extend education and training possibilities, especially for low-qualified employees, as well as developing lifelong learning while improving the quality of education and developing professional orientation measures ([341]).

Employment-related activities are also included in Latvia's national development plan for 2007 to 2013. The plan is in essence a framework document adopted by the Latvian government outlining the strategies and visions of Latvia's socioeconomic development from 2007 to 2013 ([342]).

([340]) The National Lisbon Programme of Latvia for the years 2005–2008 (*in Latvian* — Latvijas Nacionālā Lisabonas programma 2005.-2008.gadam), accepted by Order No 684 of the Cabinet of Ministers as of 2005.10.19, published in *Latvijas Vēstnesis* No 169, in 2005.10.25.

([341]) Ibid.

([342]) Government Regulations No 564 The National Development plan of Latvia for the years 2007 — 2013 (*in Latvian* — Latvijas Nacionālās attīstības plāns 2007–2013), as of 2006.07.04, published in *Latvijas Vēstnesis* No 108, on 2006.07.11.

(c) State Employment Agency

The implementation of national employment policy including providing labour market-related services is carried out by the State Employment Agency (the STA). The competence of the STA covers registration, placement, training, and retraining of the unemployed. Additionally, the STA functions as a bridge between potential employees and employers. In January 2006, the STA and the Employers' Confederation concluded a cooperation agreement that provides for mutual exchange of information regarding the labour market situation and cooperation in vocational training of unemployed persons.

The STA provides the following free–of-charge services to employers:

- registering and publishing job vacancies;
- selecting suitable employees;
- organising meetings and negotiations between employers and unemployed persons;
- enabling participation in active employment measures — salaried temporary work, subsidised employment;
- consulting regarding employee recruitment and in cases of collective redundancy.

An employer must give one month's notice to the STA of reduction of the number of employees ([343]). The notice must include information regarding the number and types of professions of the employees to be dismissed. Until the 2006 amendments to the Labour Act 2001, the obligation to notify applied only in case of collective redundancies ([344]). The extension of that requirement beyond collective redundancies aims to promote a more inclusive labour market. On that basis, the STA is better placed to take measures needed to increase competitiveness of employees belonging to risk groups.

At the request of employers, the STA offers training for the unemployed and covers the associated costs. An employer may request the STA ([345]):

- to train the unemployed in any educational programme for the needs of a particular employer;
- to participate in selection of the unemployed for training;
- to train specified unemployed persons in particular occupations needed for an employer;
- to participate in qualifying exams and to choose employees from among the unemployed and jobseekers who have completed the training programme.

Employers may offer practice places at educational institutions in order to assess the skills of potential employees in the actual working environment and to allow applicants to obtain the skills needed at a particular workplace. In practice, implementation of training for the unemployed is problematic due to lack of reliable forecasts on possible developments in the Latvian labour market. Thus, the STA finds it difficult to objectively justify what kind of employees and what professional skills will be in demand in the labour market.

([343]) Amendments to the Labour Act 2001, as of 2006.09.21, published in Latvijas Vēstnesis No 162, on 2006.10.11.
([344]) The STA were to be informed at least 60 days in advance.
([345]) According to the information available from the website of the State Employment Agency: www.nva.gov.lv, last visited on 2006.11.26.

(d) Illegal employment

Illegal employment is gradually decreasing but still remains a serious problem. Illegal employment is tolerated by society. Often an employee agrees to an illegal arrangement due either to a lack of other employment possibilities or to a desire to be paid without compulsory state social insurance contributions and individual income tax being withheld. Employees willing to tolerate this 'flexible' arrangement do so irrespective of the fact that it will leave them without social guarantees and protection. Additionally, the state loses substantial amounts. The problem of illegal employment is multidimensional and requires not only enhanced state supervision and enforcement but also overall improvement in state-provided social services.

(3) Training and lifelong learning

The system for training and lifelong learning in Latvia is in its early formation stage. As a general rule, employees search for avenues to obtain professional training and education corresponding to their professional interests, at their own discretion and their own expense. Only rarely do employers pay for professional training of their employees.

As a matter of general practice, state-funded support for education ends with graduation from secondary school. The only adults who can attend courses free of charge are the unemployed and job seekers (i.e., those registered with the STA). Additionally, some NGOs offer free education based on finances originating from separate projects.

A normative and institutional basis for lifelong learning in Latvia was established in 1993, when the Latvian Adult Education Association (LAEA) was set up with support from the Ministry of Education and Science and the International Cooperation Institute of the German Association of Adult Education. One of the main tasks of the LAEA is to form a network of adult education centres and coordinators to provide institutional support for further development of lifelong learning programmes ([346]). Regrettably, Latvia has so far failed to create a functioning system of lifelong learning, as correctly pointed out by the European Commission evaluating Latvia's action plan on combating poverty ([347]).

The National Development Plan 2007–2013 ([348]) elaborates key points on lifelong learning in Latvia ([349]). However, a national implementation plan for lifelong learning is still at the development stage. The Plan acknowledges that access to continuing education in the regions is more burdensome than in the capital. Therefore, one of the main aims of an effectively functioning lifelong learning process is to secure accessibility. Thus, all Latvian inhabitants irrespective of their place of residence, age, occupation, and property status should have equal access to lifelong learning possibilities. Another key issue is to develop a constant supply of continuing education. This includes finding a proper balance between supply and demand, examining the quality of adult education, and establishing a normative basis and mechanism for continuous and sufficient financing of continuing education.

([346]) Main viewpoints of lifelong learning for the years 2007 to 2013 prepared by the Ministry of Education and Science (*in Latvian — Mūžizglītības pamatnostādnes 2007.-2013.gadam*), available in Latvian at: http://www.mk.gov.lv/doc/2005/Pamatnostadnes.doc, last visited on 2006.11.26.

([347]) Rūta Kestnere, 'Learning does not end by graduating from school' ('Mācīšanās nebeidzas ar skolas slieksni'), Latvijas Vēstnesis Plus, 2006.03.29.

([348]) The plan in essence is a framework document adopted by the Latvian government that outlines the strategies and vision of Latvia's socioeconomic development from 2007 to 2013.

([349]) Government Regulations No 564 The National Development plan of Latvia for the years 2007 — 2013 (*in Latvian* — Latvijas Nacionālās attīstības plāns 2007–2013), as of 2006.07.04, published in *Latvijas Vēstnesis* No 108, on 2006.07.11.

The intention is that in the next planning period, 2007–2013, every individual could apply for a scholarship financed by the European Social Fund. Local municipalities will have a duty to provide facilities for continuing education ([350]). The state in its turn will provide financial support to assist planning of continuing education in the regions. Another positive practice to be introduced during the next planning period is practical training with a specific employer at state expense. At this stage, employers interested in investing resources in training or training their employees may apply for financial support only to EU structural funds. Although initiatives promoting lifelong learning are welcome, the main challenge remains unaddressed. The main challenge is rooted in lack of reliable research data and forecasts on actual demand in the Latvian labour market.

The main problems identified in national lifelong learning policy are as follows: ([351])

- Many people in Latvia cannot access formal and informal education necessary for them at various stages of life and in the field they are interested in, including 'second chance' education. This results in social segregation and formation of generations of unemployed persons because various social groups have limited possibilities to access education. For example, low-income families, new mothers, young people (especially those living in the countryside), people over 50, prisoners, people with incomplete secondary or elementary education, people with special needs, people with problems integrating in the labour market and in society in general. The state generally is not obliged to take responsibility for providing access to lifelong learning irrespective of age, previous level of education, place of residence, and ethnic origin.
- The Latvian education system does not recognise adults as a priority, or indeed as the biggest target group. As a result of inadequate offerings by the educational system adults face difficulties in securing continuing and efficient participation in the labour market and civil society. Consequently, currently general and vocational continuing education cannot efficiently provide the knowledge, skills and experience that employers need.

(4) Young people at work: bridging the gap between school and labour market

According to STA data, young people in the 15 to 24 age group make up 14.5 % of the unemployed ([352]). The overall reason for high unemployment among the young is lack of work experience, low level of education, and unsatisfactory professional training. The National Development Plan provides a target to establish mandatory secondary education by 2013 ([353]), whereas currently only elementary education is mandatory in Latvia.

Young graduates of secondary or professional schools substantially contribute to the unemployed in this risk group. This indicates that various asymmetries exist on the professional education/employment axis. Thus, either the quality of secondary and professional education is unsatisfactory for the labour market or the profession chosen by a potential employee is not in demand on the labour market. Notably, the unemployment rate among graduates of higher

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([350]) Ibid.

([351]) Main viewpoints of lifelong learning for the years 2007 to 2013 prepared by the Ministry of Education and Science (*in Latvian — Mūžizglītības pamatnostādnes 2007.-2013.gadam*), available in Latvian at: http://www.mk.gov.lv/doc/2005/Pamatnostadnes.doc, last visited on 2006.11.26.

([352]) Rūta Kestnere, 'Youth in Latvia — threatened by unemployment', ('Latvijas jaunieši — bezdarba apdraudētie'), Latvijas Vēstnesis Plus, 2006.21.04.

([353]) Government Regulations No 564 The National Development plan of Latvia for the years 2007 — 2013 (*in Latvian* — Latvijas Nacionālās attīstības plāns 2007–2013), as of 2006.07.04, published in *Latvijas Vēstnesis* No 108, on 2006.07.11.

educational institutions is relatively small. In addition to level of education, the unemployment risk of young people is also subject to regional differences. Thus, young people in the countryside face higher unemployment.

Alarmingly, a recent survey on the quality of professional orientation indicates that 90 % of respondents consider that the knowledge they gained at school is not sufficiently linked to the labour market. During public discussions, all social partners acknowledged the urgency of improving cooperation between potential employers and educational institutions.

In March 2006, the Government adopted the Concept paper 'Improving the Career Development Support System" ([354]). The Concept paper identifies the main deficiencies of the career development support system. These include lack of information about the labour market and its possible development, while information about educational availability is not comprehensive and is not aggregated in a user-friendly way. Additionally, cooperation with employers is not sufficient. Further, the Concept elaborates goals for improving the current situation and defines action needed to achieve goals identified. This programme will be implemented with the support of the European Social Fund.

One positive development is that employers increasingly offer educational stipends to young people on condition that on successful completion of the course of study the graduate will work for a certain period in the company that provided the stipend.

An important avenue for pupils from 15 to 18 to obtain work on the labour market is for them to work during the summer holidays. From 2004, the STA offers pupils a possibility to work one month during the summer holidays (June to August) ([355]). Pupils are employed in trade, manufacturing industry, municipalities and municipal-owned enterprises, in fields such as service, building, tourism, and social care. In order to secure fairness to adolescents, the STA has worked out a standard form of employment contract for all employers.

To facilitate employment of young people with special needs, a special regulation is provided within the framework of the holiday work experience programme. Thus, if an employer takes on a young person with special needs, the state covers remuneration, with the employer responsible only for paying mandatory social insurance contributions.

To facilitate employability of young persons from 15 to 18 and thus provide possibilities to gain work experience on the labour market, the government is considering amendments to statutory norms regulating employment of adolescents ([356]).

(5) Active ageing

The Latvian national Lisbon programme 2005–2008 also concentrates on employees of pre-retirement age, among other risk groups. The national Lisbon programme aims to stimulate the competitiveness of this risk group and to introduce professional orientation services within the context of lifelong learning ([357]).

([354]) Concept paper 'Improvement of Career Development Support System' (in Latvian — Karjeras attīstības koncepcija), accepted by Order No 214 as of 2006.03.29, published in Latvijas Vēstnesis No 61, on 2006.04.18.

([355]) Kate Rūķēna, 'During summertime — for job experience', ('Vasarā — pēc darba pieredzes'), Latvijas Vēstnesis Plus, 2006.02.10.

([356]) Government Regulation No 206 regarding work in which employment of adolescents is prohibited and exceptions when employment in such work is permitted in connection with vocational training of adolescents (in Latvian 'Noteikumi par darbiem, kuros aizliegts nodarbināt pusaudžus un izņēmumi, kad nodarbināšana šajos darbos ir atļauta saistībā ar pusaudžu profesionālo apmācību' as of 2002.05.28, published in Latvijas Vēstnesis No 82, on 2006.05.31.

([357]) Latvian national Lisbon Programme for the years 2005 to 2008 (*in Latvian — Latvijas nacionālā Lisabonas programma 2005.-2008.gadam)*, available in Latvian at http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=4430, last visited on 2006.11.26.

To promote economic activity among older workers, in 2006 the STA launched the project 'Prolonging active working life among the seniors target group'. This project focuses on older workers with five or fewer years to pension age, as well as pensioners. The project enables older workers to stay longer in the labour market or even to acquire new skills and abilities to continue their working life in some other profession ([358]). It must be noted that the initiative promoting active ageing is only emerging and so far this field has been largely neglected by state programmes and financing.

(6) Categories of workers at risk of social exclusion

(a) General remarks

According to the information report 'National Report on Strategy for Social Protection and Social Inclusion 2006 to 2008' ([359]), the following groups in Latvia are open to risk of poverty and social exclusion:

- large and incomplete families;
- the disabled;
- persons of pre-retirement and retirement age;
- children and young people from disadvantaged families or with functional impediments, children of ethnic minorities (mainly Roma);
- former prisoners;
- orphans;
- children from children's homes;
- unemployed young persons with various addictions;
- the long-term jobless;
- the homeless;
- some ethnic minorities (especially Roma); and
- victims of human trafficking.

To facilitate integration into the labour market of people facing risk of social exclusion, the government has worked out special support programmes with the support of the European Social Fund.

([358]) Liena Pilsētniece, 'Offer to job seekers — both for young people and seniors', ('Piedāvājums darba meklētājiem — gan jauniešiem, gan senioriem'), Komersanta vēstnesis, 2006.04.19.

([359]) Informative Report 'National Report about Strategy on Social Protection and Social Inclusion for the Years 2006 to 2008' prepared by the Ministry of Welfare, accepted by the Cabinet of Ministers on 2006.09.26 (*in Latvian — informatīvais ziņojums 'Par nacionālo ziņojumu par sociālās aizsardzības un sociālās iekļaušanas stratēģiju 2006.-2008.gadam')*, available in Latvian at: http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=4855, last visited on 2006.11.25.

(b) People lacking knowledge of Latvian

Lack of Latvian language knowledge also contributes to the risk of social exclusion. An STA survey ([360]) reveals that knowledge of Latvian is regarded as the dominant factor increasing chances of finding employment. However, it is not a decisive reason why people are rejected by potential employers. Importantly, 42 % of respondents confirmed that insufficient knowledge of the Latvian language is an obstacle to participating in employment-promoting activities organised by the STA. Thus, insufficient knowledge of the state language not only creates an obstacle to finding employment but also to participating in state-sponsored employment-promoting activities organised by the STA.

(c) People with disabilities

Latvian law does not impose a positive discrimination obligation on employers regarding employment of people with disabilities. Thus, the state imposes no obligation on employers to provide a certain number of vacancies for people with disabilities. Employment is based solely on rules of open competition where the disabled must compete with others seeking employment on the labour market.

According to recent data, of some 70 000 disabled persons only 10 % of these are employed ([361]). The situation regarding employment of disabled persons has slightly improved since 2001. Changes have occurred in social attitudes, while some possibilities regarding employment of the disabled have been developed and offered by the state and different projects.

In 2004, the Labour Act 2001 was supplemented with a provision on reasonable accommodation for disabled persons. The Labour Act 2001 *verbatim* transposes Article 5 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation providing that 'in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.' ([362]). If an employer fails to comply with the Labour Act 2001, the employee is entitled to complain to the State Labour Inspectorate or the courts.

The Law on Support to Unemployed Persons and Job Seekers and the Government Regulation 'On Procedure for Organising and Financing Active Employment Measures and Principles of Selection of Organisers of Active Employment Measures' ([363]) provide that only unemployed disabled persons are entitled to participate in active employment measures. Thus, only disabled persons that have been previously employed are able to benefit from those provisions.

Further, from 2003 the Ministry of Welfare provides unemployed disabled persons access to subsidised employment activities. The STA organises the work of disabled persons and provides the necessary advice and practical assistance. Employment of these disabled persons is partly

([360]) 'Learn the Language and find a job!', ('Mācies valodu un atrodi darbu'), Latvijas Vēstnesis Plus, 2006.10.05.

([361]) Kate Kļave, 'A job will not be brought on a plate', ('Darbu uz paplātes nepienes'), Latvijas Vēstnesis Plus 2006.05.26.

([362]) Amendments to Section 7 of the Labour Act 2001, as of 2002.04.22, published in Latvijas Vēstnesis No 72, 2004.05.07.

([363]) The Government Regulation No 309 'On Procedure for Organising and Financing Active Employment Measures and Principles of Selection of Organisers of Active Employment Measures' (*in Latvian* — Aktīvo nodarbinātības pasākumu organizēšanas un finansēšanas kārtību un aktīvo noradbinātības pasākumu realizētāju izvēles principi), as of 2003.06.17, published in *Latvijas Vēstnesis* No 93, on 2003.06.20.

financed from the state budget ([364]). If an employer chooses to be involved in the programme of subsidised working positions, the state covers the costs of adjusting the working environment. Additionally, an employer receives a small monthly grant from the state to cover part of the salary paid to a disabled person.

(d) Alcohol addicts

The STA survey 'Psychological Portrait of an Unemployed Person' suggests that 25 % of unemployed persons in Latvia are alcohol addicts ([365]). As a response to this alarming data, the Ministry of Welfare plans to use part of the resources available from the European Social Fund for medical treatment of unemployed persons with addictions.

(e) People recently released from prison

People recently released from prison experience substantial difficulties integrating into the labour market. Comparatively, only a small fraction of former prisoners possess skills corresponding to the demands of the labour market. Therefore, further measures are necessary to address the situation in this risk group.

3. Labour law and adaptability

(1) New forms of employment relation

(a) General remarks

The implementation of most new forms of employment relation is substantially underdeveloped. At the same time, the Ministry of Welfare considers that the existing regulatory framework under legislation currently in force is sufficient to accommodate various new forms of employment relation ([366]). In principle, the Labour Act 2001 is a flexible legislative document that allows for implementation of these. An underlying principle of the act is that, irrespective of the form of employment, the mandatory conditions under the act must be met. For example, the procedure for terminating employment under the act applies to all forms of employment. However, lack of specific regulation contributes to wide discretion and ambiguities in application of certain norms of the act to new forms of employment.

(b) Fixed-term contracts

An employment contract may be concluded for a fixed term only for performance of specific short-term work, such as:

- seasonal work (as determined by the government);

([364]) Kate Kļave, 'A job will not be brought on a plate', ('Darbu uz paplātes nepienes'), Latvijas Vēstnesis Plus 2006.05.26.
([365]) L. Lūse, 'A job Should be Offered Instead of Vodka', ('Šnabja vietā jāpiedāva darbs'), Latvijas Vēstnesis Plus, 2006.08.09.
([366]) Rūta Kestnere, 'Working time determined by yourself', ('Darba laiks paša ziņā'), Latvijas Vēstnesis Plus, 2005.12.21.

- work in fields where an employment contract is normally not entered into for an unspecified period, taking into account the nature of the occupation or the temporary nature of the work (again, as determined by the government);
- replacement of an employee who is absent or suspended from work, as well as replacement of an employee whose permanent position has become vacant until the moment a new employee is hired;
- incidental work which is normally performed in a company;
- specified temporary work related to short-term expansion of volume of work of a company or to an increase in production;
- emergency work in order to prevent consequences of *force majeure*, an unexpected event or other exceptional circumstances which adversely affect or may affect ordinary activities in a company; and
- paid public work intended for the unemployed or work related to occupational training or retraining of the unemployed ([367]).

The maximum period for a fixed-term contract was recently increased from two to three years ([368]). If none of the parties has requested termination of an employment contract by expiry of the term of a fixed-term contract and the employment relationship continues, then the contract is considered to be extended for an indefinite term ([369]).

To facilitate the use of fixed-term employment contracts on the labour market, the government is considering extending the exhaustive list of grounds when an employment contract may be entered into for a fixed term ([370]) and amending the regulation determining types of seasonal work when fixed-term contracts are permissible ([371]).

(c) Part-time work

An employer and employee may agree to a part-time employment contract. A part-time contract presupposes working time shorter than the regular daily or weekly working time established by law ([372]). The Labour Act 2001 and the repealed Labour Code lay down the principle of non-discrimination as the basis of a part-time employment contract. An employer is obliged to provide for part-time work arrangements on request by a pregnant woman; a woman who has given birth to a child until the child reaches the age of one or so long as the women is breastfeeding; as well as by an employee with a child under 14 or a disabled child under 18 ([373]).

Refusal by an employee to change from regular to part-time employment or vice versa is not a legitimate ground for an employer to terminate an employment contract ([374]). An employer is obliged to transfer the employee from regular to part-time or vice versa if the possibility exists in

([367]) Section 44, part 1 of the Labour Act 2001.
([368]) Including any interim extensions, unless the breaks between them are more than 30 days long. Section 45, part 1 of the Labour Act 2001.
([369]) Section 45, part 4 of the Labour Act 2001.
([370]) Government Regulation No 353 regarding work in activity areas where an employment contract is normally not entered into for an unspecified period (*in Latvian* — Noteikumi par darbiem jomās, kurās darba līgums parasti netiek slēgts uz nenoteiktu laiku), as of 2002.08.06, published in Latvijas Vēstnesis No 116, on 2002.08.15.
([371]) Government Regulation No 272 determining seasonal work for the performance of which entering into a fixed-term employment contract is permissible (*in Latvian* — Noteikumi par sezonas rakstura darbiem), as of 2002.06.25, published in Latvijas Vēstnesis No 98, 2002.07.02.
([372]) Section 134, part 1 of the Labour Act 2001.
([373]) Section 134, part 2 of the Labour Act 2001.
([374]) Section 134, part 4 of the Labour Act 2001.

the relevant undertaking ([375]). At the request of employee representatives, an employer must inform them of part-time employment possibilities in the undertaking ([376]).

Taking into consideration the low wages on the labour market, part-time employment is not a preferred form of employment.

(d) Temporary agency work

Latvia has not adopted specific regulation regarding the legal status of temporary agency workers. Temporary agency work in Latvia is an exception rather than an everyday reality. Temporary agencies are developing as a means of commercial activity. However, no statistical data are available on the scope of those activities. Temporary employment agencies can legally provide their services without obtaining a licence from the STA. Lack of normative basis hampers STA control of the work of temporary work agencies.

Some temporary agencies conclude employment contracts with their employees. Thus employees are protected by the Labour Act 2001. An employment contract provides the greatest degree of protection to employees. However, some agencies conclude work-performance contracts not governed by the Labour Act 2001. Case law is lacking on the nature of legal relations applicable to temporary agency workers. Thus, it is not clear how the employment of temporary agency workers should be regulated and whether these are covered by the act in circumstances where they are engaged under work performance contracts. The Ministry of Welfare considers that temporary workers are fully covered by the protective provisions of the Labour Act 2001 ([377]).

(e) On-call work

This type of employment is not widespread in Latvia. As with other new forms of employment, this type of employment is not specifically regulated under Latvian law. The Labour Act 2001 and its practical implementation are in line with the relevant case law of the European Court of Justice.

(f) Economically dependent workers

Latvian law does not specifically address the issue of economically dependent workers. If the legal relationship between an economically dependent worker and an employer contains elements characterising employment (i.e. a person performs specific work under the guidance of another natural or legal person for agreed remuneration), then the economically dependent worker is covered by the Labour Act 2001.

(g) Subcontracting/outsourcing

Outsourcing, especially outsourcing of ancillary activities such as cleaning and accounting services, is becoming increasingly popular in Latvia. Where an employment relationship is

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([375]) Section 134, part 5 of the Labour Act 2001.
([376]) Section 134, part 6 of the Labour Act 2001.
([377]) Informative report on Latvias's national positions. Position No 3 Proposal for a Directive of the European Parliament and of the Council on working conditions of temporary workers. Available in Latvian at: http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=3606, last visited 2006.11.21.

replaced by the outsourcing model, the process should be examined to determine whether elements of transfer of undertakings are involved.

Although Latvia has implemented Directive 2001/23/EC on the approximation of the laws of the Member States relating safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, the definition of 'transfer of undertaking' is not in full compliance with the Directive ([378]). The definition of transfer does not contain two essential criteria provided by the Acquired Rights Directive: '*economic entity*' ([379]) and '*retention of identity*' of that economic entity ([380]).

(h) Pools of workers ('multisalariat')

The Labour Act 2001 acknowledges an employee's right to enter into an employment contract with several employers to fulfil supplementary work, unless otherwise provided by the employment contract or collective agreement ([381]). However, this right may be restricted by an employer. The restriction may be justified by substantiated and protected interests of the employer, especially if such supplementary work negatively affects or may affect proper performance of employee obligations ([382]). No other legal regulations affect employment of multiple job holders.

(i) Teleworking

On 12 April 2006, the national social partners signed an agreement on implementation of the European Framework Agreement on Teleworking in Latvia ([383]). The Labour Act 2001 and the Labour Protection Act 2001 do not provide specific regulation on teleworking. However, general rules provided by the Labour Act 2001 and the Labour Protection Act 2001 apply to this particular form of employment. According to information from the ECL, teleworking in Latvia is rather widespread ([384]) and no longer regarded as an exceptional form of employment ([385]).

(j) Company networks

This form of employment, as well as other new forms, are not regulated by the Labour Act 2001 and are not regarded as common in Latvia.

([378]) Section 117, part 1 of the Labour Act 2001. For example, the Labour Act 2001 stipulates that the transfer of an undertaking within the meaning of the Labour Act 2001 is the transfer of an undertaking or an autonomous part of it to another person on the basis of an agreement, as well as merger or division of commercial companies.

([379]) Which differs from an 'undertaking' as defined by the Section 5 of the Labour Act 2001.

([380]) In addition, if the definition of transfer of an undertaking is analysed looking at the wording of the Labour Act 2001 alone, it could be concluded that 'transfer of business or part of business' is excluded from the concept of transfer. Until now, no cases regarding employee protection in the case of transfer of an undertaking have been heard before the Supreme Court of Latvia. Consequently, it remains to be seen what interpretation will be made of the definition of transfer of an undertaking.

([381]) Section 91 of the Labour Act 2001.

([382]) Section 92 of the Labour Act 2001.

([383]) Latvijas Vēstnesis, 2006.04.12.

([384]) It is hard to assess the actual number of employers and employees giving preference to one or another form of telework.

([385]) Inga Balode, 'Advantages of Telework', ('Teledarba priekšrocības'), Neatkarīgā Rīta Avīze, 2006.08.24.

(2) Working time

Working time within the meaning of the Labour Act 2001 is defined as a period from the beginning until the end of work within the scope of which an employee performs work or is at the disposal of the employer, except for breaks in work. The beginning and end of work is specified by working procedure regulations, shift schedules, or by an employment contract.

(a) Working hours

Rules on normal daily working time have not changed during the last 10 years. Regular daily working time may not exceed eight hours, and regular weekly working time 40 hours. Daily working time means working time within a 24-hour period ([386]). The Labour Act 2001 stipulates that if daily working time on a weekday is less than the regular daily working time, the regular working time of some other weekday may be extended, but by no more than one hour. In that case the length of weekly working time must also be observed ([387]). Regulations on the length of the working week also have not changed. A five-day working week is set as the norm. If the nature of work makes it impossible to determine a working week of five days, an employer must consult with employee representatives before specifying a working week of six days. Where a six-day week is required, the working day is limited to seven hours in a 40-hour week, and six hours in a 35-hour week ([388]).

(b) Working time arrangements and access to career breaks

The Labour Act 2001 provides the following working time arrangements: night work; shift work; and aggregated working time. Night work is defined as any work performed at night for more than two hours. Night time is the period from 22.00 to 06.00. Regular daily working time of a night employee must be reduced by one hour ([389]).

If necessary to ensure continuity of a work process, an employer can determine work in shifts, after consultation with employee representatives. In case of shift work, the length of a shift may not exceed the regular daily working time prescribed for the relevant category of employees. An employee may not be assigned to work two shifts in a row ([390]).

If the nature of the work makes it impossible to comply with the length of the regular daily or weekly working time prescribed for the relevant category of employees, an employer may establish aggregated working time, after consultation with employee representatives. Aggregated working time may not exceed 56 hours a week and 160 hours within a four-week period unless otherwise provided by a collective agreement or an employment contract. If aggregated working time is established, an employee must be granted rest time in accordance with a work schedule ([391]).

The Labour Act 2001 enables social partners to agree on flexible working time and to have the outcome reflected in a collective agreement. Consequently, to apply flexible forms of working time, the parties agree on aggregated working time and then specify the working regime

([386]) Section 131, part 1 of the Labour Act 2001.
([387]) Section 131, part 2 of the Labour Act 2001.
([388]) Section 133, parts 1 and 3 of the Labour Act 2001.
([389]) Section 138, part 1 of the Labour Act 2001.
([390]) Section 139, part 1 of the Labour Act 2001.
([391]) Section 140, parts 1 and 2 of the Labour Act 2001.

that is more appropriate for a specific situation. Nevertheless, the mandatory provisions of the Labour Act 2001 regarding aggregated working time and overtime work apply. Furthermore, the Labour Act 2001 provides that mandatory rules on working time can be set aside when the characteristics of the relevant work mean that the length of working day is not measured or determined in advance or may be determined by employees themselves ([392]).

The Labour Act 2001 does not address the issue of access to career breaks, apart from childcare leave. Thus, it is subject to agreement between the parties on a case-by-case basis. An important innovation introduced by the Labour Act 2001 concerns access to childcare leave. Under the Labour Code, only women were entitled to childcare leave until a child reaches the age of three ([393]). A small benefit was paid by the state during childcare leave. However, under the Labour Act 2001 one of the parents on equal terms has the right to parental leave in connection with the birth or adoption of a child. Parental leave is granted for a maximum of one-and-a-half years and may be requested until the child is eight years old ([394]). Additionally the father of a child is entitled to 10 calendar days' leave immediately after the birth of the child, but not later than within a two-month period from the birth of the child ([395]).

(3) Labour law and human resource development

(a) Principle of non-discrimination and equal treatment

The principle of non-discrimination and equal treatment in employment relations on the grounds of race, skin colour, sex, age, religious, political, or other convictions, ethnic or social origin and property status of employees was already included in Latvian law in 1996 ([396]). In 2002, the principle of equal treatment was extended to cover the grounds of disability and marital status ([397]) and in 2006 to include sexual orientation ([398]). Additionally, the prohibition of discrimination was extended to include access to employment, in the course of employment relations, promotion, work remuneration, termination of employment, and occupational training ([399]).

(b) Reconciling work/family balance

In order to reconcile work with family life a number of legislative provisions have been introduced. Thus, until 1 June 2002 by mutual agreement between employee and employer, annual paid leave could be given in parts. However, the Labour Code did not determine the minimum number of days that one part of leave can consist of. The Labour Act 2001 stipulates that one part of leave must be not less than two uninterrupted calendar weeks. Moreover, the

([392]) Section 148 of the Labour Act 2001.
([393]) Section 173, part 4 of the Labour Code.
([394]) Section 156, part 1 of the Labour Act.
([395]) Section 155, part 1 of the Labour Act.
([396]) Section 1 of the Labour Code.
([397]) Section 7, part 1 of the Labour Act 2001.
([398]) In 2004, the Labour Act 2001 was supplemented, emphasising that if the prohibitions against differential treatment and against causing adverse consequences are violated, an employee — in addition to other special rights specified in the Labour Act 2001 — has the right to request compensation for losses and compensation for moral harm. In case of a dispute, a court at its own discretion is obliged to determine compensation for moral harm. In addition, an employee has the right to bring an action in a court if an employer has violated the prohibition of differential treatment in determining working conditions, professional training, or promoting an employee.
([399]) Section 29, part 1 of the Labour Act 2001.

Labour Act 2001 enables transfer part of annual leave to the following year. However an employee is obliged to use at least two weeks of annual paid leave in the current year ([400]).

In 2004, amendments to the Labour Act 2001 provided that an employer may request an employee to work on Sunday, if necessary for the continuity of a work process. If an employee agrees to work on Sunday, then the employer must grant the employee a rest day on another day of the week ([401]). Until the 2004 amendments, it was possible to compensate work on Sunday by double work remuneration on that day.

The 2004 amendments also provide enhanced guarantees for employees who return from annual, maternity and paternity, or childcare leave ([402]). Employees in this situation have the right to improvements in working conditions and employment provisions to which they would have been entitled if they had not taken leave. In addition, at the time of leave the work place of these employees is retained. If it is not possible to retain the work place of an employee on leave, the employer must provide the employee upon return from leave with similar or equivalent work under not less advantageous circumstances and employment provisions ([403]).

In September 2006, amendments were adopted to promote job training of employees. The 2006 amendments to the Labour Act 2001 provide that employee expenses associated with vocational training and enhancement of professional qualifications must be covered by the employer ([404]). Until now the employer was obligated to cover only expenses associated with advancement of professional qualification. Additionally, the 2006 amendments establish a legal basis to regard expenses related to enhancing qualification and vocational training as an employer's commercial activity expenditure.

(4) Mobility and adaptability

(a) Mobility to other EU countries

Accession to the EU and thus access to free movement rights had a substantial impact on Latvian workforce mobility. According to various estimates, from 50 000 to 100 000 Latvian inhabitants have migrated to other EU countries for employment ([405]). The results of a survey presented at the beginning of 2006 suggest that around 200 000 inhabitants could leave the country during the next two years. 45 % of respondents in the target group between 15 and 24 years answered that the likelihood that they will migrate is '*very big*' or '*rather big*'. Employees in the public sector were less willing to leave the country than employees in the private sector or the unemployed ([406]).

(b) In-country mobility

In-country mobility is weak. As the information report prepared by the Ministry of Welfare concluded ([407]), internal mobility in Latvia is not satisfactory. Unemployment rates in different

([400]) Section 149, parts 2 and 3 of the Labour Act 2001.
([401]) Section 143, part 4 of the Labour Act 2001.
([402]) Sections 149, 154, 155 and 156 of the Labour Act 2001 respectively.
([403]) Ibid.
([404]) Section 96 of the Labour Act.
([405]) Mostly UK and Ireland.
([406]) All data in this paragraph from: Arnis Kaktiņš, 'Presentation of sociological study on migration', ('Socioloģiskā pētījuma par migrāciju prezentācija'), 2006.01.20. Available in Latvian at: www.politika.lv/index.php?id=6309, last visited on 2006.11.25.
([407]) Informative Report 'Necessary Suggestions in order to Secure Flexibility and Security in Employment Legal Relationship' prepared by the

regions differ considerably. Thus, in October 2006 the overall unemployment rate was 6.6 % but in some districts in the Latgale region the unemployment rate reached 25 % ([408]). In the context of substantial regional unemployment and development differences, in-country mobility needs urgent enhancing.

Low in-country mobility of employees is conditioned, inter alia, by a poorly-developed transport infrastructure, insufficient access to housing, and low professional mobility. The statistical data suggest that 30 % of the unemployed agree to work no further than 10 kilometres from their home. To facilitate internal mobility of the workforce, new technologies must be utilised to enable working from home. The development of new technologies to enhance internal mobility is in the rudimentary planning stage. Additionally, professional mobility needs enhancing through improved continuing professional training and retraining.

Ministry of Welfare, approved by the Cabinet of Ministers on 2006.08.22(*in Latvian — informatīvais ziņojums* '*Par nepieciešajamiem priekšlikumiem, lai nodrošinātu elastību un drošību darba tiesiskajās attiecībās')*, available in Latvian at: http://ppd.mk.gov.lv/ui/DocumentContent.aspx?ID=4855, last visited on 2006.11.25.

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- Overview of case law 'On application of law when solving disputes related to termination or amendments of employment contract', (Tiesu prakses apkopojums 'Par likumu piemērošanu, izšķirot strīdus, kas saistīti ar darba līguma izbeigšanu vai grozīšanu'), available at the website of the Supreme Court Senate of Latvia: http://www.at.gov.lv, last visited on 2006.11.29.

- **5. Internet resources**

- http://www.lbas.lv/ — website of the Free Trade Union Confederation of Latvia
- http://www.lddk.lv — website of the Employers' Confederation of Latvia
- http://www.nva.gov.lv — website of the State Employment Agency

The evolution of labour law in Lithuania

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Summary

The Republic of Lithuania re-established its independence in 1990. Soon the parliament (the *Seimas* of the Republic of Lithuania) started adopting new laws to provide new regulation of labour relationships and to replace the Soviet Code of Labour Laws. Generally the evolution of labour law in Lithuania can be divided into two periods: before 2003 — the period before the Labour Code was adopted, and after 2003 to date — the period when the Labour Code was adopted. The period after 2003 is linked to the harmonisation of Lithuanian labour law with the EU labour law.

1. New ways of regulating work: legislation, collective bargaining and beyond

Lithuanian law establishes the hierarchical list of sources of labour law: Constitution, international agreements, legal norms of the EU, Labour Code, other laws and regulatory acts, and regulatory provisions of collective agreements. Lithuanian labour law provides opportunities to conclude two types of collective agreements depending on the level of collective bargaining and the parties involved: higher than enterprise level collective agreements between appropriate level trade union organisations and employers' organisations; and enterprise level collective agreements concluded between employees' representatives and the employer. Under Lithuanian jurisdiction, collective agreements and local regulatory acts relating to working conditions, under which the position of the employees is made less favourable than that established by the Labour Code, laws and other regulatory acts, shall be null and void.

Over the last decade huge efforts were made to enlarge the collective bargaining process in Lithuania. In spite of the fact that collective bargaining is strongly promoted it does not play an important role in the Lithuanian system of industrial relations. Basic employment terms and conditions are still being shaped as previously either by individual agreements or by the state. Information and consultation rights have a rather small impact on the situation of social dialogue in an enterprise even when introduced in the national legislation following the transposition of relevant EC directives. So far, there are no statutory rules on workers' participation on the boards of companies.

The major obstacles to bargaining at higher level are related to the institutional weaknesses of the social partners. There are two major inter-sectoral employers' organisations, recognised at the national level and three independent national inter-sectoral organisations on the trade unions' side that are represented in the Tripartite Council of the Republic of Lithuania. Trade unions still face structural problems reinforced by their tough political challenges and the post-Soviet scepticism of the employees about the idea of trade unions, whilst employers do not enter into binding negotiations preferring uncontrolled enterprise level bargaining or an absence of collective bargaining resulting in autocratic determination of working conditions on the part of the employer. The individual contract of employment still remains the main source of duties and obligations of the parties to the contract of employment.

Low membership numbers of employees in the trade unions of Lithuania was the reason to introduce into the Labour Code of 2003 two new institutions for the employees' representation at the enterprise level which may emerge in the case of the absence of trade unions at an enterprise, i.e. the general meeting of employees and a works council.

2. From job security to employability

Until 2003, protection against dismissals was provided through a precise listing of instances when termination of an employment contract was permissible on the employer's initiative. After 2003 a list of instances which should not constitute a legitimate reason to terminate employment relations was introduced in the Labour Code.

Although the national legislation provisions promoting employability and job security do exist in Lithuania, such provisions are not so well integrated in practice. There is no clear national system for providing information on training and lifelong learning in Lithuania; the active ageing policy is still declaratory; the vocational counselling and training system is not effective. These deficiencies stem basically from a shortage of funding. However, the protection of young people at work in line with Directive 94/33/EC is effectively foreseen in national legal acts.

3. Labour law and adaptability

Before the introduction of the new Labour Code in 2003 the guarantee of fixed-term contracts opened the way for less favourable employment conditions being applied to employees rather than affording them a new form of flexibility. The 2003 Labour Code has strengthened a requirement that fixed-term employment contracts be of a temporary nature.

Although the Lithuanian legislation foresees a part-time work day or part-time work week, it is not very popular in Lithuania. The employer may assign an employee for on-call work only in extraordinary cases, e.g. when it is necessary to ensure proper operation of the enterprise or completion of urgent work. There are two types of work on-call: at the enterprise or at home.

There is no legislation on temporary agency work in Lithuania. No licensing, limitations or restrictions have been enacted to cover temporary agency work service. The notion of the 'economically dependent worker' is also unknown in Lithuanian labour law. While subcontracting/outsourcing has been known for at least seven years in Lithuania, it is not subject to any legal regulation. Similarly, there is no a statutory regulation regarding telework thus it is not prohibited.

As a form of work organisation, company networks may be found in some multinational companies but they have not become a positive example to be followed and have not warranted any statutory regulation.

The possibility to work for a few employers ('multisalariat') is known as *secondary work*. Due to poor remuneration for work in many sectors of activities, people work in a few workplaces to improve their economic circumstances. Consequently disputes often arise between employers and employees over working time. The Labour Code stipulates 40 hours normal weekly working time and a maximum of up to 48 hours in Lithuania. In practice maximum working hours reach 60 hours a week. Trade unions fight against long working hours and demand better remuneration. But workers' representative bodies are too weak in establishments to achieve any results. The state control and inspection of working time in establishments is not duly performed.

Due to big structural changes in the post-Soviet Lithuanian economy some categories of people faced negative effects in the form of dismissals, lack of coordinated state employment policy in mobility and adaptability programmes and other social problems. Employee mobility and adaptability have only lately featured as public policy themes in Lithuania. Territorial mobility in Lithuania is growing after joining the EU in 2004. Professional mobility is developing together with the labour market changes and demands. The means for professional and territorial mobility and adaptability are foreseen in the Lithuanian National Lisbon Strategy Implementation Programme.

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Introduction

The evolution of labour law in Lithuania during the period 1995–2005 can be divided into two sub-periods:

1. 1995–2003 — the period before the Labour Code was adopted. The labour law consisted of separate laws regulating employment and related relationships: Law on Wages; Law on Collective Agreements; Law on Trade Unions; the Law on Employment Contract; the Law on Holidays; Law on the Regulation of Collective Disputes; Law on Safety and Health of Employees, and others;
2. 2003 to date — period when the labour relationship is regulated by the Labour Code which consists of three parts: General provisions, Collective labour relations and Individual employment relations. Additional laws exist to extend or to specify relationship relative to relationship provided by the Code. The new Labour Code includes the provisions transferring EC requirements into the Lithuanian labour law.

1. New ways of regulating work: legislation, collective bargaining and beyond

(1) Role of social partnership/consultation

(a) The tripartite cooperation

The tripartite social dialogue involving representatives of the public administration, employers' organisations and trade union confederations takes place predominantly at the national inter-sectoral level, however, there were some branches and areas (municipalities) where sectoral and local bodies of trilateral cooperation and dialogue were created.

The major body of tripartite social dialogue — the Tripartite Council of the Republic of Lithuania which is composed of the representatives (Vice-ministers or State Secretaries) from six ministries (Ministry of Social Security and Labour, Ministry of Health, Ministry of Economy, Ministry of Finances, Ministry of Agriculture and Ministry of Education and Science), members of the Government and five representatives from each side of industry ([409]) — is strongly involved in the formation and implementation of the national social policy. The issues of wages and employment conditions, and new legislative initiatives were and still remain very popular subjects of heated discussions between the government and social partners within the Tripartite Council. The impact of the Tripartite Council can be shown by the fact that under the Lithuanian legislation the government is obliged to submit the proposed piece of legislation in the field of social policy to the Tripartite Council for the discussions prior to its being presented to the parliament ([410]). In addition, according to the provisions of labour law, the Tripartite Council shall propose to the government the amount of the minimum wage. The social partners are involved in the work of supervision bodies of such institutions as the State Social Security Fund, the State Labour Exchange or Guarantee Fund that are responsible for the system of covering employee claims in the event of insolvency of the employer, etc.

In the framework of Tripartite Council, a few trilateral national social pacts were signed between the government and the social partners which are represented in the Council. These documents are seen as social pacts and they are comprised of the political intentions of the parties and therefore they cannot be seen as legally binding instruments.

A rather intensive tripartite social dialogue at national level, to some extent, has prevented the creation of bilateral structures or the social dialogue at sectoral or regional levels. There are only a few examples of regional social dialogue and almost no experience of successful bilateral partnership in particular at sectoral level, since there are very few appropriate structures of employers' representation and there is no push to create them.

(b) Collective bargaining

In spite of fact that collective bargaining is allowed and formally promoted in Lithuania it does not play an important role in the Lithuanian system of industrial relations. As a rule, basic employment terms and conditions are still being shaped by the individual agreements or by the state (e.g. the state regulates the wages and working conditions of employees of the public sector by way of legislative enactments). The collective agreements are estimated to

([409]) Trade unions are represented by the representatives from three national inter-sectoral organisations: the Lithuanian Trade Union Confederation (Lietuvos profesinių sąjungų konfederacija), Lithuanian Trade Union 'Solidarumas' (Lietuvos profesinė sąjunga 'Solidarumas') and the Lithuanian Labour Federation (Lietuvos darbo federacija). The employers' organisations are the Lithuanian Confederation of Industrialists (Lietuvos pramoninkų konfederacija) and the Lithuanian Confederation of Business Employers (Lietuvos verslo darbdavių konfederacija).

([410]) The Parliament of Lithuania is the Seimas (lt. Lietuvos Respublikos Seimas).

cover from 5 to 15 % of the workforce but the poor quality of such agreements should be kept in mind — the majority of them repeat statutory provisions or they contain declaratory non-binding commitments of the parties which are not enforceable before the courts.

The coverage of collective agreements remains very low because of the clear dominance of the enterprise level collective bargaining. In 2003 Labour Code ([411]) introduced the mechanism for the extension of sectoral and regional collective bargaining agreements by the administrative act of the Ministry of Social Security and Labour. But this novelty does not change the general picture since there was only one agreement of the given type registered till 2006 and there are no extended agreements at all.

The situation regarding collective bargaining in the public sector clearly indicates an ambiguous and formal attitude of the state towards collective bargaining. In Lithuania, over the last years we can observe an almost full escape from the collective bargaining of the biggest employer, i.e. the state. This does not only concern civil servants whose bargaining is restricted to its maximum and the bargaining is limited to the enterprise level only, but it also concerns the employees of the public sector where wages and working conditions are still regulated exclusively by the government. Even in this area, the state and municipal authorities refuse to enter into any collective bargaining at a higher level arguing that under the new labour legislation they are not parties to the collective agreement.

(c) Other forms of social dialogue

The information and consultation rights have a rather small impact on the situation of social dialogue in an enterprise even when introduced into the national legislation after the transposition of relevant EC directives. The negative experience with the given rights in the Soviet past evokes small interest of employees in these issues. The majority of employers and the whole society, including judges, consider these rights as an untenable restriction of the employers' initiative in the market-oriented economy. The employees' representatives are confident neither about the objectives nor of the possible achievements of the exercise of information and consultation rights, therefore the realisation of these rights remains declarative and ineffective in principal.

So far, there have been no statutory rules laid down on workers' participation on the boards of companies.

(2) Social partners

(a) Employers' organisations

There are two major inter-sectoral employers' organisations recognised at the national level and represented in the Tripartite Council: Lithuanian Confederation of Industrialists (Lietuvos pramoninkų konfederacija) and Lithuanian Confederation of Business Employers (Lietuvos verslo darbdavių konfederacija). The first one represents a great majority of employers and, in particular, larger companies whilst the second one is focused on the representation of small and medium-size enterprises. Both organisations, especially the Lithuanian Confederation of Industrialists, have a strong structure at the sectoral level and sometimes at the regional one as well. These structures, however, are fully independent as far as the involvement in the collective bargaining or the shaping of social, regional or sectoral policy is concerned. There is no organisation that would cover public employers for the purpose of the collective representation of the interests in the sphere of labour law and social security.

([411]) In Lithuanian: *Darbo kodeksas*, Official gazette *Valstybės žinios*. 2002, No 64–2569.

(b) Employees' representatives at national, sectoral and regional levels

There are three independent national inter-sectoral organisations on the trade union side which are represented in the Tripartite Council of the Republic of Lithuania: Lithuanian Trade Unions Confederation (Lietuvos profesinių sąjungų konfederacija), Lithuanian Trade Union 'Solidarumas' (Lietuvos profesinė sąjunga 'Solidarumas') and the Lithuanian Labour Federation (Lietuvos darbo federacija) ([412]). These organisations have their sectoral and regional structures — independent legal persons affiliated to the national organisations.

(c) Employees' representatives at enterprise

Until the year 2003, the exclusive rights of representation of all employees in an enterprise for the purposes of collective bargaining or industrial actions was vested in the trade union established at a given enterprise (the enterprise level trade union) or the joined negotiation body of several trade unions acting in one enterprise. It was not possible to bargain collectively or to initiate collective action without an established enterprise level trade union. Low number of organised workplaces and low membership of employees in the trade unions which do not cover 10 per cent of the workforce in Lithuania led to the introduction of two new institutions for the employees' representation at the enterprise level. According to the Labour Code of 2003 the given institutions may emerge in the case of the absence of a trade union at an enterprise. First of all, the general meeting of employees may transfer the right of the collective representation of all employees of the enterprise to the sectoral trade union, or, as an alternative, the general meeting of employees may elect a works council for the purpose of representation. The Law on Work Councils ([413]) adopted on 11 November 2004 allows the setting up of these institutions at the enterprises without formed trade unions. If a trade union is already established at an enterprise, it enjoys exclusive rights of representation and the works council cannot be established.

The Lithuanian labour law consolidates the so-called uniform conception of the workers' representation that has two important aspects. Firstly, once the trade union is formed or a works council is elected, it shall be considered to be a statutory employees' representative and is entitled to represent all the employees of the enterprise, irrespective of their membership in the particular union or participation in the elections of the council. Consequently, the collective bargaining agreement concluded by the union or a works council shall be applicable to all employees of the enterprise. Secondly, the legislator generally does not divide the competences of the employees' representatives according to the subject matter of the representation. If the trade union, a sectoral trade union or a works council is formed, authorised or elected, they shall be considered as employees' representatives and ipso facto are entitled to all the rights of collective representation, i.e. the right to enter into negotiation, the right to conclude the collective agreements, the right to strike and to some existing participation rights. However, the legitimate realisation of some of these rights (conclusion of the collective bargaining agreement and right to call on strike) depends on approval of the general meeting of employees.

(3) Relationship between statutory law and collective bargaining

Lithuanian law establishes a hierarchical list of sources of labour law (Article 3 of Labour Code). These are: the Constitution of the Republic of Lithuania, international agreements of

([412]) The exact number of the members of the trade unions is difficult to estimate. According to the various data sources, the Lithuanian Confederation of Trade Unions unites approx. 200 000 employees, the Lithuanian Trade Union 'Solidarumas' 55 000 employees and the Lithuanian Labour Federation 20 000 employees. In reality, the number of members may be even more modest.

([413]) In Lithuanian: *Lietuvos Respublikos darbo tarybų įstatymas* // Official Gazette *Valstybės žinios*. 2004, No 164–5972.

the Republic of Lithuania, legal norms of the European Union, the Labour Code, other laws and regulatory acts, and regulatory provisions of collective agreements. This particular provision grants to the collective agreements (kolektyvinės sutartys) at national, sectoral, territorial or, clearly predominantly, enterprise level a normative effect.

Under the Lithuanian jurisdiction, the collective agreements and local (internal) regulatory acts relating to working conditions under which the position of the employees is made less favourable than the one established by the Labour Code laws and other regulatory acts (i.e. Resolutions of the Government or Regulations of the Minister of Social Security and Labour or other regulations) shall be null and void (Labour Code, Article 4(4). In this case the appropriate provision of the Labour Code or law, or some other regulatory act would be applicable. Thus, the collective agreements may regulate the position of employees only *in favorem*. In addition, they shall be guided by the principles of justice, reasonableness and good faith. The correction of the principle of *in favorem* can be found in a few legal provisions of the Labour Code which allows collective bargaining to the parties to diminish the statutory granted protection, e.g. in the Labour Code, Article 109(2) prohibits the conclusion of a fixed-term employment contract if the employment is of a permanent nature with the exception of the cases when it is provided by collective agreements. Pursuant to the Labour Code, Article 245, employees must compensate all damage caused but not in excess of the amount of three average monthly wages, with the exception, inter alia, that their full liability is provided for in the collective agreement.

The Labour Code *expressis verbis* describes the solution of contradictions between several different collective agreements concluded at the national, sectoral, and territorial levels. However, the same rule shall be applied to the possible contradictions between the national, sectoral, territorial and enterprise agreements as well as to the contradictions between several collective agreements of the enterprise. The general rule can be formulated as follows: when several collective agreements are applicable in an enterprise the provisions of the agreement that provide for more favourable conditions for the employees shall apply.

The parties to the individual contract of employment may not establish working conditions which are less favourable to the employee than those provided by the Labour Code, laws, other regulatory acts and the collective agreement. If the conditions of the employment contract are contrary to the collective agreement the provisions laid down in the collective agreement shall apply.

As an outcome of social partnership at the national level another type of agreement, namely agreements on tripartite cooperation, emerged a decade ago. These agreements concluded by the government, inter-sectoral trade union confederations and employers' organisations are regarded as national 'social pacts' without a normative effect.

In addition, the Law on Works Councils allows a work council to conclude 'agreements' with the employer. These agreements are not mentioned among the sources of the national law and consequently will have no normative effect.

(4) Types of collective agreements

Lithuanian labour law provides for the opportunities to conclude two types of collective agreements depending on the level of collective bargaining and the parties involved:

- higher than enterprise level collective agreements (i.e. sectoral, regional or national) between appropriate level trade union organisations (confederations, unifications etc.) and employers' organisations;
- enterprise level collective agreements concluded between employees' representatives (enterprise level trade union, or, in their absence, sectoral trade union or works council) and employer.

Each type of agreement deserves a specific regulation and special legal provisions. The law in a rather imperative way regulates the different procedure of the negotiation, scope of application, validity and prerequisites for the conclusion of the agreement. A national, sectoral and territorial collective agreement shall be applied in the enterprises whose employers were members of the employers' organisations parties to the agreement or joined the organisation after the signing of the agreement. A collective agreement concluded at an enterprise shall be applicable to all employees of the enterprise.

The procedure and time limits for drawing up, signing, supplementing and amending a national, sectoral and territorial collective agreement as well as other related issues shall be determined by the parties to the agreement. A draft of the enterprise level collective agreement shall be submitted to the employees' general meeting (conference) for approval and shall be signed only after the approval. A national, sectoral and territorial agreement shall enter into force from the day of its registration at the Ministry of Social Security and Labour and shall be valid until the date specified therein or until the conclusion of a new national, sectoral or territorial collective agreement. The registration of the enterprise level collective agreement is not foreseen by law.

As far as the content of the agreements is concerned, laws ensure freedom of the parties to determine the subject matter of negotiation and to determine the content of agreement, however there are certain descriptive guidelines for the parties to be followed in the agreement. For example, the following points may be specified in a collective agreement concluded at the national, sectoral or territorial level: terms and conditions of remuneration for work, working and rest time, safety and health of the employees, system of remuneration for work in case of price increase or growing inflation, conditions of the acquisition of professional qualification, in-service training and retraining, social partnership support measures that help to avoid collective disputes, strikes, procedures for determining, changing and revising work quotas, working time, supply of services, number of employees etc. According to the law, in the agreement the parties to a collective agreement of an enterprise shall lay down the conditions for conclusion, amendment and termination of employment contracts, conditions of remuneration for work (provisions regarding wage rates, basic wages, bonuses, additional pay, other privileges and compensatory allowances, systems and forms of remuneration for work and provision of incentives, setting work quotas, indexing and payment of wages and settlement procedure as well as other provisions), working time and rest time, provision of safe and healthy working conditions, granting compensatory allowances and privileges etc.

(5) Relationship between levels of bargaining

As it was mentioned above, Lithuanian labour law provides for two major levels of collective bargaining: collective bargaining higher than the enterprise level (i.e. sectoral, regional or national) and the enterprise level collective bargaining. The Lithuanian system of industrial relations can be described as strongly oriented to enterprise level. Although collective bargaining at the higher level (e.g. at the national, territorial or sectoral levels) is allowed and legal rules governing the procedure, scope of application and even extension of the agreement to third-parties are set in the Labour Code, in practice, the sectoral, regional or national collective bargaining plays a marginal role whilst an enterprise clearly remains a dominant level of collective bargaining. The situation can be illustrated by the fact that there has been only one sectoral regional collective bargaining agreement registered at the Ministry of Social Affairs and Labour since 2003.

Institutionalised industrial relations are present in large enterprises which are on the decline while in the growing private sector with numerous diverse small and medium size enterprises the structures of social dialogue are missing. The major obstacles to bargaining at

a higher level are not only the ones that are related to economic conditions but they are rather institutional weaknesses of social partners. Trade unions still face structural problems reinforced by their tough political converges and the post-Soviet scepticism of the employees about trade unions in general whilst employers do not enter into binding negotiations and prefer uncontrolled enterprise level bargaining or absence of collective bargaining resulting in the autocratic determination of working conditions by the employer alone.

(6) Individualisation of employment relationships

Beside statutory regulations the individual contracts of employment still remain the main source of duties and obligations of the parties to the contract of employment. The law allows parties to set the terms and conditions of work under the condition that they are not less favourable to the employee than those provided by the Labour Code, laws, other regulatory acts and the collective agreement. If the conditions of the employment contract are contrary to this code, law or the collective agreement, the provisions laid down in this code, laws, regulatory acts or the collective agreement shall apply.

Since the statutory provisions are lacking, both theoretical disputes and practical clashes are growing and they concern the conformity of the modern developments of such individually agreed clauses (e.g. non-competition agreements, confidentiality clauses and responsibility, the duty to compensate the employers for the expenses incurred by them during the last working year in relation to the employee's training, study visits etc.) with the *in favorem* principle.

(7) Sources of regulation other than statutory law and collective bargaining

Among the sources of Lithuanian labour law mention can be made of local (internal) regulatory acts. Internal regulations at the workplace defining the procedure of work at the enterprise and enumerating duties of employees in greater detail also fall under the scope of the given notion. Internal regulations shall be approved by the employer subject to the approval by the employees' representatives (if any), and they may not provide for the employees conditions which would be less favourable than those established by the Labour Code, other laws and normative acts. Arbitration awards are not recognised as a source of law in Lithuania.

The role of a court is limited to the interpretation and application of laws and other legal acts. The Lithuanian Supreme Court has a statutory right to shape unanimous practice of courts. Courts of lower instances are obliged 'to take into account' the published significant rulings of the Lithuanian Supreme Court as well as resolutions adopted by the Senate of the Court in a particular sphere of law. During the last two years the Senate of the Lithuanian Supreme Court has adopted two resolutions aimed at establishing the united practice of courts with regard to dismissals for economic reasons and dismissals on disciplinary grounds: These resolutions were accompanied by critical surveys made by the Lithuanian Supreme Court on the practice of lower courts.

2. From job security to employability

(1) Promotion of employability

The Law on Support of the Unemployed ([414]) was adopted in 1990 and was amended several times later. The Lithuanian Labour Exchange at the Ministry of Social Security and Labour began its activities in 1991. Seeking to improve employability, active labour market policies have been introduced. The main activity of the Labour Exchange offices in 1999 aimed to prevent youth and pre-pension age unemployment, long-term unemployment, to develop mediation and counselling services, to encourage personal initiatives that increase employment, to implement unemployment prevention, to develop and implement strategy and tactics of cooperation with employers. During 2001–2003, the number of unemployed decreased by 65 000 people and in 2003, it was 9.8 %. In 2004, Lithuania joined the EURES network, which offered Lithuanian employees new possibilities in employability. The Unemployment Reduction Programme ([415]) of the Republic of Lithuania for 2001–2004 providing the promotion of local employment initiatives was approved in 2001. The Procedure for the Implementation of Projects of Local Employment Initiatives ([416]) was approved by the Ministry of Social Security and Labour in 2002. In 2003, the implementation of the Strategic and Business plan for 2003–2005 was started.

(2) Protection against dismissals

The Lithuanian labour law regulates the termination of employment contracts in an imperative way and it does not allow the social partners or the parties to employment contract to change or to supplement the statutory regulations.

Until 2003, the Law On Employment Contract provided an exact list of cases when the termination of an employment contract was possible under the employers' initiative. Contrary to the Law On Employment Contract ([417]), the new Labour Code foresees a list of cases which shall not be a legitimate reason to terminate employment relations (e.g. participation in the proceedings against the employer charged with violations of laws, membership in a trade union or involvement in the activities of a trade union beyond the working time etc.).

There are two major types of dismissal that depend on the existence, or not, of fault on the part of the employee — 'with a fault of employee' (esant darbuotojo kaltei) and 'without a fault of employee' (nesant darbuotojo kaltės). The employer is entitled to dismiss the employee without any fault of employee if the significant reasons appear. The law does not provide the list of such reasons but indicates that only the circumstances which are related to the qualification, professional skills or conduct of an employee shall be recognised as valid. An employment contract may also be terminated on economic, technological grounds or due to the restructuring of the workplace as well as for other similar valid reasons. The redundancy is legitimate in cases where the employees cannot be transferred with their consent to another position in the enterprise. A general length of the term of notice is two months whilst protected groups of employees shall be notified four months in advance. Employees shall receive severance payment, the amount of which depends on the length of service and ranges from one to six average monthly wages.

([414]) In Lithuanian: *Lietuvos Respublikos bedarbių rėmimo įstatymas* // Official Gazette *Valstybės žinios*. 1991, No 2–25. This law was replaced by the *Employment Support Law* adopted on 15 June 2006. In Lithuanian: *Užimtumo rėmimo įstatymas*.

([415]) In Lithuanian: *Lietuvos Respublikos užimtumo didinimo 2001–2004 metų programa.* Lietuvos Respublikos Vyriausybės 2001 m. gegužės 8 d. nutarimas No 529 // Official Gazette *Valstybės žinios*. 2001, No 40–1404.

([416]) In Lithuanian: *Vietinių užimtumo iniciatyvų projektų įgyvendinimo tvarka*. Lietuvos Respublikos socialinės apsaugos ir darbo ministerijos 2002 m. balandžio 24 d. įsakymas No 59 // Official Gazette *Valstybės žinios*. 2002, No 45–1735.

([417]) In Lithuanian: *Lietuvos Respublikos darbo sutarties įstatymas* // Official Gazette *Valstybės žinios*. 1991, No 36–973.

The dismissal on disciplinary grounds ('with a fault of employee') is allowed when the employee commits a qualified breach of labour discipline (i.e. a gross breach of work duties) or a repeated breach of labour discipline or work duties during the period of the previous 12 months. The law prescribes a detailed procedure for the internal investigation of the breach on the part of the employee.

Certain groups of employees have been guaranteed special protection by the Labour Code. The former Law on Employment Contract also provided special protection to the pregnant, sick employees, the disabled, employees raising children, persons under 18 years of age, employees who are entitled to the full-age pension in less than five years' time and employee representatives. Some of those guarantees are of prohibitive nature, but most of them are related to procedural requirements of dismissal.

(3) Training, lifelong learning and active ageing

(a) Training and lifelong learning

The training and lifelong learning provisions were introduced in 1998 in *Law on Non-formal Adult Education* ([418]). The objective of the Law is to provide the participants, providers and social partners for non-formal adult education with legislative guarantees, to ensure implementation of the inborn human right for lifelong personal and professional development, to warrant an individual with opportunities to acquire knowledge or improve the skills one needs to be a citizen of a democratic state, to have access to learning and new opportunities, to contribute to creative and sensible use of leisure opportunities. Lifelong learning in this document was understood as an issue for discussion rather than a principle of an educational system.

The National Resource Centre for Vocational Guidance of Lithuania (Euroguidance Lithuania) was established in 1998 as a part of EU Leonardo da Vinci Programme Co-ordination Support Foundation. The main objective of the centre is to develop and improve guidance and counselling services in Lithuania. The centre develops information resources for guidance and counselling practitioners on education, training and mobility opportunities at the national and international level. Guidance practitioners provide information on the mobility opportunities in training, studies and work possibilities, they also disseminate information on tools and methods in guidance and counselling matters.

However there is no well worked-out national system for providing information on training and lifelong learning because the institutions operating in this area lack coordination and cooperation. The private training centres are basically seeking to achieve their own goals, i.e. to prepare employees for certain types of sectoral activities (drivers, accountants etc.). Having graduated from such training/study programmes, specialists can apply for a relevant job in the labour market.

There is no concrete national strategy or a remedy plan to help inform young people finishing schools about further professional opportunities and employment perspectives. Lack of coordination between all levels of educational institutions involved in training and lifelong learning has lead to low participation in the programme. No active adult training and lifelong learning arise due to various problems in infrastructure, qualification of personnel, availability of learning, financial difficulties, etc.

All the polemic and discussions about lifelong learning vividly demonstrate that people need more information on the basic issues and values of this initiative. This skill and benefits acquired shall be part of the content of adult education or of vocational training. However

([418]) In Lithuanian — Lietuvos Respublikos neformaliojo suaugusiųjų švietimo įstatymas // Official Gazette Valstybės Žinios. 1998. No 66–1909.

development of these skills and competences is not included in the programmes of secondary schools. A small input from the secondary educational system into adult lifelong learning has a negative impact on the labour market and competitive ability of the state economy.

In 2001, the Ministry of Education and Science and Lithuanian Association of Adult Education organised a discussion on the memorandum on lifelong learning. One of the conclusions drawn stated that Lithuania did not have a clear consecutive and integrated lifelong learning strategy. Three basic objectives aimed at creating a national lifelong learning strategy were formulated:

1) To stimulate learning motivation and to develop learning skills at pre-school and basic education levels (in order to avoid early dropouts from formal education system and lifelong learning);
2) To implement accumulative learning achievement certificates (learning portfolio) at post-compulsory and further education levels. This would enable the removal of barriers between academic and vocational education, formal and informal learning, to motivate every person to keep on learning, and employers to invest in organisational learning and staff development;
3) To involve as many as possible non-government organisations and social partners into facilitation of adult education ([419]).

In 2003 the Ministry of Education and Science and the Ministry of Social Security and Labour discussed the problems of lifelong learning. The new developments were foreseen in the 2004 Lifelong Learning Strategy ([420]).

The guarantees for employees related to training and lifelong learning are also foreseen in the Labour Code. The employees who are studying at schools of general education or at colleges and higher educational institutions are entitled for an educational leave subject to a certificate of the education institutions. The employees who are studying under the study contracts with their enterprise shall be entitled to a paid educational leave with the pay at the rate of at least the average wage. The pay for the period of study for those employees who are studying on their own initiative shall be determined in collective agreements or by agreement of the parties.

Labour Code Article 143 stipulates that the study programme, qualification improvement in a workplace or training centre shall be included into working time of the employee. Article 181 entitles a right for the employees to an educational leave if they are studying at duly registered schools of general education or at colleges and higher educational institutions. Article 209 states that employees who are studying at educational institutions shall be entitled to privileges and guarantees provided by the Code and collective agreements. The monthly wage of the employees who are studying at educational institutions may not be less than the minimum monthly wage prescribed by the government. Article 210 entitles employees to a paid educational leave if they are studying, taking entrance examinations to colleges and higher educational institutions under study contracts with their enterprise, with the pay at the rate of at least the average wage.

(b) Active ageing

According to the principles of active ageing, priority is given to labour force participation and education of the older people in Lithuania. Moreover, a guarantee of an adequate income for

([419]) Bėkšta, Arūnas, Dr Dienys, Vincentas. Report of the consultation process on the memorandum on lifelong learning in Lithuania. 2001. www.lssa.smm.lt. http://www.lssa.smm.lt/docs/Ministry_of_Education_and_Science_of_the_Republic_of_Lithuania.doc.

([420]) In Lithuanian: *Mokymosi visą gyvenimą užtikrinimo strategija ir jos įgyvendinimo veiksmų planas*. Lietuvos Respublikos švietimo ir mokslo ministro ir Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2004 m. kovo 26 d. įsakymas No ISAK-433/A1–83 // Official Gazette *Valstybės žinios*, 2004.04.17, No: 56–1957.

the people when they are no longer able to earn money and provision of the required social care services at their advanced old age are also seen as issues of major concern. These issues, with the aim of ensuring the welfare of older/elderly persons, are given much consideration in the Strategy of Policy for Residents in Lithuania ([421]).

Lithuania being an agricultural country, part of the population lives in rural areas and they are involved in agricultural activities. Those people do not want to change their way of life and are not flexible in terms of ongoing changes in the labour market. Therefore, the plans to reach 50 % employability in the age group of 55–64 year-olds are actually impossible to achieve in Lithuania because in the growing competitive labour market it is hard to stabilize the current employment level of the elderly people.

A majority of the pre-pension age people are not able or do not wish to work full-time and they want to participate in the labour market by working according to flexible schemes (part-time work, flexible shifts, working at home, seasonal work etc.) which are not popular in Lithuania. Problems arise because of great remoteness between the demand of the labour market and the supply of capabilities of older people. They do not know any foreign languages, they are computer-illiterate and are unwanted in the labour market. The employers are not interested in adapting the workplace to meet the requirements of such employees and they often try to avoid commitment in terms of additional health and safety guarantees for them.

According to the labour market statistics, in year 2000, the employment of 55 year old men (and older) was 31.8 % and that of women was even less, only 17.5 %. It should be stressed that women are less paid and have more family responsibilities.

(4) Young people at work: bridging the gap between school and labour market

(a) Vocational information and counselling services

Provision of information about education and labour market is stipulated in the Law on Education of Republic of Lithuania ([422]) that has had 11 amendments and changes since 1995. Article 26 of this law stipulates that vocational information and counselling services include provision of information and consulting about the opportunities offered by vocational training, post-secondary and higher education study curricula, studies abroad, and employment prospects in the labour market of Lithuania. This aid must be provided in schools, information centres, consulting service centres and labour exchange offices in compliance with the requirements established by the Minister of Education and Science and the Minister of Social Security and Labour. The aims of vocational counselling and consultation of the secondary school students were foreseen in the Order of Vocational Counselling ([423]) issued by the Minister of Education and Science in 1998. The Means of Professional Integration of Young People ([424]) were foreseen by the government resolution in 1998.

Law on Professional Education ([425]) stipulates the competences of the government in the sphere of professional counselling — the Ministry of Education and Science shall guarantee the professional counselling at secondary schools and professional schools and the Ministry of Social Security and Labour shall organise the professional counselling of young people on their graduation from school.

([421]) In Lithuanian: *Lietuvos gyventojų politikos strategijos metmenys*. Socialinių tyrimų institutas. Vilnius, 2004. http://www.sti.lt/strategija/stra.pdf.

([422]) In Lithuanian: *Lietuvos Respublikos švietimo įstatymas* // Official Gazette *Valstybės žinios*. 1991, No 23–593.

([423]) In Lithuanian: Lietuvos Respublikos švietimo ir mokslo ministro 1998 m. kovo 20 d. įsakymas No 465 '*Dėl profesinio orientavimo tvarkos*' // Official Gazette *Valstybės žinios* 1998, No: 39–1046.

([424]) In Lithuanian: Lietuvos Respublikos Vyriausybės 1998 m. sausio 8 d. nutarimas No 10 '*Dėl jaunimo profesinio orientavimo ir integravimo į darbo rinką priemonių*' // Official Gazette *Valstybės žinios*. 1998, No 5–86.

([425]) In Lithuanian: *Lietuvos Respublikos profesinio mokymo įstatymas* // Official Gazette *Valstybės žinios*. 1997, No 98–2478.

Despite the existing legal regulation the comprehensive legal environment for the effective vocational counselling and training system was not created. In general, the national legal acts describe the need for the professional counselling and training system. But there are no concrete provisions on the steps that could be useful for young people in this sphere. There is no national integral professional counselling system that could plan and coordinate the measures of national institutions or authorities to be taken at the national level. Only an insignificant number of the students at secondary schools can use the services of professional consultation. The professional counselling at schools is performed (if performed) too late, during the last years of studies. Young people are not duly informed about the professional counselling services and the centres where they could obtain full information and competent advice. The information does not actually reach the countryside population of Lithuania. There is a lack of qualified and competent specialists who could provide all the information about various types of professions and counselling at schools. An improper legal environment stipulating the order of information is also observed. Only main national universities have career centres which spread information about the seminars, consultancies, national and international study programmes and offer relevant publications.

The problems mentioned above are directly related to scarce funding of the programmes of vocational counselling and training. Education and research is one of the most poorly funded sectors in Lithuania. There is a great shortage of money for literature, computing facilities and equipment, Internet technology, information technology infrastructure, etc. Programme or project funding is very low in Lithuania; most projects are financed by non-national foundations. Public competitive funding received from the Lithuanian State Science and Studies Foundation is limited to a few projects in the priority areas. In 2003, the above-mentioned problems were revealed and indicated by the Ministry of Education and Science and by the Ministry of Social Security and Labour. The situation was analysed and measures to be taken were foreseen in 2003 Vocational Guidance Strategy ([426]), 2004 Lifelong Learning Strategy ([427]) and 2005 Requirements for Vocational Counselling and Guidance Services ([428]).

(b) Health and safety at work

The new Labour Code that is in force from 1 January 2003 was prepared in line with the requirements of *aquis communautaire*. Presently it foresees main regulations for the protection of young people at work.

In line with the Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work the national legal acts ensure additional higher protection for young persons at work and practice. A number of the definitions of the directive were introduced into the Law on Health and Safety at Work ([429]) that was adopted in 2000. Additional guarantees are provided in the 2003 resolution of the government on 'Establishing the procedure of employment, health checks and checks for possibility to perform certain work for persons under 18 years of age; on working time, list of prohibited work, work involving harmful and dangerous exposure for persons under 18 years of age' ([430]).

([426]) In Lithuanian: Lietuvos Respublikos švietimo ir mokslo ministro ir Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2003 m. lapkričio 19 d. įsakymas No ISAK-1635/A1–180 '*Dėl profesinio orientavimo strategijos ir jos įgyvendinimo veiksmų plano tvirtinimo*' // Official Gazette *Valstybės žinios*. 2004., Nr: 56–1955.

([427]) In Lithuanian: Lietuvos Respublikos švietimo ir mokslo ministro ir Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2004 m. kovo 26 d. įsakymas No ISAK-433/A1–83 'Dėl mokymosi visą gyvenimą užtikrinimo strategijos ir jos įgyvendinimo veiksmų plano tvirtinimo' // Official Gazette *Valstybės žinios*, 2004.04.17, No: 56–1957.

([428]) In Lithuanian: Lietuvos Respublikos švietimo ir mokslo ministro ir Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2005 m. balandžio 29 d. įsakymas No ISAK-739/A1–116 'Dėl Profesinio informavimo ir konsultavimo paslaugų teikimo reikalavimų aprašo patvirtinimo' // Official Gazette *Valstybės žinios*. 2005, No 60–2132.

([429]) In Lithuanian: *Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatymas* // Official Gazette *Valstybės žinios*. 2003, No 70–3170.

([430]) In Lithuanian: *Dėl asmenų iki aštuoniolikos metų įdarbinimo, sveikatos patikrinimo ir jų galimybių dirbti konkretų darbą nustatymo tvarkos, darbo laiko, jiems draudžiamų dirbti darbų, sveikatai kenksmingų, pavojingų veiksnių sąrašo patvirtinimo.* // Official Gazette *Valstybės žinios*. 2003, No 13–502.

The Government Resolution On Conditions and Order of Professional Preparation for Persons Under 18 Years of Age ([431]) establishes the conditions of health and safety for persons exercising the occupational training in professional schools and undertakings. Health and safety and other requirements for young people during their professional training contract must correspond to the higher requirements set up by the labour laws. In the growing economy market, the employees with a higher protection level are not popular because when employing young persons employers are afraid of a possible risk. The state tax and related policy shall be improved to promote or stimulate professional training of young persons in private undertakings.

3. Labour law and adaptability

(1) New forms of employment relations

(a) Fixed-term contracts

The Law on Employment Contract (in force from 1992–01–01, repealed in 2003–01–01), Article 9, allowed concluding a fixed-term employment contract. It was prohibited to conclude a fixed-term employment contract if the work was of a permanent nature, except for the cases when there was a will of the employee or when this was provided by the law. It should be stressed that during the period before the Labour Code came into force in 2003 the right of an employee to conclude a fixed-term contract had been transformed into a tool for employers to avoid the contracts of an indefinite duration as the general form of employment relationship between employers and workers. Quite often employees were forced to apply for fixed-term contracts which were prolonged for several times when the term of contract expired. Employers used it as an instrument to avoid a severance pay or compensation when terminating the employment contract. The guarantee of a fixed-term contract as a means of flexibility for employees has become a bridge to stipulate less favourable employment conditions.

Since 2003 in the new Labour Code, the fixed-term contracts constitute a distinct category of employment contracts which may be subdivided in three main groups: common fixed-term employment contracts, short-term employment contracts, and seasonal employment contracts.

A fixed-term employment contract may be concluded for a certain period of time or for the period of the performance of certain work but not exceeding five years. The term of an employment contract may be determined until a specific calendar date or the occurrence, change or cessation of specific circumstances. A seasonal employment contract shall be concluded for the performance of seasonal work (e.g. work, which due to natural and climatic conditions is performed not all year round, but in certain periods (seasons) not exceeding eight months (in a period of 12 successive months) and is entered on the list of types of seasonal work). A short term employment contract is an employment contract concluded for a period not exceeding two months on special grounds like substitution of absent employee etc. It is prohibited to conclude a fixed-term employment contract if work is of a permanent nature, except for the cases when this is provided by laws or collective agreements. A fixed-term employment contract may be concluded for a certain period of time or for the period of the performance of certain work, but not exceeding five years. The term of an employment contract may be determined until the occurrence, change or cessation of specific circumstances.

Labour Code, Article 108, provides that an employment contract is concluded for an indefinite period of time (non-term). The main requirement regarding the clauses on the fixed-

([431]) In Lithuanian: *Dėl Asmenų iki aštuoniolikos metų profesinio pasirengimo sąlygų ir tvarkos patvirtinimo* // Official Gazette *Valstybės žinios*. 2003, No 13–503.

term employment contract is that a work shall be of a temporary nature. A fixed-term employment contract shall become an open-ended employment contract when the circumstances in respect whereof the term of the contract has been defined cease to exist during the period of employment relations (e.g. employee does not return to work after his leave, etc.).

(b) Part-time work

Until 2003, the Law on Health and Safety at Work provided that upon agreement of the employee with the employer a part-time work day or part-time work week may be established. Employers were required to establish work schedules of part-time work days or part-time work weeks if such is requested by a pregnant woman or a woman who had a child under the age of 14 or a child who had been declared as disabled under the age of 16; a father who is a single parent of a child under the age of 14 or a guardian who is raising a child of the said age; a disabled person; or a person who is nursing a sick family member and who had presented a medical conclusion thereon. A part-time working hours regime could not limit the employee's general labour rights. The procedure for establishing part-time working time was established by the government. Other part-time work regimes that are more favourable to the employee could be established in collective agreements and employment contracts.

The new Labour Code provides that part-time daily working time or part-time weekly working time is set:

1) by agreement between the employee and the employer;
2) by request of the worker due to his/her health status in accordance with conclusions of the competent medical institution;
3) on request of a pregnant woman, a woman who has recently given birth, a woman who breast-feeds, an employee raising a child until it reaches three years of age, as well as an employee who, as a single parent, is raising a child until it has reached the age of 14or a child with disabilities until it has reached the age of 16;
4) on request of an employee under 18 years of age;
5) on request of a person according to the conclusions of a healthcare institution;
6) on request of an employee nursing a sick member of his family, according to the conclusions of a healthcare institution.

The Government resolution on Part-time work organisation ([432]) determines the minimum duration of the part-time daily working time (which shall not be shorter than half of regular daily working time) and part-time weekly working time (which shall not be shorter than three working days per week).

(c) Temporary agency work

There is no legislation on temporary agency work in Lithuania. No licensing, limitations or restrictions to perform temporary agency work service are enacted. There is polemic regarding the following issue: whether this form of work is legal or the absence of legislation means that it is not allowed. Consequently, there are no temporary work agencies in Lithuania or if they do exist, their activity is masked under a different kind of civil services.

In 2004, the Institute of Labour and Social Research carried out the feasibility study of legal regulation of agency work in Lithuania and its impact on the labour market. The research results show that less skilled/qualified individuals could be employed as agency

([432]) In Lithuanian: Lietuvos Respublikos Vyriausybės 2004 m. lapkričio 29 d. nutarimas No 1508 'Dėl Su ne viso darbo laiko nustatymo tvarka bei trukme susijusių sąlygų aprašo patvirtinimo' // Official Gazette *Valstybės žinios*. 2004, No 173–6406.

workers in Lithuania: students, unemployed and other individuals, who are satisfied with comparatively low earnings and temporary nature of work. In terms of labour market flexibility, temporary agency work should definitely be approached positively but the possible negative consequences should be kept to a minimum, i.e. such factors as replacement of permanent workers with temporary ones and decrease of employment guarantees, decrease in the average wage on the enterprise level, lessening of social guarantees in the employment sphere, etc ([433]).

(d) On-call work

The employer may assign the employee for on-call work only in extraordinary cases when it is necessary to ensure proper operation of the enterprise or completion of urgent work. There are two types of work on-call: at the enterprise or at home. The assignment to be on duty at the enterprise or at home after the working day, on rest days or public holidays can be made not more often than once a month or, with the consent of the employee, not more often than once a week.

The duration of being on-call at the enterprise together with the duration of the working day (when an employee is on duty after the end of a working day) may not exceed the regular duration of a working day set in Labour Code (40 hours per week, eight hours a day; maximum working time (including overtime) must not exceed 48 hours per seven working days). The duration of being on duty at the enterprise on rest days and public holidays as well as at home may not exceed eight hours a day. The duration of being on-call at the enterprise shall be counted as working time in full, and the duration of being on-call at home shall be counted as at least a half of working time (prior to 2003 Labour Code regulation the Law on Health and Safety at Work provided that being on-call at home shall be counted as at least a one-third (1/3) of working time).

Pregnant women, women who have recently given birth and breast-feeding women, one-parent employees raising a child under three years of age, employees raising a child under 14 years of age or a disabled child under 16 years of age alone, persons taking care of a disabled person, the disabled, if not restricted by a competent commission establishing the disability, may be appointed to be on duty at the enterprise or at home only upon their consent. Persons under 18 years of age may not be appointed to be on duty at the undertaking or at home.

The reference period is one month. For the time of being on duty at the enterprise when the duration of the regular or agreed working time is exceeded or for being on duty at home the employee shall, during the next month (before the year 2003, the time period was during the next 10 days), be given time to rest equal in duration to the time of being on-call at the enterprise or the time of being on-call (at home) counted as working time, or upon the employee's request, the said time may be added to employee's annual leave or paid for as if it were overtime work.

The case of remuneration for work of fireman brigades in Lithuania showed that the on-call work of firemen while not operating the direct work (fighting a fire) was not paid. The Fire and Rescue Department under the Ministry of the Interior is responsible for the protection of people, property and environment in case of emergencies. According to the order of the head of this department the on-call work was divided into passive ('faktiškai dirbtas laikas') and active ('realiai dirbtas laikas'). Only the active on-call work was paid. The case was brought to the Administrative Court ([434]). The court stated that due to the fact that there was no special legal regulation on the definition of night work and remuneration for it in the Law on

([433]) Inga Blažienė. *Report on temporary agency work in Lithuania. Institute of Labour and Social Research. Eurofound*. 2005.

([434]) Decision of the Administrative Court in the case of *Saulius Džiautas v. Fire and Rescue Department*. In Lithuanian: Nutartis Lietuvos Vyriausiojo administracinio teismo 2005 m. gruodžio 2 d. byloje No A2–1762–05, Saulius Džiautas v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos, Vilniaus miesto priešgaisrinė gelbėjimo tarnyba. Kat.16.7.

State Service ([435]), the Labour Code provisions must be applied. The court stated that the definition of night work, on-call work and remuneration for this type of work could not be interpreted otherwise than it is provided in the Labour Code. The Labour Code provides on-call time as a component (part) of working time which has to be remunerated.

The national regulation of on-call working time is consistent with the provisions of Directive 2003/88/EC and jurisprudence of European Court of Justice (Jeager, SIMAP etc.).

(e) Economically dependent workers

The notion of an 'economically dependent worker' is not known in Lithuanian labour law. As the given concept has not yet been developed, these workers do not belong to the category of employees in the definition of the term in the Labour Code and therefore they are not covered by the labour legislation. Some provisions of the state social security scheme regarding the age pension are applicable on the ground of specific legal provision.

(f) Subcontracting/outsourcing

Subcontracting/outsourcing in Lithuania has been known for more than five years. The legal regulation has not followed this phenomenon. Some situations of outsourcing that fall under the notion of 'transfer of undertaking or part of undertaking' are covered by the single provision of Labour Code Article 138 that prohibits the dismissal on the ground, inter alia, of transfer of undertaking or part of undertaking without defining it. In practice, however, the fact of outsourcing as such is used as a sufficient ground for the termination of the employment contract with one's own employees. The courts' practice examining the legitimacy of this ground of dismissal is still lacking.

(g) Pools of workers ('multisalariat')

There is no direct translation or any definition for the terms 'multisalariat' or 'pool of workers' in Lithuanian. The possibility of working for a few employers (undertakings, organisations) is known as secondary work. It was not prohibited by the Law on Employment Agreement and since 2003 it has been foreseen in Labour Code Article 108. The employee has a right to conclude a special type of the employment agreement 'for a secondary job' ([436]) and perform secondary duties or do a second job for a few different employers (in different workplaces).

Due to poor remuneration for work in many sectors of activities (state service, education sector, social security, health system etc.) people are forced to work in a few workplaces because of financial reasons. The requirement for a maximum of 48 weekly working hours and periods of rest time shall be followed.

There are problems regarding the differences in interpretation and understanding of the working time limits by social partners. According to Labour Code the employee can not work more that 48 hours a week but practice shows that some employees work five days a week for 10–12 hours a day and overall for 50–60 hours a week. The relevant working time problems are pointed out in the chapter devoted to working time below.

(h) Telework

There is no statutory regulation regarding telework. In Labour Code, a similar regulation of employment contracts with home-workers requires that the working time of a home-worker

([435]) In Lithuanian: Lietuvos Respublikos valstybės tarnybos įstatymas // Official Gazette *Valstybės žinios*, 2002, No 45–1708.

([436]) In Lithuanian: *antraeilės pareigos*.

may not exceed 40 hours per week. A home-worker spreads working hours over time on his/her own account. Home-workers shall record their working time by themselves.

The statutory regulation of employment contracts with home-workers requires that the work equipment which is used by a home-worker shall satisfy the requirements established by regulatory acts on health and safety at work. An employer shall have no right to require a home-worker to perform any work which involves the use of dangerous chemicals or other substances. The workstation and working environment of a home-worker must be safe, comfortable and non-harmful to health, as well as designed according to the requirements laid down in regulatory acts on safety and health at work. Home-workers are obligated to take care of safety and health to the largest extent possible in order to protect themselves and other persons who may suffer from improper behaviour or errors of a home-worker.

(i) Company networks

As a form of work organisation the company networks may be found in some multinational companies but they have not become a positive example to be followed and do not deserve any statutory regulation.

(2) Working time

After the re-establishment of independence of Republic of Lithuania in 1990 the working time duration in the Code of Labour Laws was reduced from 41 hours a week to 40 hours a week ([437]). In 1993 the Law on Health and Safety at Work was adopted providing main regulations on working and rest time ([438]). The parliament ratified ILO Forty-Hour Week Convention No 47 (1935) and ILO Night Work Convention (1990) ([439]) on 23 June 1994. These conventions were the guidelines establishing health, safety and working time standards in that period of the national law.

In 1993, the Law on Health and Safety at Work defined that the normal working hours for the employees in enterprises may not exceed 40 hours per week. The length of a workday (shift) shall be established according to the number of workdays (shifts) per week. The maximum length of a workday (shift) including overtime may not exceed 10 hours a day and only in exceptional cases upon the consent of the Labour Protection Committee of the enterprise the maximum length of the workday (shift) (together with a break for rest and meals) may be up to 12 hours a day. In enterprises which work continuously as well as in shops, sections, jobs with an interrupted work regime, and jobs in which specific categories of employees cannot observe the established work week due to production or technical conditions the employers upon receiving consent from the State Labour Inspectorate could introduce a summary record of work time; however, the work week should not exceed 60 hours. In 1993, the daily rest of minimum 10 consecutive hours per 24-hour period was provided. The 11 consecutive hours' daily rest in Lithuania was introduced in 2000.

The Law on Health and Safety at Work (2000) defines a standard duration of working time, 40 hours per week (a seven-day period). The new rule was introduced that for employees employed in more than one undertaking or in one undertaking but under two or more employment contracts, the working day (including breaks to rest and to eat) may not be longer than 12 hours. This rule clarified that normally the employee cannot be involved in work more than 12 hours a day overall.

([437]) In Lithuanian: Lietuvos Respublikos įstatymas padaryti pakeitimus Lietuvos Respublikos darbo įstatymų kodekso 52 straipsnyje // Official Gazette *Valstybės žinios*. 1990 08 10, No 22–540. In force from September 1, 1990.

([438]) In Lithuanian: *Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatymas*. Official Gazette *Valstybės žinios*. 1993, No 55–1064.

([439]) In Lithuanian: Lietuvos Respublikos Seimo 1994 m. birželio 23 d. nutarimas 'Dėl Tarptautinės darbo organizacijos konvencijų ratifikavimo' // Official gazette *Valstybės žinios*. 1994, No 49–913.

In 2002, the provisions on working and rest time were enacted in the new Labour Code that came in force from January 1 2003. The code was harmonised with the provisions of Directive 2003/88/EC. The new code has not made any big changes in the regulation of working and rest time.

The definition of working time for the first time appeared in the Labour Code in 2003. According to Labour Code Article 143, the working time shall include: the time, actually taken to do any work, hours of duty on call at home and at the place of work; the time of a business errand, business trip to another locality; the time necessary to prepare and arrange a workstation, work equipment, safety measures; rest breaks included in the working time according to statutory acts; the time of mandatory check-ups; a study programme, qualification improvement in a workplace or training centres; the time of suspension from work, if a employee who is suspended must comply with the order established in his workplace; the period of inactivity; other periods of time set by laws and regulations.

According to Labour Code (Article 147), the working time and rest time shall be arranged for each employee and the work (shift) schedule shall be approved by the administration upon coordination with representatives of employees.

The disputes between the employers and the employees often arise in the sphere of working time. Trade unions fight against long working hours and demand better remuneration. But at the same time some employees ask for longer working hours that could help them be more remunerated for their work. The state control and inspection of the working time in establishments is not performed properly enough. The employees are still afraid to be dismissed and do not dispute with employers on the employment conditions.

Occasional discussions between social partners are basically concerned with the possibility of introducing the opt-out. Still, there is no possibility for the opt-out foreseen in Directive 2003/88 in Lithuania. The Labour Code does not foresee a right for the parties of the employment contract to prolong the working time stipulated in the law.

The problems still arise with the registration of the working time in special registries approved by the government. The old style of counting the working hours is performed in many establishments. For a long time employers used to register an eight-hour working day. Even when the employee works less, the eight-hour period is registered in the time register. In some cases, although it has been agreed to work four hours, the employer registers eight hours because they do not know how to register the working hours correctly.

Sometimes a standard of an eight-hours-a-day working time form is used in cases when the employee works in fact for only three hours. The registration sheets do not reflect the real working time of the employees. If the employee works for three employers for three hours in each of the establishments, it is common to register three times eight hours (the standard working day) but not the real three hours, three times. For this reason in the time registration sheets, the working time of some employees formally becomes 24-hours-a-day when the employee works actually for only nine hours a day. The registration of the working time must reflect the exact number of working hours of each employee. Due to the wrong registering of working time the real working time of some employees remains unknown.

Labour Code Article 144 provides that ‘for employees employed in more than one undertaking or in one undertaking but under two or more employment contracts, the working day may not be longer than 12 hours’. This article is interpreted the way that the working time can reach 60 hours in five working days. But the official position of the State Labour Inspectorate is that the working time cannot exceed 48 hours. But this limit is still under discussion and the 60-hour working time is still applied.

The interpretation of overtime work has been and still is very complex. The overtime work was understood as work which is being done exceeding the 40-hour working time limit. Later this definition was changed, so that overtime is the working time exceeding the limit of time set for a certain category of employees (40 hours or fewer). In the new Labour Code a

provision appeared stating that generally overtime work is prohibited and a list of cases when it is allowed is provided. However in practice, overtime was treated as a common and normal extension of the working time limits.

Meanwhile social partners are discussing the possibility of putting a concrete ban on the working hours in big shopping centres and similar establishments on Sundays because Labour Code declares Sunday a general rest day. This question has been under discussion for several years.

Due to the above-mentioned problems the regulation in Labour Code and the real situation in life concerning various issues of working time and rest periods may differ.

Still, the majority of employers understand working time only as an instrument for calculating the remuneration for work. The doctrine introducing flexibility of working time into practice, together with the understanding of working time comprising the issues of health and safety of people, is very slowly integrating into the labour market. Despite the fact that social partners do agree on the growing importance of family responsibilities over their work, in practice employees are often unable to agree with their employers on the issues of normal or flexible working time. Unfortunately, some employers prefer to 'import' employees from third countries rather than to improve the working conditions for the present employees. This problem can also be seen as a result of the inability of the employees to organise and defend their interests through company level bargaining. The State Labour Inspectorate means implementing the working time requirements into practice seems to be insufficient.

(3) Labour law and human resource development

Participation in the common European policy and various projects creates a possibility for the Lithuanian labour market policy to become more beneficial for its parties. Due to a growing shortage of employees in the labour market employers started to use labour exchange services more actively. The introduction of required relevant services in the labour market could promote new opportunities for both sides of the employment agreement, the employers and the employees.

Investment in human resources and its development is one of the priorities in the National Development Plan and Regional Development Plans. It is foreseen to develop lifelong learning in Lithuania, introduce and promote flexible working schemes in practice and exercise other significant measures.

(4) Mobility, adaptability and social exclusion

(a) Reasons for social exclusion

Due to the significant structural changes in the post-Soviet Lithuanian economy some categories of people (especially with poor education) faced negative effects. Mention can be made of dismissals, lack of coordinated state employment policy in mobility and adaptability programmes and other social problems. Incapability of the national labour market to offer a job for these groups of people (sometimes well-educated and qualified specialists) led to a decline in the standard of living, crimes, appearance of homeless people etc. Thus, in search of employment some of the people started emigration legally or illegally to various foreign countries (USA, Great Britain, Spain). Others, unable to adapt to the changes in the labour market formed groups of social exclusion.

Social exclusion is also obvious in the poverty groups of the employees where all the salary is spent mostly on food supplies with no money left to cover expenses for pastime and social life activities. The state remuneration policy is critical in the sectors financed by the

state budget, such as education (university/school teachers, lecturers, professors, researchers) and healthcare (doctors, nurses, etc.), especially in old aged families or families with small children.

A similar risk of social exclusion appears for employees that are not attractive for employers because of the additional guarantees provided by laws. In the Soviet period, there were no private undertakings and all the guarantees were financed from state budget. Since re-establishing of independence the various kinds of special guarantees provided for employees became as obligation for owners of private undertakings. In 1991, less than 30 % of employees worked in the private sector, while in 1999 it was more than 70 %. Some employers began to be aware of persons with additional guarantees because these employees needed more assets. The state did not construct a relevant tax system that could enable the workers with a risk of social exclusion to get duly integrated into the labour market. A paradoxical situation is observed when an additional guarantee that has to provide equal opportunities and a right to work creates a difficulty for an employee to get a job. Young people (especially pregnant women) and disabled people can also face a risk of social exclusion in the labour market. One of the measures to be taken in order to fight the exclusion in Lithuania is to create a special social programme aimed at employing the people from various risk groups, e.g. the disabled (blind people) and people who are released from prison.

To seek implementation of the European Commission Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid and Commission Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 of the EC Treaty to state aid for employment the Law on Social Undertakings ([440]) was adopted. The law indicates the groups of persons that need social support in the labour market. These groups of people that are at particular risk of social exclusion consist of the unemployed disabled people, persons that are unemployed for a long period of time, pre-pension age people who are unemployed, unemployed parents with children under eight years of age, and persons released from prison. Special legal acts stipulate the adaptation of the people from these risk groups: The Law on Social Integration of Disabled ([441]); 2004–2007 Programme of Social Adaptation of Persons Returned From Imprisonment ([442]), etc.

(b) Mobility and adaptability

The policy for the employee's mobility and adaptability has been lately developed in Lithuania. In the government programme ([443]) for 1997–2000, the problems of low territorial and professional mobility and flexibility in the labour market were identified. The need for adaptability of the labour market to the new information technologies, development of small and medium businesses was considered of vital importance for the economic growth of the Republic.

Despite the considerable structural changes in the area of employment over the last decade labour mobility still remains very low. The state policy for employment was impeding labour mobility and 'inefficient' employment was artificially supported, which actually postponed the implementation of real measures and actions to be taken against the problems raised. Attempts to mitigate social tensions were sometimes temporary, while measures to make the labour force more competitive and flexible would have been much more effective ([444]).

([440]) In Lithuanian: Lietuvo*s Respublikos socialinių įmonių įstatymas* // Official Gazette *Valstybės žinios*. 2004, No 96–3519.

([441]) In Lithuanian: *Lietuvos Respublikos neįgaliųjų socialinės integracijos įstatymas* // Official Gazette *Valstybės žinios*. 1991, No 36.

([442]) In Lithuanian: Lietuvos Respublikos Vyriausybės 1999 m. spalio 25 d. nutarimas No 1179 'Dėl Nuteistųjų ir asmenų, paleistų iš laisvės atėmimo vietų, socialinės adaptacijos 2004–2007 metų programos patvirtinimo' // Official Gazette *Valstybės žinios*. 1999, No 91–2676.

([443]) In Lithuanian: 1996 m. gruodžio 10 d. Lietuvos Respublikos Seimo Nutarimas No VIII-28 'Dėl Lietuvos Respublikos Vyriausybės Programos' // Official Gazette *Valstybės žinios*. 1996, No 120–2821.

([444]) Dilba, R. *Employment. Lithuanian Human Development Report. United Nations in Lithuania*. 2000. p. 37.

The territorial mobility in Lithuania has started growing since its accession to the EU in 2004. Professional mobility is developing together with the changes and demands of the labour market. The Labour Code does not contain a definition or regulation on the concept of 'mobility' or 'adaptability'. Even if some related provisions exist, they do not create a comprehensive system promoting mobility and adaptability. The new Law on Support of the Employment ([445]) of 2006 (Article 34) claims the promotion of territorial mobility to be the programme measure strengthening employment.

The Lithuanian National Lisbon Strategy Implementation Programme ([446]) adopted in 2005 aiming to promote professional and territorial mobility and adaptability of people, foresees measures to promote territorial mobility of job-seekers and organise territorial programmes; improve competence and abilities of employees of governmental, municipal and other public institutions and establishments, as well as industrial and business enterprises; increase computer literacy of employees; enhance the ability of employers, employees and social partners to adapt themselves to changes and needs in the labour market by applying investments into formal and informal training; and implement means of the participation of the Lithuanian Labour Exchange in the European Employment Services (EURES) system.

When drafting the strategy for the use of the European Union structural funds for 2007–2013 the Ministry of Social Security and Labour worked out a programme for the development of human resources. The priority areas cover three points: increasing adaptability of employees and enterprises to the demands of the market; promoting the employment of residents and their participation in the labour market; and strengthening of social inclusion.

([445]) In Lithuanian: *Lietuvos Respublikos užimtumo rėmimo įstatymas* // Official Gazette *Valstybės žinios*. 2006, No 73–2762.

([446]) In Lithuanian: *Nacionalinė Lisabonos strategijos įgyvendinimo programa*. Lietuvos Respublikos Vyriausybės 2005 m. lapkričio 22 d. nutarimas No 1270 // Official Gazette *Valstybės žinios*. 2005, No 139–5019.

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- **Resolution of the Government of the Republic of Lithuania No 1055 of 11 September 1996 On list of work prohibited for persons up to 18 years of age and hazardous and dangerous exposure and conditions of work and employment of persons from 13 to 14, 14 to 16 and 16 to 18 years of age**. In Lithuanian: Dėl asmenims iki 18 metų draudžiamų dirbti darbų, kenksmingų ir pavojingų veiksnių sąrašo ir asmenų nuo 13 iki 14 metų, nuo 14 iki 16 metų ir nuo 16 iki 18 metų darbo sąlygų ir įdarbinimo tvarkos patvirtinimo. //Official gazette *Valstybės žinios.* 1996, No 87–2065. (Repealed).
- **Resolution of the Government of the Republic of Lithuania No 138 of 29 January 2003 'Establishing the procedure of employment, health checks and checks for possibility to perform certain work for persons under 18 years of age; on working**

time, list of prohibited work, work involving harmful and dangerous exposure for persons under 18 years of age’. In Lithuanian: Dėl asmenų iki aštuoniolikos metų įdarbinimo, sveikatos patikrinimo ir jų galimybių dirbti konkretų darbą nustatymo tvarkos, darbo laiko, jiems draudžiamų dirbti darbų, sveikatai kenksmingų, pavojingų veiksnių sąrašo patvirtinimo. (Official gazette *Valstybės žinios.* 2003, No 13–502).

- **Resolution of the Government of the Republic of Lithuania No 139 of 29 January 2003 On conditions and order of professional preparation for persons under 18 years of age**. In Lithuanian: Dėl Asmenų iki aštuoniolikos metų profesinio pasirengimo sąlygų ir tvarkos patvirtinimo. //Official gazette *Valstybės žinios*. 2003, No 13–503.
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The evolution of labour law in Hungary

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I. The legal framework and sources of labour law

The legal framework of the Hungarian post-socialist labour law directly reflects the impact of the rejection of all attributes of the communist labour law.

1. Labour rights in the Constitution: freedoms in preference

The 1989 modification of the Constitution (Act XX of 1949) has resulted in a totally renewed piece of legislation, bringing the Constitution into compliance with the requirements of the basic law of parliamentary democracy, market economy and the rule of law.

The Constitution and the Introductory Provisions of the Labour Code lay down the most important principles (prohibition of discrimination, protection of privacy of employees, the right to legal remedy, trade union rights and freedoms). Moreover, the Labour Code provides a comprehensive regulation on all general issues of the employment relationship. Its norms on labour contract and labour conditions set minimum standards: on the basis of these norms, parties are free to negotiate over terms exceeding the respective minimum standards.

The peaceful shift of the political regime (the so-called 'constitutional revolution') was the result of long negotiations and several compromise arrangements between the forces of the old and new political power holders. These compromises are reflected in the Constitution, in particular in retaining a number of social and labour rights. The Constitution (Article 70/B) declares the right to work, the right to equal pay for equal work and to a remuneration that corresponds to the quantity and quality of work as well as to rest, time off and regular paid holiday. The first ever Constitutional Court of Hungary (existing from the end of 1989) has considered these provisions as a rescued remnant of the previous regime and considerably restricted their content through interpretation. In its decisions, the Constitutional Court has denied any positive meaning of the 'right to work', emphasising it as a 'freedom' and not as a positive right. It declared several times that the right to work has been considered a version of the freedom of occupation and the freedom of enterprise. Furthermore, the right to equal pay for equal work has been repeatedly declared a specific formulation of the general non-discrimination rule of the Constitution.

In considering the freedom of the contractual will of persons, the Constitutional Court went as far as invalidating the statutory right of trade unions to represent workers at courts and authorities without a formal 'power of attorney' issued by the aggrieved worker as a violation of the right of the workers to dispose autonomously over their rights, thereby violating their dignity and thus being unconstitutional ([447]). The involvement of trade unions in the employers' decision on granting early pension (paid by the employer) to an employee was also considered unconstitutional on similar grounds ([448]) (violation of autonomy and thereby dignity) leaving out of consideration the collective element of their rights to representation. These decisions reflect

([447]) Resolution No 8/1990 (IV.23). AB (ABH 1990, 42, 48).
([448]) Resolution No 11/1996 (III. 13). AB (ABH 1996, 240).

the overall unfriendly stance of the high judicial body towards the trade unions, which were deeply discredited in the communist past. In another characteristic example of the prevailing ‘freedom-oriented’ approach of the Constitutional Court (i.e. suspicious and cautious with positive rights and statutory protection), the obligation upon an the employer to give the reasons for an ‘ordinary notice’ was qualified as ‘positive discrimination’ in departure from the general freedom of the parties to terminate their contract of employment at free will ([449]).

2. Labour code or civil code

2.1 Shift from status to contract

After the fall of the communist regime, the freedom of contract was considered identical with the abolition of nearly all restrictions on the freedom of the entrepreneur to hire, fire and utilise (in fact, to exploit) its labour force at will.

The political shift brought about a vigorous claim to restore the freedom of contract in labour relations as a response to the administrative-bureaucratic ([450]) regime of the socialist labour law. It was hoped that liberalisation and greater contractual freedom would reward performance instead of the previous support of mediocre and unproductive labour by the levelling policies of the centrally set wage systems and working conditions. Public discourse focused on how to ‘reintegrate’ labour law into civil law and to regulate employment within the context of contract law ([451]). In a way this was a historically delayed repetition of Maine’s ‘development from status to contract’, the labour law of the state socialist regime providing ‘workers’ (members of the working class) with a certain status where contract had a relatively minor role in determining the rights and duties of the individual, of the parties to the employment relationship.

In parallel, the idea of a distinct Labour Code has also been sharply contested: Labour Codes all over the central-east European region were a copy of the relevant Soviet legislation, thus, codified labour law became identified with the legacy of the Soviet regime. This has meant a drive towards the abandonment of a Code and the collapse of labour regulation into separate thematic legislative products.

Legislative initiatives along such lines were nevertheless restrained to some extent by political considerations, partly as a result of the emergence of a functioning tripartism. Accordingly, the 1992 new legislation was promulgated in the form of a Labour Code ([452]), giving preference to the stability and guarantees provided by a comprehensive piece of legislation on labour rights. The Civil Code still does not regulate employment contracts (although the issue arises repeatedly) and the liberalisation of the labour contract has been kept within limits.

([449]) Resolution No 11/2001(IV.12). AB (ABH 2000, 144).

([450]) Throughout this report there will be several mentions of the ‘administrative-bureaucratic’ or the ‘administrative-hierarchical’ character of the socialist labour law and employment relationship.. These expressions reflect that the employer-employee relationship has not been separate or different from the state-citizen (or rather state-subject) relationship both in their totality and in the details.

([451]) Radnay, J. A munkajog és a polgári jog kapcsolata, in: –Bánrévi, G.–Jobbágyi, G. — Varga, C. (ed.s): Justum, aequum, salutare (1998) Liber Amicorum Janos Zlinszky. Osiris, Budapest. pp. 242–248. Prugberger, T.: A munkajog és a polgári jog kapcsolata a jogdogmatika tükrében. Publicationes Universitatis Miskolciensis, Sectio juridica et politica. Miskolc, 2000. Tom. 17. pp. 211–224.

([452]) Act XXII of 1992 on the Labour Code.

The key principle of previous regulation was its predominant mandatory character. In order to approximate the regulation to the *ius dispositivum* characteristic of civil law while at the same time guaranteeing the protection of the workers in a weaker bargaining position, the regulation of the terms and conditions of labour employment (Part Three of the Labour Code) has become — as a general rule — 'one-way permissive'. This means that the parties — either in a collective or in an individual agreement — may depart from the provisions of the Labour Code in favour of the employee (taking over the German 'Günstigkeitsprinzip') unless the Labour Code itself explicitly provides to the contrary (i.e. either by prohibiting any departure or by permitting departure in general on the specific issue that implies departure to the disadvantage of the employee, too).

2.2 More freedom in hiring and firing

The most significant changes have been introduced with respect to the right of the employer to hire and fire people. In hiring, the mandatory preference to be given to women with small children has been abolished. The scope for prohibiting and/or limiting the termination of the employment relationship in the case of some groups of vulnerable workers has been reduced, and only a part of the former cases were retained. The prohibition to dismiss an employee during sickness, pregnancy, maternity leave and various kinds of family leave has been retained, but seven former prohibitions have been abolished. The regulation of the public service — by the explicit intention of the legislature to provide an increased level of job security — has retained more of the former protected cases.

The increased role of contract resulted in the removal of the former provisions on 'disciplinary action' taken by the employer. This was now considered a sign of the so called 'administrative character' of past labour law. The new approach was that violations of workplace duties have to be sanctioned within the context of the contract of employment. This approach in the new labour code has resulted in an easier removal of the undisciplined worker: whereas in the past a disciplinary dismissal required a formal procedure, with the right of the worker to hearing and to legal representation, in addition a formal, explained decision had to be given that could be appealed against and the appeal had a suspending effect to the dismissal, now the employer can invoke a so called 'extraordinary notice' that removes the worker immediately from the workplace, regardless of any legal dispute proceedings launched by the worker.

(The issues of job security and 'employability' are addressed in Part II.)

2.3 The double meaning of the 'individualisation' of employment

The 'individualisation of employment' is generally understood as a synonym for 'contractualisation', i.e. giving more freedom to the individual parties to an employment relationship in determining the terms and conditions of their relationship in contrast to the formerly prevalent statutory or (less common) collective regulation.

The privatisation of the economy has brought about another meaning of 'individualisation' which, although less frequently emphasised in the post-socialist labour law literature, becomes

highly relevant in the context of efforts to establish a ‘security’ balance offsetting emergent ‘flexibility’ tendencies. Individualisation, in this second sense, means the fragmentation of an employment history, breaking a whole lifelong working career down into shorter or longer periods of employment spent by a worker with a given individual employer. This represents a radical departure from the past, when a worker’s lifetime career was not split into separate periods of individual employment, instead, it was considered as one continuum, an uninterrupted process, even if it happened to be spent with a series of state employers.

This used to mean that rights and benefits, connected to seniority (e.g. notice periods, annual holiday, wage category or certain premiums) were, in general, conditional on an employee’s work experience accumulated over the course of a lifetime. One of the major changes brought about by the transition was the introduction of the ‘individual’ approach to employment in this second meaning. The new enthusiasm for private ownership ruled out the possibility to impose any burden on an employer for periods ‘served’ with another employer. Accordingly, the new rules prevent employees from carrying any right or entitlement from one employer to the other. Thus, as newcomers they have to accumulate time with a given employer in order to qualify, for example, to an entitlement to a period of notice above the statutory minimum. For this reason the length of annual holiday has been separated from the length of service and is connected to the age of the worker. This lack of statutory accreditation of accumulated seniority is, of course, different in the case of public employment and civil service. In the latter instance, a more generous regulation provides for the recognition of previous public employment and service; in the case of public servants, even some periods spent in private employment can be credited to the worker.

The ‘individualisation’ of the employment relationship has been coupled with a specific commodification, whereby pecuniary compensation for the loss of employment has been given stronger emphasis: severance pay now compensates for the loss of the years spent with a particular individual employer that will not be acknowledged by the next employer. As it will be seen in connection with the rules on job security, this commodification introduced a statutory entitlement to monetary compensation for the first time, as a possible alternative to what had previously been a mandatory obligation on an employer to provide reinstatement as the only way of rectifying unlawful dismissal.

Although all these changes liberalising the contract of employment have remained within moderate limits, the imbalance of power between the two sides of the employment contract, under the special circumstances of the early transitional period has resulted in a huge deficit of democracy and equity that is reflected in the increasing defencelessness of employees against frequent, semi-legal or openly unlawful arbitrariness on the part of employers. This has been most striking in those geographical areas worst hit by mass unemployment.

3. Separation of public and private branches of labour law

The state-socialist regime made no distinction between private and public labour law. The forced unity — one Labour Code for all employment relationships — had a primarily ideological justification: in the ‘workers’ state’ the rights and duties of governmental and industrial workers

had to be the same, from the top to the bottom. This uniformity was also supported by the public character of all employment relationships within the nationalised property.

As a reaction to the past, the separation of 'public' and 'private' was considered to be an indispensable ingredient of the new, post-socialist legislation. The lack of appropriate time to elaborate the new system resulted in a trifold division in the structure of labour law regulation. Rejecting the idea of not only a single, uniform Labour Code, but also a single, uniform concept of 'worker', the 1992 legislation created three laws, with three different types of employment status identified as follows: 'employee', 'public employee' and 'civil servant' ([453]). The latter has been more or less corresponding to the concept of public servant or civil servant, or — as it was intended — similar to the German 'Beamte'. The system had inconsistencies from the beginning, generating debates as well as the extension of the concept of 'public service' to other 'service relationships' (justice, security, defence, policy etc.) distinct from the general concept of 'public servant'. At the beginning a trifold categorisation of employers (i.e. 1. private employers, 2. employers financed from public budget, and 3. central or local governmental offices) had been the determining factor regarding the category and legislative coverage of the employer. Later, this changed and former public servants, working in physical or simple technical jobs, were transferred under the jurisdiction of the Labour Code, although they do not qualify as 'private' employees per se. This move has contributed considerably to the over-complicated and confusing system of the structure of labour law regulation.

There is a governmental plan to modify the main labour laws, however, the concrete preparation of the re-codification has not yet commenced.

4. Collective agreements

4.1 The role of collective agreements

'Collective contracts' were present in the pre-1989 Hungarian labour law. In spite of their name, these were not real 'contracts' (similarly to the 'employment contracts') they were not based on agreements between autonomous parties, the two opposite sides of industry (given the absence of two separate sides with clearly different, opposing interests), rather they represented a kind of specification of central provisions (mainly wage categories, working time schedules, fringe benefits, disciplinary rules) for a given workplace. From the beginning of the market reforms (fluctuating between occasional speeding up and regression) in 1967, there was some limited opportunity for 'real bargaining' (at least in comparison to the previous period and in comparison to other CEE countries), although this was far from the free negotiations customary in the Western market economies.

The 1992 Labour Code has delegated — both implicitly and explicitly — a significantly more important role to collective agreements than they had before. Collective agreements were designated as an important pillar of labour regulation complementing the Labour Code. In the past collective agreements could only regulate those issues already authorised by the Labour

([453]) The Labour Code covering private employment, Act XXXIII of 1992 on the Legal Status of Public Employees, and Act XXIII of 1992 on the Legal Status of Public Servants.

Code. In spite of the broad power to regulate, the number of conclusions has radically shrunk. Employers did not want to provide more than the minima laid down by the Labour Code, thus, they were not interested in concluding meaningful collective agreements.

The increasing anti-union inclination of employers has been coupled with frequent inter-union rivalry as opposed to cooperation between trade unions. Employer antipathy has resulted in comparatively few genuine negotiations, and in the completion of even fewer collective agreements having a relatively narrow coverage. Together these factors have prevented collective bargaining from becoming the instrument it was intended to be by the Labour Code under the conditions of market economy.

On the whole, collective agreements could not become significant sources of labour law. Hopefully the increase of sectoral bargaining will change the present situation.

4.2 Material scope of collective agreements

The Labour Code (Article 30) broadly defines the material scope of collective agreements. So long as the agreement does not violate the law, it may regulate:

a. terms and conditions of the individual employment relationship,
b. the collective relationship between the employer(s) and trade union(s).

Current collective agreements focus on two main issues: wage setting and working time/rest time regulation.

Sectoral or industry level collective bargaining remained problematic throughout the period of post-socialist development. Trade unions themselves insist on focusing on company level bargaining, a point on which there is a shared opinion between national level trade union officials and local representatives.

The provisions of the collective agreements still seem to reflect the spirit of the pre-transition period, as much as they are frequently filled with description of statutory regulation, with organisational and procedural rules of the company administration. Besides setting fundamental wage issues the existing collective agreements predominantly concentrate on labour safety and hygiene, on working time issues (overtime, breaks, leaves of absence) as well as on social welfare measures.

As for the relationship between the employers and employees the far too broad wording of the Labour Code seems, apart from a minority of cases, rather to restrain than to authorise and encourage the parties with regard to the complexity of their relationship. The legislature intended, by Article 30, subsection b, to authorise and encourage the parties to adopt an autonomous regulation of their relationship, to lay down a framework for their ongoing negotiations and thereby facilitate a balanced relationship and cooperation between the parties. Apparently provisions in practice, however, mainly limit themselves to regulating mere procedural issues of their cooperation (such as list of issues and deadlines regarding the duty of

the employer on giving information or to consult the trade unions, confidentiality rules) and on the use of company facilities by the trade unions.

4.3 The levels of collective agreement

The Labour Code permits collective bargaining at enterprise and higher levels. While it is specified that there may be only one collective agreement at company level, the number of levels and the number of upper level collective agreements are not specified in the law. It is clear from Article 31 of the Labour Code, that there can be more than one level and more than one collective agreement at the same level. On the employers' side collective agreements can be concluded by one employer, by more employers or by employers associations (federations of associations). That makes quite a wide variety available.

In contrast to the position in the developed market economies of the EU 15, most collective agreements are concluded through company level bargaining (leaving more than about two-third of employers without a collective agreement). Sectoral level bargaining is weak, concentrated upon a few issues (mainly engaged with wage bargaining and setting minimal wages).

The weakness of sectoral level bargaining stems mainly from the lack of a supportive legal framework, as well as the marked indifference of employers. While at company level there is a legislative duty upon the employer to engage in collective negotiations once initiated by the trade unions (as well as to initiate wage bargaining annually), no corresponding duty applies to employers at sectoral level. It appears that employers do not perceive it to be in their interest to engage in sector level collective bargaining, whether to offset competitive forces or to achieve greater efficiencies in human resource management costs. Although there is a statutory provision facilitating the administrative extension of the coverage of existing collective agreements to the rest of the sector upon request of the concluding parties, it very rarely happens. Thus, in the absence of either interest and/or obligation, the employers have so far largely avoided engaging in sector or industrial level bargaining.

A preparation for change was begun in 2002 (through the EU supported Phare Project ([454])) resulting, by July 2003, in a framework agreement on the basic principles of the establishment and operation of the so-called 'Sectoral Dialogue Committees'. On the basis of the Framework Agreement bipartite sector level dialogue committees have been established and a Council of Sector Dialogue Committees has been set up. The preparations concluded in two bills: one ([455]) on national level interest reconciliation and the other on sectoral bargaining which was adopted by the Parliament on 11 December 2006. Under the law, the Interest Reconciliation Council is a tripartite national body (as existing today), membership of organisations in the body — being subject to politically tinted disputes between trade unions — is regulated in detail by the act, and it has a right to information, consultation and to give consent to certain governmental decisions and legislative drafts. The Sectoral Dialogue Committees are bipartite organs for sectoral bargaining, with a right to information and consultation regarding laws on sectoral issues as well as having the right to request the relevant minister to extend their collective agreement to the rest

([454]) The Covenant between the Hungarian Government and the EU Representative (Gunther Verheugen) signed on June 20, 2002.
([455]) See also the further reference to this law below in Section 5.

of the sector. However, the laws are not yet in force, because the President, instead of signing them, sent them to the Constitutional Court for a preliminary ruling because of the legislative power they delegate to organs that — by the composition of the relevant bodies — lack constitutional legitimacy. (Although such cases submitted by the President have to be decided 'with urgency', the Constitutional Court has not ruled on the issue as of mid-June, 2008.)

5. Social partners and social partnership

In Hungary, just as in other post-socialist countries, trade unions are engaged in a continuing fight against decline. They face an erosion of their membership, bargaining capacity and collective contract coverage as well as their political and economic power to influence working conditions. While trade union density is difficult to assess (since trade unions do not disclose such data and usually try to inflate their membership figures in public statements), it is estimated at about 17 % of the labour force ([456]). The total coverage by collective agreements is about 25 % of the workforce (for employers hiring more than four persons it is 27 per cent) ([457]). Most collective agreements continue to be concluded at company level. Although the parties to a collective agreement are obliged to announce the conclusion of a collective agreement to the competent ministry (for the moment the Ministry of Employment, Labour and Social Affairs, called 'the Ministry' further on) and to provide certain data, there is no sanction in the event of non-compliance. Furthermore, even if the parties submit a copy they may (and usually do) decline to make it public. In these circumstances, reliable information cannot be obtained regarding the number of collective agreements concluded, the parties to such agreements or the content of these agreements.

Social partnership — as with everything associated with the past regime — had a controversial reputation in the transition period, although this has been mitigated to some extent by the EU accession.

During the communist regime an artificial machinery of cooperation with representatives of workers operated as a rubber stamp on the decisions dictated by the Party. This machinery served as a substitute for the adversarial bargaining that had — for political and ideological reasons — fallen out of favour and been eliminated. Not surprisingly the idea of 'social partnership' is surrounded with suspicion and tainted by the past experience. On the other hand, machinery exists at national political level — legal forms of tripartite interest reconciliation — that still operates relatively smoothly on the basis of old skills and practices established in the previous regime. As a consequence of these well established routines, the process of privatisation and economic restructuring — requiring huge sacrifices on the part of workers — has to a great extent been carried out without major outbursts.

The process of tripartite national-level interest reconciliation was institutionalised in 1988, shortly before the shift of power, and its operation is largely based on mutual acknowledgement and agreements. For this reason the operation of social partnership has been dependent on and changing with the political attitude of the various governing coalitions. Relations with the social

([456]) Labour Market Mirror, 2005, (MTA Institution of Economics, Budapest, 2005, p. 69).
([457]) Id. p. 135.

partners during the first post-communist government based on a middle-right coalition, can be characterised by 'reluctant cooperation': in order to preserve social peace in this critical first period, the authorities tried to resume and maintain the institutional framework of national interest reconciliation (established in 1988, shortly before the shift of power), however, this process was permeated with controversies partly due to reluctance on the governmental side and also in part due to the unstable and frictional relationships among the social partners. The second, socialist-liberal coalition (with a strong socialist overweight, involving pre-transition political actors) had strong and amicable relations with the trade unions. Although the promised 'national social pact' has never been concluded, the government could implement its severe 1995 belt-tightening stabilising package without dangerous tension or the risk of a major social explosion. The third, right-wing government openly downgraded social dialogue. The openly anti-union attitude of the government resulted in an increased solidarity among trade unions so that they could overcome their political differences as well as in an increased activity: concerted efforts at national-political level to stop liberalising legislation, slightly improved negotiations at multi-employer and branch level (national level tripartite negotiations hardly worked at all), increased bargaining at company level and also increased strike actions, especially in public transportation, in spite of the improving economic and monetary indicators. The current social-liberal government (with a strong neo-liberal emphasis), while obediently implementing all that is required under Community regulation, seems to attribute relatively little importance to social dialogue in its budget-balancing and budget-reforming efforts.

This would dictate an easy compliance with the social partnership requirements set by the European Union. However, the past manipulative use of formal cooperation techniques have resulted in reluctance on the one hand and mere formal compliance on the other, based on 'path dependence': observing old techniques of formal compliance while in reality allowing things to go on as before.

II. The impact of european harmonisation

1. A general beneficial impact

The accession process obviously served as a counter-balance to the harsh effects of the process of liberalisation begun in the post-communist period. It was 'revealed' through the harmonisation process, that labour protection, job security and decent working conditions, trade union rights and workers' participation are not just some sort of 'communist eye-wash' as it was perceived by the dominant view in the society at the time of the demise of the state socialist regime, instead, they were part of the social traditions of Europe that the country now wanted to join.

The balancing effect of the accession can be attributed to several factors, but two of them deserve attention. One can be called 'the timing factor', the second one can be found in the more or less 'coercive nature' of the accession process.

1.1. Timing factor

The accelerated enlargement process eventually coincided with the dynamic emergence of the social agenda within the European Union — a fortunate coincidence. Although there had been several earlier efforts by the Commission and by various expert groups linked to the Commission to bring the social agenda onto the table of the European Union earlier, the breakthrough can be linked to the 2000 Lisbon summit.

In summary the accession process proved to be helpful in saving and confirming social values and this confirmation was undeniably an effect of the coincidence of the acceleration of the enlargement with the intensive progress of the social policy agenda and accompanying political decisions in the EU. There was a strong interest on the side of the European Union, too, not to admit 'Trojan horses' of American style capitalism into its community and not to engage upon further and deeper 'regulatory competition' with its new community members.

1.2. Voluntary coercive nature of legal harmonisation

The harmonisation process also had a 'voluntary coercive nature'. Notwithstanding a narrow margin for negotiations available to the candidate countries, the process was closer to unilateral imposition. The obvious and hardly negotiable legal requirements of the *acquis communautaire* were coupled with 'voluntary coercion'. Namely, the desire of these countries to integrate in the West was so strong, that the promise of the accession, could work as a sort of 'honeyed stick'. The political will for accession increased the willingness of the governments to comply with the Commission's requirements to moderate extremes of privatisation and liberalisation in the social field. It is also a part of the picture, that leaving open the question of 'small enlargement' or 'big bang' up to the last minute, maintained a sort of competition among the candidates, thereby increasing their readiness to 'obey' the requirements coming from Brussels.

1.3. Affected areas of labour law

Besides the overall beneficial impact on values and attitudes, the transposition of the *acquis communautaire* in labour law had a progressive impact — advancement and evolution at the same time beneficial with respect to the function of labour law — on the Hungarian labour legislation in two areas.

First, it introduced institutions and legal regulations that had no precedence in the socialist labour law, because they are organically connected to the existence of a market economy. The transposition of the EU norms on the protection of employees' rights in case of company restructuring (transfer, collective redundancy and insolvency) necessitated new legal institutions and detailed rules concerning these important practical problems. The development of the new institutions will be discussed in subsection 2.

Second, a part of the new legal arrangements had extensive precedence in the socialist labour law, however, they were not taken seriously neither before, nor after 1989. After 1990, these features of labour law were treated as a sort of communist-inheritance with reluctance and not enforced in practice. Here particularly the gender equality norms as well as the provisions guaranteeing employee involvement in managerial decision-making have to be mentioned. The reinforcement of old institutions will be analysed in subsection 3.

In contrast to the above-mentioned positive legal changes, there are two areas of labour law, where the level of protection was diminished by legal harmonisation: working time and the dispatching of workers to new tasks or working premises. In these areas the approach adopted to the transposition of the EU norms violated the non-regression rule and had the effect of increasing managerial prerogatives over the labour force and affording employers more flexibility compared to the past. Although carried out under the label of 'EU harmonisation', these changes can be considered already as an overture to the third, 'globalisation phase'. Part III contains the summary of these kinds of changes.

2. Developing new institutions: company restructuring

Protecting the rights of employees in the process of company restructuring — transfer, group dismissals and insolvency — had no precedent in socialist labour law. These events are typical for a market economy, but do not exist in a state-owned, centrally planned economy. All organisational and economic measures occurred within the property of one single owner: the state. Change of owner, bankruptcy and group dismissals were unthinkable in a political regime based on nationalised property, labour and in an economy struggling with permanent labour shortages. Thus, labour protection was built into the socialist system and there was little need for extra legislative protection for situations that could be assimilated to restructuring in a market economy. On the other hand, the post-1989 economic reforms, especially privatisation, led to all kinds of splits, transfers, orchestrated bankruptcies which entailed uncertainty and helplessness for the affected workers in the face of the unrestrained freedom of the employer.

The accession process introduced a gradual process of institutional change.

2.1 Transfer of undertakings

The purpose of Council Directive 77/187 ([458]) was to safeguard the acquired rights of employees in cases of change of the employer as a result of a business transfer. In the socialist era, there were no transfers of this kind, since it entails a legal transaction, where each party has the power to transact and transfer assets. Under the socialist system such transactions simply did not occur. The tight restrictions put on the size and operation of any private entrepreneurship excluded such a move by private entrepreneurs. In the case of state-owned companies a 'transfer' was no more than a mere reorganisation of one unit of the indivisible state property managed by the respective supervisory organ of the affected establishments, usually a ministry overseeing the particular industry. Similarly, the status of the workers in such cases was not adversely affected by the reorganisation of an establishment: they remained in the same place and only the name of the employer changed.

Transfer had significance in a different, individual sense: if an employee was moved from one employer to the other (because he was redundant at the first one, or was more needed at the second one) then, besides the general continuity of employment mentioned above ([459]) the transferred employee was treated at the new workplace as if all his prior service with the previous employer had been spent with the new one ([460]) (and, if he was assigned by a transfer already to the previous one, then all his past service, from the commencement of the chain of transfers). In practice this meant that (beyond the general accumulation of service) the worker was entitled to the special workplace benefits (bonuses, fringe benefits) reserved for long-term employees of that particular employer. Moving (housing) costs were also reimbursed if the employee was transferred to another location.

The transfer of an employee was, therefore, on the surface, similar to a transfer of employees covered by the EU directive (change of employers coupled with full protection of acquired rights). However, there was a significant difference: while the EU model of the transfer of a business focuses on retaining employees at the old workplace, the 'socialist' transfer of the employee was a smooth way (i.e. smoothest possible) to terminate the employment of a redundant employee without putting him/her on the 'open' labour market. The duration of the transition between workplaces was decreased to zero by the cooperation of the employers. (Another difference is that while the EU model of the transfer of a business does not require the consent of the employee, this was required, at least in the later years, in the case of the socialist 'individual transfer'.)

In the post-1989 period the law ceased to protect credits and entitlements accruing by employees. While not unusual for market economies, the impact was harsh on workers who not only were forced to seek new employment opportunities, but were suddenly deprived of the fruits of decades of working life. The new Labour Code not only separated the employments with different employers from each other, but also abolished the procedure for the 'transfer' of an

([458]) Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61, p. 26, as amended, now in the consolidated text of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82, p. 16.

([459]) See Part I on the two meanings of 'individualisation'.

([460]) Article 25(3) of the 'old' Labour Code (Act No II of 1967).

individual worker, as described above, and did not introduce any new norm on workers' rights and entitlements, in circumstances where the company changed hands. In its desire to erase the legacy of the past and to foster a pro-investor environment, the Labour Code did not treat legal succession differently from other cases of changing employer. The worker was considered simply as a newcomer at the successor firm with no seniority, frequently hired for a probationary period.

This legal gap resulted in considerable harm for workers, since on the emergent markets the dissolution, sale or lease of state-owned companies occurred at high frequency. The resulting wave of litigation and public outcry prompted the Hungarian Supreme Court to issue a binding resolution ([461]) soon after the Labour Code had entered into force, mandating the continuity of existing labour contracts in the case of succession. This special 'labour law succession' was very similar, although not identical to the business transfer as regulated by the EU directive. It addressed only the imminent and burning problem of preserving the continuity of the employment relationship, when workers were 'offered a job' by a new employer as a result of a business action (sale, rent, leasing, etc) with their previous employer. Far from the level of protection provided by the EU directive, the resolution focused only on those employees, who were transferred to a new employer. However, the resolution did not deal with the situation of those employees who lost their jobs as a result of the transfer.

The resolution of the Supreme Court was openly and consciously *contra legem* with the intention to reveal and correct the legislative gap. As such, it was in contradiction with the constitutional role of courts, what is restricted to the mere application of the law. The Supreme Court's disregard for formal law that it thought to be inadequate, as well as the reluctance of the Constitutional Court ([462]) to instruct the legislature on labour law matters within existing constitutional constraints, were characteristic of the amorphous legal situation during the post-socialist era.

The divergence between the law on the statute books and the Courts' case law created uncertainties that continued to leave employees exposed to the superior bargaining position and legal expertise of employers. Nevertheless, the legislature made no attempt to correct the blatant divergence between statutory law and the Courts' ruling until 1997, when Hungary had to start the harmonisation process. Reluctantly, a few words were inserted into the Labour Code to transpose Council Directive 77/187 ([463]). This change hardly exceeded the protection already provided by the above-mentioned resolution of the Supreme Court ([464]).

The new directive of 2001 ([465]) as well as the deadline for accession, made it essential to update and also upgrade the text. The 2003 amendment of the 1992 Labour Code, introduced most of the necessary corrections and filled the gaps arising from the first harmonisation experiment ([466]).

([461]) See MK 154, Resolution of the Labour Section of the Supreme Court. The Hungarian Supreme Court has the right to issue guiding decisions that, either formally, or simply because of the power of the Court to review any case, are obligatory for the lower courts.

([462]) The Constitutional Court rejected a petition seeking a declaration that this Supreme Court decision was unconstitutional. The claim of the petitioners was for a decision obliging the parliament to adopt a law on legal succession and also to give an option to the worker on the basis of the constitutional freedom to choose one's occupation (Resolution No 500/B/1994. AB.of February 20, 1995).

([463]) See article 85/A of the Labour Code and the governmental explanation of the bill emphasising that the amendment took place under the harmonisation duty.

([464]) See footnote 461.

([465]) Council Directive 2001/23/EC of 12 March 2001, OJ L 82, p. 16.

([466]) Changes included the introduction of a definition of 'transfer' (Article 85/A), the mandatory transfer of employment relations, new

One of the gaps still outstanding — up to this point of time — is the lack of any provision on 'constructive dismissal'. If the transfer involves a substantial change in working conditions to the detriment of the employee, extraordinary dismissal is available for the employee, but this can be resorted to only in extreme cases, let alone that it does not involve the remedy as provided under Article 4.2 of the Directive. It is likely that the majority of cases involving changes detrimental to the position of employees fail to satisfy the conditions required for the applicability of 'extraordinary dismissal', thereby leaving the employees defenceless in the face of such changes.

There are no exceptional provisions regarding the transfer of companies under bankruptcy procedure. This does not constitute a 'gap', since the EU directive leaves the adoption of measures in such circumstances to the discretion of Member States rather than an obligation for national legislation. This solution rather reflects the legal difficulties to transpose more complex and entirely novel provisions on bankruptcy procedures, than an intentional extension of the protection to the transfer of bankrupt companies. (See also the imperfect transposition of the insolvency directive below.)

2.2 Collective redundancy

The regulations on collective redundancies in Council Directive 98/59/EC ([467]) restrict the employer's right to dismiss its employees in order to assure adequate preparation and participation for those affected. No such regulation of group dismissals existed in the socialist command economy, because it was uncalled-for. The right of the employer to terminate employment was in any case highly restricted by law and by the bureaucratic barriers created by the involvement of the trade unions and through the political control of the communist party officer at the company over eventual multiple dismissals.

The stronger protection, however, lay in the guarantee of full employment and the incentives for employers to keep on employees during slow periods rather than dismiss them, i.e. to fend against unplanned labour shortages. In the rare event that a company was restructured and employees were dismissed, they were always placed with another state enterprise. The situation changed dramatically in the wake of privatisation. Since the over-protection of workers, as well as over-employment, were blamed for the economic inefficiency of the communist regime, thus dismissals were made easier in the legal sense, but were also supported by public opinion. Efforts to protect redundant labour against dismissal were seen as an effort to preserve the inefficient socialist economy, likely to restrict the freedom of the private employer and discourage potential investors.

Thus, the regulation of group dismissal was perceived as a social policy instrument to cope with unemployment, and not as a restriction on the employer's right to dismiss: the law on unemployment ([468]) obliged the employer to inform the competent labour market agency and workers' representatives on the planned group redundancy. This served the purpose of

provisions to assure proper functioning of the right of workers to information and consultation (Articles 56/A and 56/B and 85/B), and protection against dismissal based merely on the fact of the transfer (Article 89(4)).

([467]) OJ 1998 L 225, p. 16.

([468]) The 'original' Articles 22–23 of Act no IV of 1991 on the Promotion of Employment and the Assistance to the Unemployed (abolished in 1997).

facilitating the reception of redundant labour by the local labour markets. Although there was a duty to consult with the workers' representatives, the consultations were carried out merely on technical details concerning the realisation of the employer's decision. Reasons for the scale of the dismissals, and alternative solutions were not a matter for consultation.

The norms were implemented in a 'typical post-socialist way', permeated with failures and misguided reactions. The first reaction of employers was simple ignorance and open evasion. When this was challenged by courts ([469]), the employers 'sliced' the dismissed group into groups that fell below the statutory threshold, thereby avoiding the consultation and pre-notification obligations. Employees also tried to protect themselves: (mis)using the timely information they received on their planned dismissal they took sick leave and thereby put themselves under protection in order to block their dismissal. Taking long sick leave became a widespread practice whenever the workplace situation became unstable.

Legal provisions on collective redundancy were inserted into the Labour Code in 1997 in the context of fulfilling Hungary's harmonisation obligations. The new regulation broadened and refined the former narrow definition of group dismissal and set up the basic rules of the consultation and information procedure.

The new rules signalled a shift from treating these rules as a mere labour market measure into a mechanism designed to foster cooperation between workers and employers in critical situations. Nevertheless, these new collective rights were effectively applied only where there was a strong labour organisation or where the employer (typically a larger multinational with skilled, professional human resource management) attached importance to dialogue with workers' representatives and wished to ensure that staff reductions were implemented smoothly.

The amendment of the Labour Code, effective from 1 July 2001, adjusted the existing regulation to Council Directive 98/59/EC, replacing Directive 75/129/EEC ([470]). On this occasion the procedural rules were further elaborated in order to promote efficient implementation. The government also tried to create incentives for employers to comply with the provisions on collective consultations, by making financial support available for them to cover retraining costs or the operational costs of joint committees that worked on the placement of the redundant labour. This support aimed at helping the development of EU-style 'social plans' that could slow and scale down the dismissals and to provide the ultimately dismissed workers with a cushion. The relatively modest effect of the regulation was, however, counterbalanced by the stabilisation of the labour market around the turn of the century.

2.3 Insolvency: protection of employees and their outstanding claims

The third among the triad of directives dealing with company restructuring was Council Directive 80/987/EEC, now 2002/74/EC ([471]) on the protection of outstanding claims of employees in the event of the insolvency of their employer. The pattern of harmonisation was by and large the same as for the previous two examples. No equivalent rule existed under socialism

([469]) Decisions of the Supreme Court have invalidated dismissals in a row, due to the non-observance of the 30 days preliminary notification period (decisions published in the Bulletin of Court Decisions (BH) no.s 1995/130, 1996/66., 1996/285, 1996/401.

([470]) See above, footnote 467.

([471]) OJ 1980 L 283, p. 23.

and the immediate post-1989 period gave rise to rather chaotic circumstances. Eventually, the efforts to bring the law into alignment with EU directives brought some changes, albeit falling short of complete harmonisation.

Under state-socialism the issue of insolvency was simply irrelevant. Insolvency of state-owned enterprises was not foreseen for most of the socialist period. By implication, bankruptcy laws were not part of the legal system during the socialist period ([472]). To be sure, state-owned enterprises were liquidated from time to time, however, this was done by way of administrative decision of a state agent, not always for economic considerations and always settling the continuous employment of the labour force.

During the post-1989 process of privatisation and restructuring of the economy, characterised by a high turnover of firms, the position of employees vis à vis an employer's bankruptcy conformed to the situation recounted already. On the one hand, there were some remnants of state intervention aimed at protecting employee' claims ([473]). On the other hand, the untamed freedom of the market created pressures that rendered existing legal provisions and institutions insufficient for the effective protection of such claims. Workers usually bore the brunt of fraudulent schemes, common in many of the former socialist countries, under which companies were established, hired employees and raised capital, only to see the company promoters disappear overnight under the shield of limited liability. Employees were entirely powerless in enforcing any legally guaranteed rights under such circumstances.

Some limited assistance was introduced by the so called 'Wage Guarantee Fund' ([474]), established in 1994, and amended in 2001 and in 2005, in order to at least approximate compliance with the insolvency directive. However, the act on the Wage Guarantee Fund does not, in the author's view, fully transpose all the provisions of the directive. The measures reported by the Hungarian authorities appear so far to have been acceptable to the EU Commission, leaving the issue open in this difficult regulatory area. The directive focuses on the protection of the rights of individual employees having regard to their outstanding claims. The norms of the law on the Wage Guarantee Fund are mainly focused on the economic organisation, the rights and duties of the liquidator, the collective access of employees to the Wage Guarantee Fund rather than on the protection of the rights of the individual employees. The act does not guarantee an individual minimum, but only an aggregate maximum. Accordingly, it stipulates that the support provided for the whole firm, taking the average payment to all employees, cannot be more than the five-month amount of the statistical average gross salary of the second preceding year ([475]). It provides only loans, and last but not least, it is not a separate, real guarantee fund. The Wage Guarantee Fund is a part of the Labour Market Fund, financed and controlled by the two sides of industry and the relevant ministry ([476]) of the government.

([472]) The first bankruptcy law was adopted in Hungary in 1986, pioneering in Eastern Europe.
([473]) Remnants of state intervention are noted by the treatment of employees as priority claimants in the bankruptcy laws, as well as by undertaking temporary state guarantees for claims against privatised state companies.
([474]) Act LXVI of 1994 on the Wage Guarantee Fund.
([475]) See Article 7, para. (1) as amended from April, 2007. The provision now permits the payment of some very small additional amounts in the case of a long stretching procedure of insolvency.
([476]) Since 2006 the Ministry of Social and Employment Affairs.

2.4 Defects of hasty transposition

To summarise, the Hungarian experience with transforming relevant EU directives on workers' rights reveals a pattern that may be consistent with the experiences of other CEE Member States. In the planned economy institutions existed, which were similar at face value to those envisaged in the EU directives, but were designed for a very different economic system, where the employing authority and the regulatory, as well as administrative powers, were effectively merged. In the immediate post-communist period, this system-dependent form of labour protection was replaced by the unrestrained power of private employers.

Hastily adopted reflexive legislative interventions, frequently questionable and deficient from a legal point of view, were used to correct the most extreme deviations. The transposition of labour protection law has frequently been slow, if not reluctant, and was undertaken without regard to the need to ensure enforcement and implementation lest such an approach might undermine efforts to attract private capital. Thus, while the harmonisation process had been formally completed just by the end of 2003 (ie. 'seconds' before the accession took place), the actual alignment process will require more time, including probably intensive court activity both at the national and at the European level.

3. Reinforcement and revitalisation of old institutions

The major part of EC labour law regulates subject matters that had long been regulated in Hungary. However, in the light of the more sophisticated EU regulations, the previously existing rules needed updating and improvement. Moreover, their defective implementation needed serious fortification, that is: 1) laws with clear, applicable content, and 2) a legal infrastructure that promotes enforcement.

3.1 Equal treatment

Hungarian law has contained uniform anti-discrimination provisions in several acts (Labour Code, Civil Code etc.), which applied to all discrimination grounds, such as sex, age, religion, political views as well as membership of labour organisations. 'Women's emancipation' measures, in spite of its promulgated equality goals, have confirmed traditional inequality of sexes, while violating equal treatment by discriminating against men. Gender as well as ethnic discrimination was widespread at the workplace, although formally prohibited under the communist regime. The universal prevalence of such forms of discrimination was ignored and litigation on the grounds of discrimination was practically unknown.

After 1989 the right to equal treatment came under two different influences. Firstly, as a reaction to the formerly extensive labour market participation of women, the role of motherhood was now elevated. The idea of the 'working mother' was viewed as a communist device aimed at exploiting and undermining the family. Demands for effective guarantees of women's equality were dismissed as exaggerated and unnecessary and an echo of communist propaganda. Secondly, the greater awareness of human rights, political freedom and the mushrooming of civil

society organisations helped in raising the consciousness of the problem of discrimination and in providing assistance to its victims.

As early as in 1992 the Labour Code (Article 5) created a broad provision prohibiting employment discrimination and placed the burden of proof on the employer in a way that was well ahead of contemporary European legislation. Nevertheless, the formal enactment of this provision has not been accompanied by actual enforcement. The accession process gave an opportunity to change the former rules and practice. Certain requirements of the equality directives were implemented by the amendment of the Labour Code in 2001. The updated anti-discrimination provisions of Article 5 became a forerunner of the provisions of the new statutory provisions on equality.

3.1.1 Practice of the Constitutional Court

Article 70/A of the Constitution provides for the overall principle of equal treatment. Human and citizens' rights shall be guaranteed to everyone without any distinction ([477]). In the event of violation, 'rigorous sanctions' are foreseen and the realisation of equality shall be promoted by measures aiming to eliminate inequalities of opportunity.

The Constitutional Court has interpreted the above-mentioned constitutional provisions in numerous decisions, devising its discrimination test, which requires the treatment of everyone as persons of equal dignity, that is, with equal respect and consideration, paying equal attention to the individual aspects. Permitted exceptions distinguish between fundamental rights and non-fundamental rights applying two different tests: a rigorous one based on 'necessity' and 'proportionality' for fundamental rights, and a softer one based on reasonableness for non-fundamental rights. These consistently and routinely used definitions have become the basis of judicial practice and also of the legislation, in line with the above-mentioned 'repercussion' atmosphere of the early post-transition period.

3.1.2 Equal Treatment Act

The accession process and compliance with the harmonisation requirements brought about the adoption of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Equal Treatment Act further on), which was a significant step forward. The concept of the Equal Treatment Act is closely related to the practice of the Constitutional Court and the *acquis communautaire*. The act regulates equal treatment issues in a separate, general and uniform piece of legislation, extracting and absorbing the former equality-provisions spread across the various laws regulating different areas of law. Thus, the Labour Code — Article 5 (1) — declares only the obligation to observe the principle of equal treatment now, while the detailed provisions are found in the Equal Treatment Act.

The principle of equal treatment shall be applied not only to employment relationships covered by the Labour Code, but also to all other kinds of contractual relationships aimed at employment.

([477]) Article 70/A (1) of the Constitution: 'The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.'

The Act defines five ways of violating the principle of equal treatment: direct discrimination, indirect discrimination, harassment, segregation and victimisation, and contains detailed prohibitions for employment.

The exemption clauses are based on the EU equality directives combined with the Constitutional Court decisions. Thus, in employment the principle of equal treatment is not violated, if the distinction is proportional, justified by the characteristic or nature of the work and is based on relevant and legitimate criteria ([478]). From January 1, 2007 differentiation with respect to wages and other benefits on the ground of sex, race, colour, nationality and ethnic origin cannot be a legitimate exemption. Otherwise the exemption may take place in any possible context of employment (training, selection process, hiring, working conditions or termination as well as collective rights.)

The Labour Code introduced the reversed burden of proof ([479]) in 1992, which was restricted to labour disputes, but the Equal Treatment Act expanded it to all kinds of discrimination. In procedures initiated because of a violation of the principle of equal treatment, the plaintiff has to prove that the injured person or group has suffered a disadvantage, and the possession of a characteristic that is a prohibited ground of discrimination under Article 8 of the Equality Act ([480]). If at least a likelihood is established of these, the respondent shall prove that the treatment was equal or that he was not obliged to observe the principle of equal treatment in respect of the relevant relationship.

The act set up a new equality body (Equal Treatment Authority), that is part of the public administration structure. The act assigns a number of tasks to the authority, the most important of them is conducting an investigation, either upon the initiative of an aggrieved person or ex officio, in order to establish whether the principle of equal treatment has been violated, and making a public administrative decision ([481]). If the violation of the principle of equal treatment has been established, the authority may impose the following sanctions: order that the situation constituting a violation of law be eliminated, prohibit the further continuation of the violation, publish its decision establishing the violation of law, impose a discrimination fine ([482]). The authority has other competences as well, such as to initiate class action; comment on drafts related to equal treatment; provide information and offer help with acting against the violation of equal treatment etc. Consequently, the authority has very strong powers, compared to similar equality bodies in other Member States.

Beyond equal treatment provisions, the act also contains rules on the promotion of equal opportunities, though with a remarkably differing philosophy. Budgetary organs and legal entities in state majority ownership employing more than 50 employees are obliged to accept an equal opportunities plan. The act provides sanctions for the Equal Treatment Authority to use against employers that fail to comply with this obligation. Unfortunately these plans contain for the most part, empty provisions, promises and the general declaration of the intention to promote the equality of the specific groups, without guaranteeing concrete enforceable rights.

([478]) See Article 22 of the Equal Treatment Act.
([479]) See former Article 5(8) of Act XXII of 1992 on the Labour Code.
([480]) See Article 11(1) of the Equal Treatment Act.
([481]) See Article 14.a of the Equal Treatment Act.
([482]) See Article 16 of the Equal Treatment Act.

3.1.3 Effects of Community law

Community law has had a remarkable effect in two respects. Firstly, it compelled the legislature to adopt a separate and comprehensive anti-discrimination act instead of compromising with the patchy modification of the existing scattered anti-discrimination provisions in the various acts regulating different branches of law (e.g. the Labour Code, Civil Code). The imperative influence of the equality directives, especially the framework and the race directives, is obvious on the final adoption of the act ([483]). Secondly, the decisive effect of the equality directives and the best practices of the 'old' Member States ([484]) are reflected in the content of the act.

The harmonisation of Hungarian anti-discrimination law has taken place in two waves. Existing laws complied with six of the then eight sex equality directives by the *acquis* screening in 1998. The two missing directives — 75/117/EEC on equal pay and 97/80/EC on burden of proof — were implemented by inserting two new paragraphs in the Labour Code in the course of its amendment in 2001 ([485]). However, those two labour law articles did not bring about substantial change, and so legal harmonisation — along with many other countries in the region — practically failed to deliver the expected outcome, namely to elaborate an effective legal framework.

The Equal Treatment Act of 2003 marked the second wave of harmonisation, prompted by the obligation to comply with the new requirements of the race and the framework directives, especially as regards introducing the equality body and sanctions. While a general anti-discrimination act is not an obligation under Community law, it was believed that such a piece of legislation would create a more effective, 'EU-compliant' legislative framework. In summary, special emphasis was put, in the implementation of Community law requirements on the following issues: definitions, sanctions and institutional framework. Besides providing a framework for a comprehensive regulation of equality issues, the act brought about development by a sophisticated regulation of concepts and definitions, such as direct and indirect discrimination, harassment and victimisation, applying these with a general scope for the whole legal system. A significant innovation of the act was, in order to comply with Community requirements on sanctions and institutions, establishing the Equal Treatment Authority, with competence to fine wrongdoers within a public administration procedure.

While age discrimination is prohibited by the Equal Treatment Act, employment discrimination is widely permitted on the basis of pension entitlement with regard to dismissals. (See below, Part III, Section 1.2.3.) It is important to note that in these cases the disparate treatment is never attached to the mere fulfillment of a certain age, instead, to pension entitlement, that, in some cases might be severed from age. (I.e. pension entitlement under pension age eliminates protection, whereas reaching pension age without pension entitlement does not.)

([483]) Several Members of Parliament supported in 2003 the idea of postponing the passing of the Equal Treatment Act. However, the government could always refer to the obligatory requirements and also the deadlines of the equality directives.

([484]) We must mention here particularly the legal solutions of the equal treatment legislation of The Netherlands (form of the legislation), United Kingdom (definitions) and Finland (equality body).

([485]) Act XVI of 2001 amending Article 5 of the Labour Code and inserting the equal pay provision as new article 142/A.

3.2 Health and safety and protection of young workers

Health and safety regulations (including the protection of young workers) in the socialist period were enforced even in the face of silent acquiescence on the part of workers, if violations went beyond some moderate level. Large state-owned companies were monitored by labour inspectors, and trade unions had powers to cause discomfort to management in case of serious violations of safety and hygiene standards. Additionally, health and safety regulations created social security funds which could be used to compensate workers. Workers who had suffered damages could bring civil suits ([486]). Finally, the prohibition of child labour was observed by the major state employers. Still, child labour flourished and was ignored by the relevant authorities, light work of children at the parents' workplace during school holidays was considered rather as a 'social service' for the parents than a form of prohibited child labour.

Privatisation resulted in extensive and increasing violations of existing health and safety provisions. This may be attributed to the ignorance of many small and medium size entrepreneurs of the very existence of these rules. In part, the abuses reflected the altered power relations between employers and workers during the transition period.

The current fundamental rules on the protection of health and safety of workers were introduced by Act XCIII of 1993 (Labour Protection Act), and the amendments strived to implement Directive 91/383/EEC on safety and health at work of workers with a fixed-term relationship or a temporary employment relationship. The Labour Protection Act contains provisions on information and training for workers which comply with the directive (Directive 91/383/EEC). The employer must provide training for the employee at the time of starting work and in the course of employment as well on health and safety provisions, however, the Hungarian provisions are a more general text, than required by Article 2 of the directive. To be sure, the Labour Protection Act applies to all kinds of 'organised labour', regardless to the type or form of the contract, thus it covers fixed-term and temporary agency workers as well. However, this general coverage fails to provide the more specific 'necessary measures' that would guarantee prevention of the specific risks associated with the multiplicity and/or frequent change of employers. Therefore, this provision needs to be specified in order to fully comply with the directive. The involvement of the employees and social partners is guaranteed by specific actors.

Furthermore, the Labour Protection Act does not adequately ensure ([487]), that designated workers, services or persons are informed of the assignment of fixed-term or temporary workers, to the extent necessary to be able to carry out adequately their protection and prevention activities for all the workers in the undertaking and/or establishment. Therefore, the Labour Protection Act does not comply with Article 6 of the directive.

Decree No 33/1998 of the Minister of Welfare (33/1998 (VI. 24.) NM rendelet) contains the regulations of the medical examination and report of the job, and the professional and personal hygienic suitability. These rules protect workers who carry out particularly dangerous work or which requires medical supervision. The decree does not differentiate between the various groups of employee. Consequently the general rules apply to fixed-term and temporary workers

([486]) Claims regarding occupational disease and injury belonged to the exceptional group of labour disputes that had full access to the courts.
([487]) See Article 57.

as well. The decree obliges employers to carry out different kinds of medical surveillance tests in the different phases and cases of an employment relationship. There are preliminary, periodical, extraordinary and final medical surveillance tests during the employment relationship.

Unfortunately, the medical surveillance test is only implemented appropriately in large companies, where in general the labour protection conditions are adequately arranged. However, the situation is much worse at the small and medium sized enterprises. It is a general problem with small to medium size enterprises, as a doctor usually has very limited knowledge on the special conditions and risks of the workplace in question. Thus, the medical surveillance test is rarely more than a 'normal' medical test. Medical practice should considerably be improved in order to take into account the special risks of the workplace.

3.3 Involvement of employees

The involvement of employees in managerial decision-making was an area in the past where trade unions formally had extensive rights (numerous rights to consent to a decision, to 'take a stand' on issues, to be consulted, both with respect to individual employer's actions as well as enterprise issues, both at the level of establishment and above). Nevertheless employees or their representatives did not have real power to influence managerial or economic policy measures, this was prevented by the political style of the regime. Thus, just as in the case of the protection of women, these rights were considered meaningless by the workers on the one hand, and were regarded by managers, on the other hand, as a nuisance hindering effective management. In the late 1980s, new and direct forms of workers' participation — emphasising the importance of the 'owner's spirit' of workers — were initiated as a trial to reform the inefficient state economy.

The 1992 Labour Code has established a dual-channel system of employee representation: with parallel operating trade unions and works councils. Trade unions were guaranteed freedom to organise and the right to bargain collectively — liberties that were not guaranteed in the past. At the same time the former broad rights of the trade unions to consultation or co-decision were abolished (a retrograde move in the view of the trade unions). The underlying idea was to clarify roles and relations and to separate 'bargaining' from 'participation', that is, confrontational representation by trade unions from cooperative representation through works councils ([488]). Works councils ([489]) proved a faint copy of the German 'Betriebsrat', without its strong entitlements to influence decisions: 'co-decision' was transformed here to the relatively passive right of 'giving consent' to managerial decisions, the right to consultation was transformed into a mere right to 'give opinion' ([490]). Still, these rights offered some opportunity to influence managerial decisions and, since the Labour Code made possible the trade union control over the works councils they served as a consolation for the trade unions as well as a political consensus over the new Labour Code.

([488]) See: C. Kollonay Lehoczky: The Emergence of New Forms of Workers' Participation in the Central and East European Countries. In: Raymond Markey and Jacques Monat (Ed.s): Innovation and Employee Participation Through Works Councils. Avebury Publishers, 1997. pp. 169–189.

([489]) Works councils have to be set up at companies with more than 50 employees, while at those employing between 15 and 50 employees single employee representatives may be elected to exercise the rights of a works council. (Article 43 of the Labour Code.)

([490]) Art. 65, paras 3 and 4.

The originally clear system became somewhat hazy subsequently as trade unions were granted almost the same information and consultation rights as works councils as a result of political bargains. Only works councils have a right to co-decision, however, this entitlement is virtually insignificant: it is limited to the use of assets designated for social and welfare purposes in the collective agreement (if any).

Now both works councils and trade unions have to be provided at regular intervals (at least every six months) with information on key business indicators, wages, liquidity regarding payment of wages, data on the employed staff and the use of working time. Furthermore information has to be given in due time to both kinds of representation on any major decision regarding investments or affecting the scope of activity of the employer. Both the works council and the trade union may request information on any other matter pertaining to the economic and social interests of employees and the employer is obliged to provide the requested information. Both the works council and the trade union must be consulted prior to decisions on measures affecting a substantial group of employees, with particular regard to re-organisation, transfer of ownership, privatisation, separation or merger of units. Besides these crucial decisions the works councils have further rights to consultation on a number of issues.

In spite of — or, perhaps, because of — the extension to trade unions of guaranteed information and consultation rights the effective exercise of these rights has been dependent on the existing relations between employers and employee representatives or rather on the benevolence of the employer. With the exception of the few employers who were forced by their trade unions, or otherwise motivated to comply with statutory obligations, the words of the law have been perceived as belonging to the traditional decorations of the law-books inherited from the socialist era — something that can be set aside with silent acquiescence in the absence of works councils possessed of stronger powers or entitlements ([491]).

The debilitating influence of the past has begun to be eroded by the establishment of a number of European works councils, although the relevant legislation has not been in force before Hungary's accession to the European Union ([492]). The joint work in the EWCs — in spite of all organisational and language difficulties, frictions and scarcity — has been at the same time a training and consciousness raising programme for those who had the opportunity to participate in the activity of these bodies where Hungarian representatives started to be invited from as early as 1999, and more intensively from 2002 (although such involvement on the whole remained scarce) ([493]). Workers' participation has been 'rehabilitated' by the legitimising 'stamp' of Europe: to the extent that it is viewed as European, it can no longer be considered merely as a communist device designed to substitute for real trade union representation.

Nevertheless, employee involvement under the Hungarian Labour Code has remained predominantly formal and inefficient. The cautious words of the Labour Code have enabled the

([491]) Ladó M.-Tóth, F. (ed.s): *Helyzetkép az érdekegyeztetésről. 1990–1994* ('A snapshot view of interest reconciliation'). Érdekegyeztető Tanács Titkársága-Phare Társadalmi Párbeszéd Projekt: (Published by the Seretariat of the Interest Reconciliation Council, Phare Project on Social Dialogue.) Budapest. 1996, pp. 341–343.)

([492]) Act XXI of 2003 was to come into force on the day of Hungary's accession to the European Union, April 1, 2004.

([493]) Whereas in 2002 there were 114 multinationals operating in Hungary, covered by thee EWC Directive only 23 filials were taking part in the work of an EWC. See also Neumann, László: The prospect of European Works Councils in Hungary. In: *Casale, G.* (ed.): European Works Councils and Industrial Relations in Europe: East-West Comparison. International Labour Organisation Central-Eastern European Team, Budapest, 1999; Borbély, Szilvia: Hungarian EWC participation. Summary. Budapest, 2002.

employers (without actually departing from the intention of the drafters) to frustrate substantive involvement while formally observing the provisions. A further change has been brought about by the adoption of an amendment of the Labour Code in order to transpose Directive 2003/14 establishing a general framework for informing and consulting employees in the European Community. The amendment (494) — adopted under slight pressure — has brought about sophistication and clarification of the formerly vague norms on the procedures of informing and consulting the representatives of employees. Public interest in the amendment of the law was increased by a case that served as a warning about the need to take the right to consultation on the part of employees seriously. At the end of August 2005, the Budapest Labour Court, as upheld by the second instance Court of the Capital City, invalidated a privatisation tender relating to the Budapest Airport Co. Ltd. on the grounds that the management had failed to inform and consult appropriately with the works council prior to the issue of the tender invitation.

(494) Act VIII of 2005 inserting a whole new Article 15/B into the Labour Code on consultation and information.

III Adaptability

1. The concept of adaptability

Adaptability means a requirement of flexible adjustment to the new market conditions by the employers (economic organisations). Similarly to 'employability', adaptability requires adjustment from the employee and it also means external and internal economic adjustment. Externally enterprises have to adjust to the changing technical and market conditions that can be attained by changing products, technological methods, form of property, management, shifting between consumer markets, modifying marketing policies etc.

These external changes have an internal aspect as well. They necessitate the adjustment of the human resources, that is, increasing flexibility in the functioning of the labour market, requiring more flexibility from the individual employees as well in work schedules, accepting new or unusual tasks, accepting training, or retraining orders. These measures have implications for the internal security of the workers. Market adaptability also implies rapid adjustments of the size of the applied labour force, thus giving employers an incentive to find alternatives to regular forms of employment through recourse to more flexible contractual solutions that make hiring and firing less expensive in financial, social and legal terms.

Hungarian labour law had already begun such adjustment during the pre-transition period as evidenced by the highly inventive spirit of both the legislature and the practice which had an impact on developments in the post-socialist period. In order to reform and thereby save the bankrupt and eroded 'socialist economy' various forms of 'entrepreneurship' were initiated by the law permitting the combination of employment relationship with private undertaking, using company assets, bringing gains for both the employer and the employee. These forms rapidly disappeared with privatisation; however, the enthusiasm for re-contractualisation of labour employment was energised by the past experiences with relatively free contracting. This background facilitated the way of employers to invent new, loose forms of employment, frequently providing employees with the false feeling of being an 'autonomous entrepreneur'.

Disillusionment and defenselessness among the newly-made 'worker-entrepreneurs' did not provoke serious legislative intervention. The real force of legislation and administrative intervention was prompted when the huge losses of the state budget and social security funds incurred as a result of the growing use of fake independent contractors showed that a quick and easy conversion into individual companies might not be in harmony with the need of increasing the adaptability of the whole national economy.

Trying to find reasonable limits of flexible contracting, regulating the unregulated, and enforcing existing regulations — this is the summary of the main thrust of the legislation. The stronger hand with respect to the forms and formalities of employment has been counterbalanced by a legislative accommodation of unilateral power on the part of employers to exercise control over, and dispose of, their labour force.

European harmonisation has frequently proved to be a vehicle of flexibilisation by open or hidden regression of the existing protection in the Labour Code within these subject areas.

2. Adaptation through external flexibility: old and new atypical forms of employment

Full time employment for an indefinite period was the dominant form of employment in the socialist period. Thus, the provisions of the 1992 Labour Code were 'tailored' to this model. At the same time, there have always been two atypical forms of employment: part-time and fixed-term employment. These atypical forms of employment were regulated by the Labour Code as exceptional, and, especially the fixed-term employment, as restricted types of contracts. Legal harmonisation did not add too much to the existing regulations of these two old atypical forms of contract.

The regulation of the two new forms of employment — temporary agency work and telework — are good examples of the gradual and finally balanced way of reacting to spontaneous developments induced by employers' interest. Temporary agency work obviously decreases job security and helps employers in escaping certain protective rules of the Labour Code. On the other hand, the legislation has constrained the spontaneously spreading use of this type of atypical work within a statutory framework providing thereby some level of security and protection to the temporary workers.

Presently there are two 'old' (part-time and fixed-term) and two 'new' (temporary agency work, telework) atypical forms of employment regulated by the Labour Code. Other forms of employment enumerated in the task description for this national report (e.g. on-call work, multisalariat), are unknown in Hungary. However, there are a number of specific forms of employment relationships, established in the last 10 years by the legislation in order to promote adaptability or catch informal employment that, even if not covering a massive amount of workers, will be mentioned.

With respect to the further development of labour law and in order to promote flexible forms supportive to adaptability, an important difference must be noted between the two forms of 'old' and the two forms of 'new' atypical contracts. Whereas employment for a fixed term is mainly initiated by the employer, the need for part-time employment is typically brought up by the employees. This difference is reflected in the aim of the legislation. In the case of fixed-term work, the norms are intended to restrict the application of this form, favoured by the employers, whereas in the case of the less favoured part-time employment, the legislation rather aims at the promotion of this form, as well as protecting the worker against discrimination. Similarly, while the use of temporary agency work is rather driven by the employers, telework is frequently requested by the employees, and serves primarily the employee's interest. Consequently, the legislation is restrictive in the case of agency work, and just fair conditions are safeguarded in the case of telework.

2.1 Fixed-term contracts

2.1.1 Stability of the restrictions on fixed-term contracts

Fixed-term employment has always been an exceptional form of employment, surrounded with legislative restrictions and limitations all through the socialist era. Lengthy continuous service, possibly a lifetime spent with the same employer was the ruling model. In line with this standard, the legislation treated fixed term as an exception, putting limits on its applicability up to now. These limits have just slightly changed with the EU harmonisation, in part decreasing, in part increasing security of fixed-term workers.

Article 79 of the Labour Code establishes fixed-term contract as an exception from the general rule of indefinite employment, effective only in the case of a valid, explicit agreement between the parties on this term of their contract. This construction of the norm implies that any legal defect of the agreement on this specific term automatically deletes the stipulation on fixed term from the contract, and replaces it with the general indefinite period. Such invalidity may be the result of abusive use of successive fixed-term employment contracts (i.e. in the absence of reasonable grounds, especially if it aimed to deprive vulnerable workers of protection), or exceeding the statutory maximum or a lack of clarity of the fixed term.

Abusive or simply unreasonable use of the fixed term had been prevented by a stable and sophisticated development of case law of the courts since the early 1970s. The transposition of the text of Council Directive 1999/70/EC brought about an express prohibition in the text of the law, while at the same time marking a retreat from the established case-law in two aspects. In the past the text of the law did not distinguish between first and further (or prolonged) fixed-term contracts if it had no reasonable purpose. On this basis the courts consistently found invalid already the first unreasonable use of the fixed term especially if it resulted in depriving an employee from protection in any respect ([495]).

Under the current text of the Labour Code invalidation requires repeated use of the fixed term contract without reasonable purpose, although in principle the general rules on *bona fide* and reasonable exercise of rights may be applied concerning the validity of a first fixed-term contract, too. Furthermore, while under the past case-law invalidation was possible merely on the basis of the objective lack of reasonable ground, now the phrasing of the law requires cumulatively the lack of just interest on the side of the employer and the intention to deprive the worker from a legal right for invalidation.

The maximum total duration of fixed-term contracts is limited to five years regardless of the number of successive renewals. Exceptions to this rule arise where the employment is dependent on permission from the authorities (e.g. work permit for foreigners) or election. EU harmonisation added a restrictive provision limiting an employer's options. Whereas in the past, the expiry of a fixed-term contract and subsequent re-hiring could re-start the five year cycle

([495]) E.g. when six-month fixed term contracts were used in order to try the suitability of a qualified worker, with reference to the insufficiency of the maximum three-month probation in the Labour Code, the Supreme Court of Hungary has invalidated the fixed term and converted the contract to an unlimited time employment because using fixed term to escape the statutory maximum of probation was considered an unreasonable and therefore unlawful purpose.

however short the interruption may have been between the two contracts, now employments have to be added up not only in case of continuous prolongation of the contract, but also if re-employment takes place within six months.

The protection of workers requires clarity. Fixed-term can be defined in several ways, some of them might define only an approximate forecast of the end, however, the employee must be informed of the exact date of expiry of the contract. This day has increased relevance, since the employment turns into an indefinite one, if the work of the employee with the employer continues for at least one day after the expiry of the contract without an express agreement on the prolongation defining the period of the prolonged employment.

The harmonised provisions of the Labour Code introduced a duty for the employer to provide public information in due time by any means customary at the workplace (board, Internet etc) about any permanent vacancies so as to make it possible for fixed-term employees to have their contracts converted into indefinite contracts. An employer is not obliged to accept such a request. Although an employer has to decide on the basis of his legitimate interest, this rule is weakened in the absence of an explicit obligation to give an explanation for rejection. Similarly, since there is no express sanction for failing to publicise available permanent jobs, compliance with this provision is dependent on the goodwill of the employer. ([496])

2.1.2 Labour market mobility and fixed-term contracts ([497])

Apparently not only has the regulation on fixed-term contracts remained relatively stable, but also trends in the use of such contract forms have also remained stable. The dominant form remains employment for indefinite period (close to 90 %) and it is also true that there is still a relatively low rate of labour market mobility in geographic terms in the CEE countries (including Hungary). At the same time, in the absence of research on the impact of the legal forms of the contract (including severance pay regulation) on the mobility of the labour force, there is no evidence of a supposed direct correlation between the type of the contract (fixed or indefinite) and labour force mobility.

While the fixed-term contract on the whole is easier to terminate, if it is for a short (three- to six-month) term, there is less flexibility in the case of fixed-term contracts established for longer periods due to the difficulty of bringing such contracts to an end before their formal expiry. On the other hand it is true that indefinite type of contracts if lasting for decades are expensive to terminate (period of notice, exemption from work, severance pay are all a cost-factor), indefinite contracts existing for less than three years are relatively cheap to terminate under Hungarian regulation. A maximum notice-period of 30 days has to be provided and there is no severance pay. Furthermore, parties to any employment contract may opt for the stipulation of a trial period (of a maximum of three months) during which immediate termination without giving the reasons is possible.

([496]) Article 84/A of the Labour Code.

([497]) The data and conclusions below are based on the survey written by Cazes,S.-Nesporova, E.: Labour markets in transition: Balancing flexibility and security in Central and Eastern Europe. ILO Geneva 2003. Köllő,J.-Nacsa,B.: Flexibility and security in the Labour Market — Hungary's experience. ILO, Budapest, 2005.

Considering all the mentioned advantages and disadvantages of the two (fixed and indefinite) kinds of employment contract, employers have tended recently to hire new employees for shorter fixed periods, and to use trial periods more frequently. This trend is well illustrated in the data, that while the total percentage of fixed term employees has not changed much from 1997 to 2003: it has grown from 6.30 % to 7.19 %, the ratio of fixed-term contracts among **new** employees has grown from 40.09 % to 52.34% between 1997 and 2003 ([498]). Such contracts (short, fixed term, combined with a trial period) are more often used in the case of hiring the unemployed who have weaker bargaining power.

2.2 Part-time work

Part-time work, similarly to fixed-term employment, was an exceptional form of employment in Hungary during the state-socialist era. It was a predominantly supplementary activity for pensioners, students, and disabled people, and only exceptionally the main source of income — and still is, as much as these categories can find employment at all. In fact, part-time work was considered a deviation from social standards, unless justified by a very large family or other serious barriers in the way of full-time engagement. After the transition, part-time employment became a more 'acceptable' form of employment. It remains more closely associated, however, with those who are hard to place or on the margins of the labour market.

Before the Labour Code was brought into alignment with Council Directive 97/81/EC, part-time employment had no special regulation in the Labour Code, apart from some exceptional rules on the scheduling of working time. The principle of proportionality between benefits and working time was consistently enforced by the courts and surrounded by sophisticated calculations for the widest variety of cases. The duty of harmonisation prompted the drafters to put the proportionality rule explicitly in the Labour Code in 2003 ([499]), and on this occasion the rules were supplemented somewhat by a few provisions and adjusted to the more flexible needs of the employers in order to promote their adaptability.

Article 84/A of the Labour Code contains the most important provisions harmonising regulations on part-time work. The most important change is — similarly to fixed-term employment — the new rule on the possibility of requesting a transfer between full-time and part-time work. Modification of the contract, including the switch between full-time and part-time, was possible before and the employee could initiate it any time. The change under the new provisions is, that such a request by the employee has to be responded to by the employer, within a 15-day deadline foreseen by Article 84/A (1)(b). Furthermore, in order to promote such modification of the employment contracts, the employer shall provide timely information for employees by any customary means at the workplace (e.g. notice board, Internet or other locally customary way) about available positions to facilitate transfers between part-time and full-time employment. Another legislative change arising from the harmonisation with EU law was the inclusion of part-time employment in the Equal Treatment Act (Act CXXV. of 2003) as a prohibited ground of discrimination, thereby affording part-timers all the detailed legal protection covering disadvantaged groups.

([498]) See: Köllő, J.- Nacsa, B.: Employment instability due to fixed-term contracts. In: Eyraud, F.-Vaughn-Whitehead, D. (Ed.s): The evolving world of work in the enlarged EU. Progress and vulnerability.. ILO, Geneva, 2007,. p. 326.

([499]) See Article 78/A of the Labour Code.

The harmonisation of labour law provisions and the insertion of Article 84/A into the Labour Code did not have a tangible effect on part-time work. Despite governmental efforts to popularise part-time employment, only a small minority (4 %) of employees and self-employed were part-time workers in 2004. This figure might be corrected by labour union and labour inspection experiences, according to which a significant part of part-time employees are actually engaged on a full-time basis. This might be called 'undeclared full-time work'. By employing workers as part-time employees, although paying them unreported full-time wage, some employers seek to evade paying the full social contributions and taxes, while leaving the employees with little choice but to accept for fear of losing their jobs.

One reason for the low interest in hiring labour for part-time jobs is the relatively high unit-costs incurred by employers, the (shorter) length of the working time involved. However these explanations are debated. It is argued that expenses are lower in Hungary than in several other Member States where the number of part-time workers is remarkably higher ([500]). Similarly, the 1999 introduction of the uniform (lump sum) health contribution, a supposed disincentive, cannot be a true explanation, because recourse to part-time was limited prior to 1999 and this did not change after the 2006 reintroduction of the contribution calculated in percentage.

Further provisions for flexible working, such as those making possible more unusual patterns of work schedule (e.g. contracting only for weekend work) in the case of part-timers, have also failed to stimulate increased part-time employment.

The fundamental reason for the low incidence of part-time employment is, most probably, the prevalent low wages. To work for such low wages is only worthwhile for those having a basic income from either a pension or a social benefit, which can be complemented by a part-time salary. Part-time employment is only current among those receiving pension or child raising benefit: 34 % of employed pensioners, 43 % of employees on disability assistance and 29 % of employees eligible for child raising benefit worked part-time in 2002. 43 % of all part-time employees were eligible for pension or some kind of child raising benefit. The hourly wages of part-time employees eligible for pensions or social benefits are slightly higher than their full-time counterparts: they work 51.7 % more and earn 47.3 % less. Part-time employees not eligible for pension or social benefits only work for higher wages: they work 48.9 % less, but earn only 31.7 % less, and their hourly wages are 34.9 % higher than their full-time counterparts ([501]).

([500]) Köllő,J.-Nacsa,B.: Flexibility and security in the Labour Market — Hungary's experience. ILO, Budapest, 2005.
([501]) *Id*.

Employees according to the form of employment (2004)

Period	1. All part-time workers, fixed-term workers and self-employed as a percentage of all employees	2. Percentage of part-time and fixed-term workers				3. All self-employed as a percentage of all employees	
		Part-time workers	Fixed-term workers	Fixed-term workers with part-time employment	Altogether	Part-time self-employed	Self-employed together
Men and women together							
2002	21.67	2.99	7.19	0.71	9.97	0.66	13.06
2003	21.93	3.51	7.49	0.92	10.65	0.65	12.69
2004	22.08	3.39	6.79	0.86	9.91	0.67	13.56
Men							
2002	24.55	2.03	7.78	0.58	9.66	0.70	16.52
2003	24.97	2.32	8.29	0.76	10.34	0.60	16.36
2004	24.92	2.23	7.44	0.78	9.39	0.65	17.17
Women							
2002	18.21	4.15	6.54	0.87	10.31	0.63	8.92
2003	18.32	4.92	6.61	1.09	10.99	0.70	8.33
2004	18.72	4.76	6.09	0.95	10.48	0.70	9.29

Source: National Statistical Office

2.3 Temporary agency work: legitimisation and regulation to decrease precariousness

Temporary agency work started to spread already in the early and mid 1990s, using (in fact, misusing) the existing provisions of the Labour Code on posting and temporary transfer between workplaces. As temporary agency work has a wide scale of specialties and hazards compared to the typical and the other atypical forms of employment relationship, the legislature decided to adopt specific regulations. The 2001 amendment of the Labour Code ([502]) inserted a new chapter (Chapter XI) into the Labour Code giving a set of detailed provisions on temporary agency work.

The new chapter on agency work intended to establish a legitimate form of such employment, at the same time providing protection for the temporary workers. Evidently, agency work became an increasingly popular way of diminishing the costs of employment, far beyond its original and reasonable function of supplying temporary labour to satisfy short-term operational needs.

([502]) Act XVI of 2001 entering into force from July 2001.

According to the definition given by the Labour Code ([503]) temporary agency work shall mean when an employee is hired out by a temporary employment agency to a user enterprise for work, provided there is an employment relationship between the worker and the agency. Accordingly, two contracts are made between the three parties (temporary agency, temporary worker, user enterprise) of this legal relationship. On the one hand, an employment contract must be concluded between the temporary agency and the temporary worker, which can be stipulated as an open-ended or a fixed-term agreement as well. The Labour Code lays down a number of mandatory provisions on the terms to be included in this special contract of employment ([504]). On the other hand, a civil law contract must be concluded between the temporary agency and the user company. This civil law contract falls under the scope of and is regulated by the Labour Code ([505]), however, its content is left unregulated on many issues.

As seen above, the temporary worker establishes an employment relationship with the agency, however, de facto he works under the direction of the user company. The rights and powers of the employer are divided between the agency and the user company along the norms provided for by the Labour Code and by their agreement. According to the Labour Code, all administrative tasks lie upon the agency, and it is the agency that pays the wages and may terminate the employment relationship. In practice, getting free of administrative tasks is the most attractive feature of agency work for the user employer. The user company pays a fee for the service of the temporary employment agency. On the other hand, the user company determines the work schedule, is liable for health and safety of the temporary workers and for the observation of equal treatment.

Agency work can be used in all sectors. The only restrictions introduced in 2001 were that it was not permitted during a strike, and for activities that were anyway prohibited for the given worker.

There is no regulation for the maximum proportion of employees hired on temporary agency work, therefore, it is possible that a company may not have any employees of its own, instead, employs all its labour force through a temporary agency. Large (multinational) companies often exploit this possibility and usually hire a large number of 'temporary' workers for longer periods. Using temporary agency work instead of hiring employees in regular employment relationship is cheaper and easier to manage, therefore it becomes more and more popular.

Flexibility — and an accompanying lack of protection for the employee — is most visible in the regulation of the termination of such employment relationships ([506]). Severance pay and protection against dismissal in vulnerable situations do not apply, and there is a shorter period of notice. The agency may terminate the employment relationship by notice also if it is unable to arrange suitable employment for the employee within 30 days.

Certain guarantees protecting the temporary worker have been also adopted: temporary workers have to be hired explicitly for such work, none of the employee's rights can be breached by the agreement of the agency and the user company (e.g. right to leave, termination of employment)

([503]) See Article 193/C.a of the Labour Code.
([504]) See Article 193/H.
([505]) See article 193/G.
([506]) There is a more flexible regulation for appropriation of vacation time and fixed-term employment.

and it is prohibited to limit the temporary worker in establishing employment with the user company after the temporary work.

Due to the significant economic advantages, the use (and misuse) of flexible temporary employment has become increasingly popular. Dismissing and then re-hiring own workers through a temporary employment agency (frequently owned by the employer) started to become a routine solution for lowering overhead costs of employment. In order to prevent further abuse, a major amendment of the chapter on agency work was passed (effective from 1 January 2006) ([507]), restricting many of the previously much too flexible rules and strengthening the protection of temporary workers.

The amendment stopped the growing practice whereby the employer dismissed its regular employee and then re-hired the worker from an agency (frequently established by the former — and single — employer). The use of temporary labour is now prohibited in cases where an employee already had an employment relationship with the user company that had been terminated in the last six months for the reasons specified in the Labour Code ([508]).

A further important new guarantee is the introduction of the principle of equal pay that shall be applied between temporary workers and workers employed by the user company, if is the situation of the latter is more favorable.

Last but not least an important new guarantee is that the user employer becomes the employer if a) the legitimacy of the temporary agency to carry out such activity is lacking, or b) the temporary agency does not conclude an employment contract with the temporary worker. These provisions create a reasonable incentive for the user company to hire employees only from agencies whose legal background and legitimate conduct is checked and guaranteed. There are of course critiques of this provision on the side of employers and various interested agencies.

In summary, temporary agency work became far more popular after the amendment of the Labour Code in 2001. Whereas the Labour Code tries to achieve a balance between flexibility and security of employment, which balance had initially swung towards flexibility. The amendment of the Labour Code in 2005 has somewhat restricted the legal conditions of agency work; however, the effects of this modification on the popularity of temporary agency work cannot yet be evaluated.

2.4 Telework

Telework is a form of flexible employment that is at least as much driven by the needs of employees as by employers' interest. (As compared with temporary agency work — clearly a form of 'employer-driven flexibility'.)

As soon as information technology became widely used, telework started to be applied in Hungary, primarily as a way of supporting the labour market participation of persons with

([507]) Act 154 of 2005.
([508]) See article 193/D(2) of the Labour Code.

difficulties to undertake labour outside their home (e.g. parents with multiple children, the disabled, people living in remote areas), but also school-leavers or unemployed intellectuals. Assistance to purchase the necessary IT appliances was available from public resources and employers could become eligible to support for the purpose of widening applied telework. Occasionally at the outset the rules on outworking were applied in the absence of adequate regulation, in spite of the qualitative differences between outworking and teleworking. While telework is clearly a form of subordinate labour under the continuous control of the employer, outworkers are much more in control of the process of labour and their responsibility is more focused on the result to be delivered, thus, their status is half way between employment and a civil law contract for work.

The amendment of the Labour Code in 2004 provided legal certainty, by inserting Chapter X/A on telework into the Labour Code. The provisions define the concept of the teleworker: a worker engaged in activities on a regular basis within the employer's regular profile of operations at a place of his choice, other than the employer's facilities, using computers and other means of information technology and delivering the product of his work through electronic means ([509]).

The new provisions introduced a set of guarantees and specific rules for teleworkers and their employers on the following issues: compulsory content and modification of the employment contract, information of the employee on the working conditions, data protection, mutual access to the assets of the employers and the employees, the rights of the employer to instruct and control the work of the employee, specification of the tasks of the employee, organisation of working time, liability of the employee and the employer for damages.

There were two reasons behind the insertion of a new chapter on telework to the Labour Code. The primary aim was full harmonisation of the Labour Code with the Framework Agreement. The second aim was promoting the spread of telework, since it hardly existed in the in Hungarian labour market before 2004. In addition to the legal changes, the Ministry of Employment launched a fund for the promotion of employers employing teleworkers, which resulted in the establishment of almost 4 000 jobs for telework. The government's efforts to promote telework has so far resulted in an increase in the percentage of employees working as teleworkers from an estimated proportion of 2 % to 4 % of the total employed labour force. This is still considered low, and further efforts are expected, similarly to part-time work, to provide additional incentive and increase the level of participation in this flexible form of labour, adaptable to the interests of both the employers and employees.

3. Contract labour at the borderline of labour law and civil law

3.1 Special forms of employment and economically dependent work

Beyond the private and public forms of employment relationships ([510]), there are numerous contractual relationships serving as a legal framework for the use of human labour creating a transition between subordinate employment and independent entrepreneurship. An extended list

([509]) See Article 192/D of the Labour Code.
([510]) See Part I. 3. on the 'trichotomic' system of employment relations.

of such forms is enumerated in the laws on social security in order to cover all possible forms of work, most of them representing exceptional, peripheral forms. These forms of work are a source of ongoing debates about their legal nature, whether being an atypical form of employment governed by labour law or a specific form of private law contract, governed by civil or, respectively company law.

Outworking will be discussed below, in section 3.2, and the casual workers' book in section 3.3 as two forms at the periphery or at the boundary of employment relationship, whereas the broad issue of fake private law contracts will be discussed in section 3.4.

3.2 Outworking, secured outworking

Outworking is also called home-working in Hungarian labour law. It means a form of work, where the place of work is either (and typically) the home of the worker or any other place indicated in the contract, except the premises of the employer. The work undertaken may be any type of work that can be autonomously performed, and the performance can be measured either by quantitative or qualitative indicators ([511]).

Outworking was present as a feature of the labour market throughout the decades of the socialist era and has subsequently survived relatively little affected by developments in labour law. The economic significance of this form is declining, remaining a legal way to hire peripheral workers or to buy 'fragment time' of persons engaged in other type of activity.

In order to guarantee some security for those, who have the intention to perform regular work, the law provided two forms of outworking, distinguishing between the so-called 'secured' and 'non-secured' forms ([512]). In the case of a non-secured worker, the amount of the monthly work is entirely dependent on the will of the parties, in reality there may be a regularity, but there is no obligation of the parties, and the legal relationship is fairly loose. Nevertheless, even such a free relationship involves a number of obligations of the employer with respect to careful procedure, observing the safety, hygiene, personal and property security of the worker as well as paying a fair wage (i.e. performance rate may not be less favorable than that of the regular workers.)

'Secured' outworking contracts mutually guarantee a certain amount of work to be offered and performed. The quantity of work and the corresponding wage under such a contract cannot be less than 30 % of the national minimal wage. Such contracts contain guaranteed holidays, period of notice and job security. They are regulated as an atypical type of employment, rather than a private law contract.

3.3 Casual workers' book system

Casual work is not an autonomous concept under the Labour Code — it is a fixed-term contract, usually established for a very short term (one day or a few days) work. The category was

([511]) Governmental Decree 24/1994 (II. 25) on the employment of remote-workers (Articles 3 and 5).
([512]) Id., Article 24.

established in 1997 in order to simplify social security contributions and taxation for such very brief casual work activity ([513]). These contributions can be paid in a slightly reduced amount as a lump sum, by purchasing small stamps which are then literally glued into a small book. There is no additional recording or reporting paperwork, it saves money and time for the employer making social security available for the casual workers, and in the final analysis, creates an incentive to formalise work that had habitually remained unreported. This limited, short-term work is also legitimately available for persons receiving unemployment benefit. The Labour Code applies to such casual work with a few, specified exceptions.

The regulation of this activity partly achieved its goal, since the entire first wave of casual workers came back to the legal world from the informal market, though their number was only a few thousands per year. (Only five thousand out of 420 000 unemployed registered as casual workers, for a week or less in one year.)

The first rules of the act on casual work were strict, especially in terms of the maximum number of days permitted in this form: 90 days with one employer or 120 days throughout a year with more than one employer. These strict conditions have been gradually eased since 2001. Several legal changes — formal and financial facilitation — served the dissemination of the casual workers' book. As a result, the number of casual workers doubled in 2003. The milestone of 'flexibilisation' of casual work was the amendment of the act in 2005, when the maximum number of days grew to 200 days in a year in case of three or more employers. In 2006 the availability of such simplified means of making contributions to the state have been extended to agricultural casual labour ('green book') and domestic workers (so-called 'blue book') The objective of this major modification was to create an easy access to formalised employment for groups such as home helps, babysitters, gardeners etc. mostly working in undeclared jobs. In fact, the changes made casual work very attractive resulting in a rapid expansion of casual work, since the number of issued books hit 250 000 in 2006. Unfortunately, labour inspectors still encounter large-scale misuse of the casual workers' book scheme, especially in the construction industry, and in the tourism and restaurants sector (where regular work is masked as casual work). Although many employers preferred hiring casual workers in the framework of temporary agency work, the amendment of the Labour Code prohibited the employment of temporary workers under the casual work book system from April 2007.

In summary, casual work rapidly became very popular after 2005, because it is cheap, fast and easy to manage. Unfortunately, a 'hide-and-seek' game is developing again as a result of frequent legislative changes, on the one hand, and the efforts of labour inspectors trying to prevent the massive misuse of the flexible forms by 'smart' employers for cheap permanent employment, on the other hand.

([513]) Act LXXIV. of 1997 on Casual Employment Book.

3.4 The fight against disguised employment relationships

3.4.1 The growth of disguised employment relationships

Besides the above-mentioned atypical forms of employment contract, a large variety of legal forms aimed at work have developed in the course of the past 10–15 years. These contracts vary from civil law contracts for personal services, 'freelancer' contracts, agricultural small-scale producers, private entrepreneurs (called 'self-employed'), and company services when the employee is a member of a company that provides the services etc.

Apparently, employers in Hungary, too, are interested in forcing their employees to sign a disguised civil law contract instead of an employment contract, in order to minimise their social security burden and to put aside the protective provisions of the Labour Code. There is an estimated number of 100 thousand 'employees' working under a civil law contract instead of an employment contract, who are, in reality, dependent employees in the meaning of the Labour Code.

On the one hand these forms — in major part simply imposed on the worker — can provide a considerable flexibility to the employers by freeing them from all the legal and financial constraints accompanying employment relationships under the Labour Code. On the other hand the economic risk is shifted to the workers by these contracts. Consequently, it is not guaranteed that these forms, besides increasing the profit of those entrepreneurs, can contribute to the adaptability of the labour market to new requirements. While the adaptability deriving from these forms is highly uncertain, the damage caused by them to the rest of the labour market is tangible. The employees who (are forced to) leave the scope and protection of labour law bear increased individual and social risks while at the same time these forms of employment deprive society of sizeable social contributions and taxes. Thus, the inventive creation of new forms of employment that helps individual employers to avoid social security burdens reduces social security for the whole society, including the current and prospective class of employers.

The reaction of the legislation has been the initiation of legal combat against those fake civil law contracts that disguise an employment relationship. The statutory and administrative steps have been multiple: from prohibition and sanctions through clear classification to extending social security protection. These legal efforts have only had a very moderate effect on the number and popularity of civil law contracts aimed at employment. It is unlikely that prohibition and legal steps can go far enough to restrict such disguised contracts so long as the social and administrative burdens are not converged. The cost of an employment relationship remains far higher than those associated with civil law contracts. Accordingly, certain protective rules of labour law should be extended over the civil law relationships aimed at employment.

3.4.2 Legislative classification of the forms of employment

Labour courts had a consistent case-law on disguised employment. In line with the case-law of most countries, the courts limited the freedom of the parties in choosing the title of their contract and qualified the relationship on the basis of its substantive attributes. Nevertheless the scale of

law-evading contracts in the world of labour prompted nervous legislative steps in the early 2000s to intervene against this unlawful social practice.

An amendment of the Labour Code, adopted in 2003, explicitly prohibited the choice of a type of contract that would 'limit or prevent the application of provisions aimed at the protection of just interests of the employee'. It also added (nothing new) that the type of the contract has to be evaluated, irrespective of its title, with respect to all circumstances of the case, with special regard to the preliminary negotiations of the parties, their declarations, to the character of the work performed and their rights and duties ([514]). This amendment only reiterated the text of formal court decisions; it represented a desperate attempt to address a warning to employers rather than a real legal development. Consequently the amendment, besides a temporary 'restraining' effect, did not change (and did not help) resolve the dilemmas faced by the courts in the interpretation of ever more complex cases ([515]).

On the other hand a few special kinds of work services, that have been considered as distinctively different from traditional employment, have been regulated and legitimised as non-employment forms of using labour, in view of the irregularity and increased autonomy of the type of work performed. Accordingly, contracts for hiring business agents (market promoters), private security guards as well as those covering some categories of artists and journalists got classified as contracts for independent work services ([516]). The special regulations guaranteed special employment as well as social security and taxation status to these groups — trying to remove them from the 'grey' part of the economy. In these cases the special circumstances of the activity supposedly justified the departure from labour law employment. While the exercise of these professions in most cases indeed offered and also required a considerable amount of independence and autonomy of the worker the automatic legitimisation of the avoidance of labour law has lacked differentiation and protection in cases of clearly dependent labour in these areas (e.g. in the case of security guards).

Another small measure, intended to prevent the escalation of the escape from employment covered by labour law, is found in the Employment Act ([517]). While unemployed job seekers ([518]) have a duty to accept any offer of 'appropriate' employment, only those job opportunities that fall under the protection of labour law are deemed to qualify as 'appropriate'.

3.4.3 Uncertainties and typology in the case-law of the courts

The uncertainty about values and the lack of experience with market economies has created a fluctuating and mixed case law of the labour courts. On the one hand courts tried to maintain the past case law that was extensive, sophisticated and well established. The jurisprudence —

([514]) The 2003 amendment of the Labour Code enacting this qualifying norm (article 75/A) was the fulfillment of a priority promise made in the election campaign by the left-wing government. This serves to highlight the social importance of the issue.

([515]) See section 2 below on the case law of the Labour Courts.

([516]) On the other hand, the legal relationship of professional athletes (another category swinging between employment and independent contractorship throughout the decades) got fixed as exclusively a form of employment, under specific regulation:. Act No I of 2004 Art.8, para. 3.

([517]) Act IV of 1991 on employment and the assistance to the unemployed.

([518]) The name of 'unemployed [person]' has changed to 'job-seeker' in the laws on the assistance to the unemployed from May, 2005, indicating the change of the attitude of the law-maker, too.

similarly to most European countries — has been consistent in assessing a contract independently from the title chosen by the parties, merely and entirely on the basis of the real circumstances of the relationship. Relying on a combination of primary and secondary attributes ([519]), and, although using the right of the employer to give instructions (and the subordination based on it) as an ultimate test — *differentia specifica* — of employment, none of the attributes have ever been used as decisive, always the totality of the attributes has been taken into consideration. On this basis the courts moved in two directions.

First, they tried to restrict the untrammeled freedom of the parties to choose the type of their contract.

Three types of the cases — reflecting the dominant practice in the Hungarian labour market — come before the courts, and, in spite of some unevenness of the case-law, a more-or-less harmonised response by the courts can be detected, corresponding to the dominant characteristics of the cases, ascribing the will of the parties to one or other type of contract (irrespective of the title used by them).

The three groups can be called: sequential, supplementary and autonomous occurrence of the labour law and civil law contracts.

In the first group of cases, when there is a sequence between the employment relationship and the civil law contract, the courts are mostly establishing a continued employment. In these quite frequent cases of Hungarian practice, an existing employment relationship is terminated, usually by agreement (i.e. without any period of notice, without any severance pay) and following the termination the parties conclude a civil law contract whereby the former employee undertakes, either as an 'individual entrepreneur' or as the internal member (with unlimited liability) of a limited partnership, the same duties as had previously been performed under the employment contract.

The second group consists of cases when the labour law employment is supplemented by a second contract for independent services. In the typical case the parties conclude the employment contract at the minimum wage (or just above) and the bulk of remuneration comes through a civil law contract where the services to be provided are identical or tightly connected to the tasks to be performed within the employment contract. Under the supplement-contract the employee gets the 'real' compensation for the job even if the performance requirements (the services to be provided) seem to be clearly and separately determined for both contracts. The courts in these combined cases typically merge the duties and compensation and subsume both considerations under the employment contract. That is, for example, in a case of an unlawful termination of the employment, under the heading of 'back pay', the employee becomes entitled not only to the

([519]) Primary attributes are the: a scope of activity, regular and personal work performance, subordination and working for a wage that is only based on the work performance of the employee (i.e. does not include costs and is basically independent from the business gains and losses of the employer) and that is protected by legislation. Secondary attributes are: working within and with the properties of the employer, the duty and right to work only personally (no right and duty of the employee to find substitute in case of incapability to work) the right of the employer of disciplinary actions, etc. These qualifiers are themselves not undisputed, in part rely on past jurisprudence and distilled legal scholarship, in part as a disputable method, to a 'guideline' (not even law) issued by the Ministry of Employment and Labour Affairs and by the Ministry of Finances (700/2005 FMM-PM).

wages from the employment but also to the more generous remuneration deriving from the private law contract ([520]).

The third group of cases is the largest, where there is an autonomous private law relationship and there is neither an accompanying nor a preceding employment linked to the civil law agreement. In assessing these cases, the courts are apparently struggling with the dilemma of maintaining the old case law, or adjusting it to the new — increased — amount of general market freedom. The most frequent dilemma is generated by cases when the contract for work is purely established between companies, no private individual is a signatory party to the contract, nevertheless, the worker asserts the conclusion of an employment contract and submits a claim for lost wages. In such situations the courts are divided: some decisions exclude, as a principle, the establishment of an employment between two companies. However, there are contrary decisions. In one case, the first instance Labour Court declined the claim of a newspaper editor to qualify the contract between her and her husband's limited partnership on the one hand and the employer on the other as an employment contract. The court of appeal invalidated the above decision and instructed the first instance court to analyse the real elements of the relationship — most notably the elements of subordination and control, in combination with the other elements — regardless of the signatory parties and the form of the contract and, if it should find that it was in fact a subordinate relationship, award the back-pay for unlawful termination with regard to the fee, contracted between the two companies. Interestingly, the calculation of the amount has to take into consideration that the contract fee was to be paid for two persons, not only to the worker ([521]).

3.4.4 Enhanced inspection and increasing punishments

The legal measures, primarily the 2003 amendment of the Labour Code to impede the spread of 'pretended' civil law contracts did not prove really successful. Labour inspection is the only way of enforcing this provision, however, it is rather scarce and has been proved to be ineffective.

The high percentage of undeclared labour decreases the assets for, and efficiency of, the labour market measures and creates an extremely vulnerable stratum of workers at the permanent edge of social exclusion. The fight against unreported labour is, even if not explicitly identified among the employment policy priorities, a strong focus of the legislative and policing activity of the government, affecting the development of labour law.

Thus, parallel with the substantive regulations encouraging employers and employees to find the correct legal forms of their relationship, the regulations on inspecting and sanctioning the observance of the various regulations have tightened. Inspection and collection of social security dues has been transferred to the tax authorities with very wide authorisation (close to the criminal prosecution authorities), and both labour and tax inspectors have received the right to punish employers who classify their employees in the wrong category.

([520]) The Capital Court of Budapest stated concerning the dispute about the lawfulness of the termination of the contract, in the case of a radio programme editor, who was employed under an employment contract and a civil law contract, that the total remuneration had to be considered as a part of the employment contract (Case No 49.Mfv.27643/2001).

([521]) Capital Court case No 59 Mf.630.572/2004/4.

While the Constitutional Court has declined to find a violation of the Constitution in the right of labour inspectors to qualify the title of a contract ([522]), there seem to be a real controversy around the increased intensity and rigor of the sanctions. There are two interests to be served by the actions of the authorities, two intertwined problems that should be separated. One is the observation of the statutory rights of dependent employees to protection in the employment, primarily in order to protect them from risks that are beyond their control. The other is the legitimate interests of the state to collect its dues (taxes and social security premiums) so as to cover its expenses. As a consequence of the hide-and-seek game, involving strong, frequent and tough inspection by both tax inspectors and labour inspectors and the open as well as the hidden collaboration between them ([523]), this divergence between the two legitimate goals or interests can distort the context as well the effort to find the right answers. One clear example of such distortion is the interpretation by reference to the 'ministerial guideline' mentioned in footnote no.519: such administrative 'guidelines' directing courts' jurisprudence were a practice of the pre-transition era characterised by the lack of the rule of law.

In the tough game between the government and employers, a relatively recent instrument is the provision in the law on public procurements that requires 'orderly labour relations' for eligibility to apply, that requires, among others, a clean record with the labour inspectorate.

Apparently, the legislature tries to fill the gaps in the system, not always using the most appropriate (constitutional, principled) method, however the employers always find a legal solution to avoid the establishment of an employment relationship: adapting themselves to the changing legal environment and requiring employees' adaptability to the new legal patterns.

3.4.5 Extension of employment protection to non-labour law areas

Some of the core protections attached to employment covered by labour law and established for those in vulnerable situations has been extended to workers in other relationships where the worker is, or might be, in a dependent situation, even if not in the form of subordinate labour. The forms of protection so extended are: social security, safety and hygiene, prohibition of child labour, equal treatment, and entitlement to unemployment benefit.

The extension of social security coverage to 'independent contractors' has been one of the very first measures in re-regulating social security, as a remedy of the previous discriminatory measures regarding any 'non-socialist' (i.e. other than employment in the state sector) type of work under the communist regime. The prohibition of child labour and the prohibition of discrimination both have been extended to the so-called 'other relationship aimed at work performance' ([524]) in the early 2000s. Similarly, the law on labour safety and hygiene covers 'all organised forms, regardless of the organisational form or proprietorship' ([525]).

([522]) Decision No 28/1998.

([523]) E.g. tax supervision lasts for weeks and during this period the tax inspectors are working on the sites of the employer. If they find a contractor's bill issued by a person who was cooperating with them throughout this period, they have to give a signal to the labour inspection organs about the 'employee like', still 'billing' person.

([524]) Article 72/A of the Labour Code and article 5.d of the Equal Treatment Act.

([525]) Act XCIII of 1993 on labour safety and hygiene, Article 9.

A clear acknowledgement of the ‘intermediate’ position of the ‘self-employed’ persons between the dependent employee and the (truly) independent contractors was the establishment of a limited version of unemployment allowance, called the ‘entrepreneurs allowance’ which is made available to those who worked previously as individual entrepreneurs (self-employed), or as members of an associate form of undertaking ([526]).

4. Internal flexibility

‘Internal’ flexibility is the extension of the unilateral managerial prerogatives within the framework of an employment contract in order to adjust labour force availability to the changing needs of the management. This has affected all possible dimensions of labour in employment: working time, workplace, scope of activity as well as wages. The increase of such flexibility is a necessary part of the enhancement of adaptability of undertakings to the changed economic and market conditions and sound solutions, based on the re-conciliation of the opposite interests of the employers and employees, can be found.

Successful reconciliation of interests needs trust. Unfortunately in Hungary a mis-tracked way of such flexibilisation has undermined the necessary trust between the three actors (employers, employees and the government) of the labour market. Namely, in order to make the flexibilisation acceptable for the labour side in Hungary the measures were presented misleadingly as being required by the EU harmonisation.

As it was presented above, in Part II, European harmonisation had a sound, balancing impact to the changing and waving provisions of labour law: it reinforced values protective of human labour and developed institutions providing guarantees under the challenges of the liberalisation tendencies at the turn of the century. On the other hand, EU harmonisation has sometimes been used as a guise to introduce measures that decreased the level of existing protections and increased the room for the use of the managerial power of the employer. These measures, decreasing the protection of workers, were not required by harmonisation, rather they went against the ‘non-regression clause’ in the transposed directives or, in a few cases had no basis in EU legal norms at all.

The amendments increasing internal flexibility — with reference to EU harmonisation or without — have affected four aspects of working life: working time and work schedules (called ‘temporal flexibility’), the various forms of of temporary transfer, posting and out-sourcing labour force (called ‘spatial flexibility’), the change of the contracted scope of activity (‘job flexibility’) and, last but not least, the setting and calculating of wages (‘wage flexibility’).

([526]) Articles 44–46 as in force from 1 January 2005 of Act IV of 1991 on Promotion of Employment and the Assistance to the Unemployed (Employment Act).

4.1 Temporal flexibility: working time and work schedules

The most remarkable case in Hungary was the transposition of Council Directive 93/104/EC ([527]) on organising working time, effective from July 1, 2001 ([528]).

The radical amendment of the Labour Code among others significantly increased the freedom of the employers to introduce flexible work-time patterns as well as in moving employees between jobs and workplaces. The fervent protest against the changes was hoped to be defused with reference to the obligations of the Hungarian government regarding European harmonisation. While the proposed changes were consistent with the directive, they violated the non-regression clause, which states that '[the] directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.' ([529]) Trade unions allied with the political opposition made efforts to unmask the 'harmonisation' proposals; however, based on governmental majority they mostly could pass parliamentary voting.

Although the heated debates preceding the parliamentary adoption of the act on the amendments have mitigated some of the extremes of the original draft proposal ([530]) and the shift of government resulted in reversal of some of the changes. On the whole, the lack of a fair dialogue on the subject matter — regardless of political colours — makes it difficult to find solutions that increase the adaptability and competitiveness of economic undertakings through the reconciliation of the interests of the two sides of industry.

4.1.1 The length of working time

The length of working time has not changed on the surface, as it has been 8 hours a day or 40 hours a week since the 1990s. This is in compliance with the EU requirements and is also in harmony with the regulation of most EU Member States. In principle work beyond this period is extraordinary work, which has to be paid at higher rate, with an additional supplement.

Working hours might be shorter and longer than the statutory amount. Shorter working hours might be prescribed by law or collective agreement, and longer working hours might be agreed by the parties, if the job is of the 'on-call' type (i.e. a part of the working hours is spent idle, with pure waiting) or if the employee is a close relative of the employer. In such cases the maximum working hours may be 12 hours per day, or 60 hours per week. Of course, in such cases the wage has to be proportionately raised, however, this provision does not bring much compensation for the extended hours since in most physical works the (formally reported) wage is the national minimal wage.

([527]) Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L 307, p. 18.

([528]) Act XVI of 2001 effective from July 1, 2002, amending the Labour Code.

([529]) Article 18(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L307/18. The same principle enshrined in most of the labour law directives.

([530]) Among others, the finally adopted changes included, most importantly: the removal of the clear distinction between regular and overtime with reference to the absence of such a distinction in the Work Time Directive. Employers may therefore, within certain limits, use overtime work without paying extra remuneration to the employees. Weekend rest period has been decreased from 42 to 40 hours with reference to the European 35-hour minimum (this has been 'restored' to 48 hours in 2002 after the shift in government), and the scope of exceptional employees, which fall under less favourable norms was broadened considerably. See Article 15 of Act XVI of 2001, and the pertinent ministerial explanation.

While the statutory length of working hours formally has not changed, the extension of reference periods (both in terms of length and scope of application) has resulted in a de facto increase of hours worked for basic wages. Already the definition of the length of working time has been a matter of discussion, because the Labour Code makes possible the determination of the working time not in daily or weekly hours, instead, for a period of two months (eight weeks), or, by collective agreements, even longer periods. These reference periods work as a definition of working hours, and limit the duty of the employer to pay overtime supplement only in the case of work performed above the total (e.g. above 320 hours in case of an eight-week reference period).

4.1.2 Shift towards increased temporal flexibility

Temporal flexibility has become most widespread. According to a survey in 2001 at least one form of temporal flexibility (shift-work, overtime, weekend or holiday work, night work and part time ([531])) was affecting two thirds (67 %) of the total examined labour force (out of which part time, as seen above, represents an insignificant percentage) while 50 % of the workers worked under the most irregular circumstances and also close to half (48 %) worked evening shifts ([532]).

The most intense disputes have been raised by the following issues, subject to significant flexibilisation with a reference to the European regulation:

— Sunday work,
— overtime work (re-named as ‘extraordinary’ work),
— the total maximum of the daily, weekly working hours, and the way of their regulation,
— permitting collective agreements to set provisions that are less favorable for the employee than the standards of the Labour Code,
— the definition of night shifts,
— the regulation of the ‘reference period’ that works in practice as a definition of maximum working hours.

A next, radical step of flexibilising the working hours entered into force from January 1, 2008. Act LXXIII of 2007 modified a number of labour laws under the label of adjusting Hungarian legislation to Directive 2003/88/EC and its interpretation by the ECJ in the SIMAP, Jaeger, Dellas and Vorel cases ([533]). The new laws establish that the periods of being ‘on-call’ have to be counted as working time in their totality with respect to the upper limit of the weekly working hours. With respect to overtime payment, only effective work must be paid. In cases of being on-call the daily working hour may not exceed 24 hours, out of which the ordinary and extraordinary work may not exceed 12 hours. The weekly upper limit of working hours is 48, in healthcare industry 60, and in case of health related on-call the weekly maximum is 72.

([531]) Such a definable flexibility can cause terminological difficulties: what intensity of irregular work (here once a week: in strict terms, once a month in loose terms) qualifies someone a night-worker, weekend worker or overtime worker? The forms of flexibility chosen for the survey are mixing contracted flexibility (part-time) with unilaterally ordered flexibility. In the case of other flexibilities the criteria are even more complex to define for a scientific survey.

([532]) Sík,E.-Nagy,I.: The Forms of Flexibility (FRF) in Contemporary Hungary. Budapest, TÁRKI, 2002, 4–5, available at: **http://www.tarki.hu/adatbank-h/kutjel/pdf/a074.pdf**.

([533]) C-303/98, C-151/02, C-14/04 and C-437/05 accordingly, see the explanation accompanying the draft bill proposal, General explanation, p. 1.

On the other hand for workers working in a so-called 'standby job' the amendment radically increased the working time. A 'standby job' is either a job where the employee does not work and may have a rest at least in one-third of the working time at an average of a longer period, or where the work is significantly less demanding than average ([534]). The maximum working time for such workers is 24 hours per day and 72 hours per week.

However all the mentioned upper limits have to be observed only at an average of the reference period that might be three months or, if regulated by the collective agreement, a maximum of six months. (In healthcare legal provision may prescribe a four- or six-month reference period.) Consequently any real upper limit on the weekly working hours can only be set indirectly by the daily rest period and the weekly rest day (if observed).
Consequently, an employee working on-call or employed in a standby job may work 96 hours in a week, or even in two or more consecutive weeks.

4.2 Spatial and job flexibility

Job flexibility means the transfer of the employee between different jobs, changing the scope or content of activity. Some flexibility is permitted as necessary for the everyday operation of an undertaking: the content of the job is defined and changed unilaterally by the employer within the contractual job. Permanent and substantial modification of the contracted scope of activity means the modification of the contract and requires the consent of the parties.

However, short periods of transfer to another post or assignment of tasks in addition or instead of the normal job are permitted, called re-assignment ('*átirányítás*') by the Labour Code ([535]).

Similarly, spatial flexibility (having a mobile workplace, working regularly or occasionally outside the contractual workplace, working abroad, occasionally working from home) means transfer or mobility of the employee between workplaces, units or plants. Such moves within the contractual workplace can be freely decided by the employer, and ordered unilaterally for shorter periods, however, significant and permanent change is a modification of the contract and requires consensus. Working from home is also a mobility (flexibility) option frequently initiated by the employee, but might be also initiated by the employer. Such an arrangement is possible only by agreement.

The transposition of Council Directive 91/533/EC into Hungarian law on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship as well as of Council Directive 96/71/EC on the posting of workers in the framework of services brought about a whole new system of workplace flexibility, multiplying the length of periods when a worker can be ordered to do work in departure from essential elements of the labour contract ([536]).

([534]) See Art. 117, para.. (1), subsection k, of the Labour Code. Employers may interpret the amorphous definition within their prerogative. (The Labour Inspectorate's trial to supervise the practice has bumped so far on the broad interpretation by the Supreme Court. E.g., it invalidated the decision of the Labour Inspectorate requiring employers to provide a facility for rest besides the work-station (i.e. the cabin of a security guard) in order to meet the precondition of having 'a rest at least in one-third of the working time'.)

([535]) See Article 83/A of the Labour Code.

([536]) With reference to the mere information duty of the employer under Dir. 91/533/EC there was a trial by the legislator to loosen the contractual guarantees on the amendment of the terms of employment and permit permanent amendments unilaterally upon mere

Four different kinds of temporary change of the contracted workplace is foreseen by the new law: 'sending out', 'reassignment', and two kinds of 'posting' have been defined and regulated by the new law.

'Sending out' (*'kiküldetés')* covers those situations when the employer requires the employee to work temporarily at places other than the normal (contractual) place of work ([537]). This may involve working for the same employer at another establishment or working at the premises of another employer, however the work is done on behalf and under the direction and control of the original employer. (These cases, cover the EU concept of 'posting' defined in Article 1, paragraph 1 (a) of the Posting Directive ([538]).)

'Posting' (*'kirendelés')* under the Labour Code means performing work on a temporary basis at another employer based on an agreement between the two employers and under the direction of the user employer. (Covering Article 1, paragraph 1 (b) of the Posting Directive.) All employers' rights and duties might be transferred, except the termination of employment. It is a precondition that there is an ownership-connection between the two employers (one owns the other or both are owned or linked by a third owner) and no consideration of any kind is involved between them ([539]).

A second form of temporary posting (*'átengedés')* is when forced redundant labour is ordered to work for and under the control of another employer who would pay the wages and overhead costs ([540]). No fee might be charged, the employer simply saves the cost of wages.

The transposition resulted in significant flexibilisation. Temporary departure from the contractually agreed job and place was possible altogether for a maximum of two months within one calendar year. Now, by the creation of a sophisticated catalogue of the various temporary changes, the former maximum (44 days now) applies as a cap for each separately. For cases of combining the different forms of 'job' and 'spatial' flexibility, the law sets a total maximum of 110 working days per year. This means that, instead of the past maximum two months, now an employee might be engaged with work in departure from the employment contract for more than half of the annual working days.

According to the above-mentioned survey, one third (33 %) of the labour force is already engaged in some form of spatial flexibility. Since the surveyed forms are also mixing contractual and unilaterally ordered flexibility, it cannot reflect the effect of the 2001 amendment of the Labour Code, that increased the employers' possibility to order employees to work out of their contractual workplace from two months to 110 working days per year ([541]), working in some form of spatial flexibility ([542]).

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notification, however, this attempt failed. The amendments were introduced by Act XVI of 2001 (similarly to the working time provisions).

([537]) See Article 105 of the Labour Code.

([538]) Directive 96/71/EC of December 16, 1996.

([539]) See Article 106 of the Labour Code.

([540]) See Article 150 of the Labour Code.

([541]) Act XVI of 2001 has been in force from 1 July, 2001. The amendments have been adopted with reference to the transposition of the posted worker directive, which 'smuggled in' provisions, that were not required by the *acquis.* At the same time this amendment stopped the use of the opportunity of hidden agency work in the form of posting workers to other employers.

([542]) Cf. note 532 above, at 4.

4.3. Wage flexibility

Wage flexibility imposed on workers in the name of contractual freedom proved one of the most ominous inventions by the employers. Since only the fairly low national minimum ([543]) is mandatory under the Labour Code, the labour contract frequently stipulates wages only at the statutory minimum and the rest of the real payment (frequently the major part of the remuneration) is provided as 'flexible' or 'mobile wage'. The payment of such wage-components depends on the fulfilment of further pre-conditions prescribed by the employer. Frequently the supplement is paid to the employee as 'presence premium', not paid for days of absence. Such arrangements, while being within the limits of permitted contractual freedom, discourage employees from taking sick leave, annual leave or any time off (such as for parental duties) to which they are entitled by the law.

Performance-based wages have meant in the past nearly unlimited freedom of the employer to set performance criteria, exposing workers to artificially high performance requirements and depriving them even of the statutory minimal wage. A 2006 amendment of the Labour Code put a limit upon such arbitrariness: if at least half of a group of workers does not reach 100 % and the average performance of the whole group remains below 100 %, it is considered to be a result of unfair conduct by the employer and the wages have to be paid to everyone on the basis of 100 % fulfilment of the performance requirements.

Although 'wages in kind' are tightly restricted, the restrictions can be circumvented by the so called 'cafeteria system' becoming increasingly popular and permitting some flexibility for the employer as regards remuneration. The advantage is the possibility to avoid taxes and social security dues as recourse to this system by employers is cost-saving and less bureaucratic. Although these are qualified as 'social and welfare benefits' under the law, the employers practically pay a part of the wages in the form of various vouchers. The most popular kinds of vouchers within the cafeteria system were food (lunch) tickets and schooling tickets (to pay costs incurred at the start of the school year for parents), but tickets to pay Internet services and other kinds of services (e.g. private insurance) are also spreading with variations among employers and according to categories of employees.

([543]) The minimal wage was HUF 65.500 (about EUR 260) in 2007 and is HUF 69.000 (about EUR 280) in 2008. The qualification and skill increases the minimum wage to 120 % in 2008.

IV. From job security to employability

The search for increased adaptability of the companies has been manifested in the enhancement of external (contract) flexibility. This means in part the use of informal labour (that is illegal and is increasingly penalised) and also the use of legal albeit less protected forms of contract. These developments — present in Hungary from the start of the shift of the economic and political regime — have brought more and more into the limelight the issue of diminishing job security within the classic employment relationship. There were claims for changes in order to prevent the further segregation of the labour market and to preserve labour law employment as the main form of employing labour, even if with less security, to stay in the same job for a long while or for life.

The next part below is going to give first an overview of the new construction of job security necessarily decreased in comparison to the state-socialist past, and then the construction of 'employability' that improves the chances of an employee to get a new job when the previous one has been lost, the easy and rapid move of workers between employment forms and positions.

Labour law still prevents unreasoned, arbitrary removal from the job, permits a transitory period and assistance to the redundant or dismissed workers as well as the gradual build-up of the objective and subjective measures of promoting the move of workers between jobs, between the unemployed and the employed status (externalised and internalised employability).

While adaptability was emphasised as an important attribute of the enterprise, meaning its capability to maintain or improve their competitiveness in the market; employability will be addressed here as a capability of the individual employee: legal developments advancing this capability will be surveyed.

The Hungarian National Reform Programme (NRP) identified nine main challenges nearly half of them relating to the labour market: raising employment and activity rate; improving the labour market situation of the disadvantaged; reducing regional labour market disparities; and enhancing human capital through better education and training. These challenges mainly relate to the placement of persons in jobs, however, the importance of keeping employees in their jobs and reasonably protecting them against unjustified or arbitrary termination also contributes to the balance of the labour market, let alone the close interrelationship between job security and the enforcement of workplace protection of workers.

1. Job Security: decreasing protection against dismissals

1.1 Overview

In the post 1989 period the intensive move towards re-establishing the private law concepts and terminology in labour law has reached and permeated the area of the termination of employment, too. The private law exchange ('quid pro quo') character of employment as well as a consequent

stronger ‘symmetry’ of the opportunity to terminate the employment relationship has been emphasised.

At the same time, job security of the employees remained a value and an important element of the regulation of labour law. In contrary to the past, when employment and job security was a derivation of the ‘caring state/dependent subject’ relationship with a strong administrative-herarchical character (everyone was ‘given’ a job) under the new conditions job security was considered a derivation of the connection of employment relationship to fundamental rights of persons and the personality rights of the employees.

Similarly the conceptual difference expressed by the vocabulary of the laws on civil servants and public employees was also accentuated by the different terminology used for the termination of their employment (‘dispensation’ for dismissal and ‘resignation’ for termination by the employee) — in accordance with the more hierarchical and administrative character of their employment.

The original aim was to establish two distinct labour law regimes: a more liberal and flexible private employment and another one with stronger job security and lifelong career (similar to tenure) for public employees and civil servants. However, recent legal developments — making the termination of public employment and civil service easier and cheaper in order to save money for the state budget, as a part of the ‘convergence programme’ to achieve the Euro-zone — undermine the original conception.

1.2 Regulation of ordinary notice

1.2.1 Justification

The legal form and preconditions of ordinary notice have not changed significantly upon the shift to the market economy. This smoothness has been a result of the former market oriented economic reforms that liberalised the termination of employment already in 1967.

An ordinary notice can be given to a worker on any reasonable ground, that has to be specified in the written notice. The cause of the termination might be rooted either in the personal capabilities or work-performance of the employee or in the organisation or operation of the company, however it has to satisfy three substantive requirements: it has to be true, reasonable (proportionate) and clear. When the reason is economic or organisational the courts normally accept it; it is a consistently applied principle that the courts may not examine the economic rationality or effectiveness of the decision (re-organisation, staff reduction, contracting out activities etc.) that has led to the termination.

Although these are not excessive requirements employers frequently violate them, in great part due to lack of knowledge or due to ignorance of the substantive or formal requirements. These three substantive requirements of a lawful termination are subject to frequent criticism by employers who consider them an obstacle to their freedom to fire and hire workers and as unreasonable rigidity of the labour law system.

The employee has no obligation to give a reason for notice of termination. A typical symptom of the exaggerated contractual approach of the post-1990 period is the repeated emphasis the Constitutional Court put on the 'full and unlimited freedom of the parties to terminate their labour relationship'. It went as far as considering the obligation of the employer to give a justification of the notice as 'positive discrimination' by the legislature in favour of the employee ([544]).

1.2.2 Restricted right to terminate employment of specially protected workers

Such restrictions are: the prohibition to give a regular notice to employees in a vulnerable labour market position (being away from work for a longer period or having limited capacity to work), the safeguard on dismissal of elected trade union employees and the limitation of the dismissal of persons close to pension age.

There have traditionally been certain vulnerable groups that have enjoyed total or very strong protection of their job security. The protected groups are: sick or pregnant workers, workers during maternity or parental leave or during an extra non-paid leave to take care of a sick relative as well as during building their own home ([545]). The legal construction of past protection of these persons made any termination impossible (unless for disciplinary reason), even if there were short interruptions between the periods of protection (e.g. between two sick-leaves or parental leaves etc.)

The level of protection guaranteed by these 'prohibitions' has significantly decreased in the process of transition. The above enumerated list of protected workers and situations reflects the result of a reduction made by the 1992 legislation. A further, more radical change was adopted in 1999 when the formerly absolute prohibition was converted into a mere temporary delay. Now, if the protected situation is interrupted and the employee resumes working for any short period, the formerly communicated dismissal becomes effective, in spite of any eventual continuation of the 'vulnerability situation' and the employment automatically terminates at the end of the period of notice.

Workers who become disabled during employment are another protected category. Regardless of the origin of their disability (whether related or not to their occupation) the employer has a duty to continue their employment in the interests of rehabilitation ([546]). Thus the dismissal of the disabled worker is prohibited as long as there is a chance of finding an adequate job for them in the same employment. (Serious fault of the employee or deficient work performance might be, of course, a ground for dismissal if not connected to the disability.) This protection has not been touched by the developments of the last 20 years.

([544]) Resolution No 11/2001 (IV.12.) AB. See also Part I, section 1.

([545]) This is a typical pre-transition situation, which reflecte the housing difficulties, their encouraged solution as well as the strong socialist type of job security.

([546]) Exceptions are: if the degree of disability qualifies the employiee to disability pension or when the non-occupational related disabling accident or disease occurred during the trial period. See the joint decree of the Minister of Health and Minister of Finances on the employment and social benefits of persons with altered working capacity, No 8/1983 (VI. 29.) Eu.M.-PM, as amended.

Elected trade union officials have also been a traditionally protected category: their ordinary dismissal requires the consent of the superior trade union organ. The transitional case law of the courts has weakened the protection of the trade union officials by requiring a 'justification' from the superior trade union organ if they refuse to give their consent to the dismissal of an official. The courts then weigh the reasons of the trade unions against the reasons of the dismissal. The courts have frequently found the trade union protest to be unjustified and have maintained the dismissal on the grounds that there was no retaliatory or discriminatory intent on the side of the employer. Originally these court decisions clearly represented a departure from the Labour Code as it did not require any explanation of the trade union refusal and in no way limited the protection to retaliatory or discriminatory terminations. The *contra legem* case law induced legislative intervention: a 2005 amendment of the Labour Code ([547]) has legitimised such case law and at the same time defined its boundaries. Now, under the current text of the Labour Code, the trade union rejection is deemed to be justified not only if the proposed action is discriminatory, but also if the removal of the trade union official would burden the operation of the trade union body. Still, in the latter case, unreasonable or substantial detriment to the employer may prevail over the interest of the trade union.

Aged workers (within five years from pension entitlement) are protected by an enhanced duty upon the employer to justify the dismissal: a particularly warranted reason has to be the ground of such dismissals. This protection and the time limit of this protection are together automatically connected to the pension age. At the same time it has to be added, that reaching pension entitlement deprives the employee of all kinds of protection: no justification of the employment is needed, no situation (sickness or any leave for family reasons) brings the employee under protection. However this loss of all protection is not connected automatically to age, but rather to pension entitlement. (As written above in Part II, 3.1.3, the pension age and pension entitlement might not coincide together.) It is still a question how much this legislative arrangement can survive the age-discrimination test of the European Court of Justice.

1.2.3 Period of notice

The period of notice is obviously a cost-factor for employers, especially when several employees have to be dismissed. The period of notice was slightly reduced with the emergence of the private economy, but this was not particularly significant. The most significant change affecting employees, in comparison to the past, was that the length of notice has been made conditional on the period spent with the same employer, in comparison to the socialist past when all the time spent in employment was added up throughout the working life. In other words, the employee now starts as a 'newcomer' in each new job, and does not carry forward the previous entitlement to an accumulated 'period of notice'. This evidently has increased the interest of workers to stay for longer terms with the same employer.

The minimum period of notice prescribed by the Labour Code is between 30 to 90 days, dependent on the length of service with the same employer. This can be extended up to a maximum of one year with the agreement of the parties (top executives are exempt from the upper limit).

([547]) Act VIII of 2005 amending the Labour Code, effective from July 1, 2005.

A perverse, typical post-socialist reaction to the threat of privatisation was in the early 1990s when management and trade unions at state-owned companies facing privatisation concluded collective agreements with long periods of notice — approaching the one-year upper limit — in order to protect themselves in the first period with the new, private employer. The new employers — again, typical of those years — simply avoided expensive dismissals by resorting to termination by 'agreement', making use of the lack of information and the defenceless situation of the employee. (See the pre-history of 'transfer', Part II. 2.1 above.)

In order to facilitate finding a new job, the employee has to be exempted from work for half of the period of notice, and at least half of this exemption period has to be provided at times and in installments to suit the preference of the employee.

1.2.4 Severance pay

A principal change in the approach to job security has been the promotion of pecuniary compensation for job security. In the past job security was coupled with (not replaced by!) strong employment security: full employment, guaranteed by the socialist planned economy (that was, in fact over-employment, i.e. permanent labour shortages, even if this was artificially generated). Employees could find a job without delay after (or even before) leaving their employer. Furthermore the advantages deriving from seniority had been carried from one state employer to the other, (and were also carried over to the private employer, in the very infrequent cases of persons being employed by a private employer). Severance pay was, under such conditions, obviously unknown: it was not needed, because practically there was no 'severance' from the workplace, instead, only some move between two employers.

With the start of the privatisation, severance pay got regulated immediately in 1989 and that position was not changed significantly by the adoption of the 1992 Labour Code ([548]). Severance pay takes into account the length of time spent with the same employer, compensating proportionately for the loss incurred by the termination. Since ageing workers have a higher risk of losing their job, and are less likely to find new employment, the Labour Code prescribes that those within five years of being eligible for an old age pension are entitled to severance pay with an additional three months' salary (four months in the case of public employees).

1.2.5 Summary dismissal: contractualisation of 'disciplinary action'

The former 'disciplinary dismissal' — together with the statutory empowerment of the employer to launch disciplinary procedure and to assign disciplinary punishment — has been considered as part of the administrative-hierarchical labour law of the state-owned centrally planned economy and incompatible with the horizontal private law character of the employment contract. Therefore the punitive power of the employer was abolished and replaced by 'extraordinary notice' in the 1992 Labour Code ([549]). This is a rapid, summary solution available in cases of serious violation of a significant duty deriving from the employment contract, committed

([548]) Article 95 of the Labour Code.
([549]) Disciplinary procedure and punishmenets were maintained in the public employment and civil service.

intentionally or through grave negligence, or in cases when otherwise the continuation of the contract cannot be expected from the other party ([550]). This can be applied without any formal procedure and is only available before the expiry of a relatively short deadline of 15 days upon discovery of the violation. Although — in the name of 'symmetry' — this opportunity is open for both parties equally, it is predominantly an instrument for employers and scarcely used by employees ([551]).

It has to be mentioned that while 'extraordinary notice' is in principle a private law 'sanction' in reaction to the breach of the contract and not a 'disciplinary punishment' anymore, nevertheless it has punitive, administrative consequences in social law: the worker who was dismissed by 'extraordinary notice' is not immediately entitled to unemployment benefits. Prior to 1995 the eligibility for unemployment allowance commenced only after 180 days from the date of the dismissal, now there is only a 90-day delay before payment of the jobseekers' allowance ([552]).

1.3 Consequences of unlawful dismissal

Job security is also dependent on the basic choices that the law makes with regard to the consequences of an unlawful dismissal. In the past reinstatement was the only option, pecuniary compensation in lieu of reintegration was not possible under the socialist labour law (resulting in frequent injustice when the employee — reasonably — did not want to continue the unlawfully terminated employment). The shift towards a more private-law style labour law resulted in the introduction of a statutory option for compensation instead of reintegration. Compensation is, however, only a secondary option; it is not always — in consequence of a decision of the Constitutional Court — automatically available.

([550]) Article 96 of the Labour Code.
([551]) Mainly in cases of repeated and consecutive failure of the employer to pay monthly wages.
([552]) Article 27(5) of the Employment Act.

All cases of dismissal (ordinary, extraordinary notice or any other termination) can be taken to the court by the worker. If the court finds the termination unlawful, three types of consequences follow: reinstatement, back-pay and compensation for (any other) damages.

The very first and most important consequence is the right of the plaintiff to reintegration: the worker has the right to be reintegrated into the same job, under the same terms and conditions. This is not only a freely available option for an employee, but also a part of the constitutional right to dignity — according to a decision of the Constitutional Court ([553]). It declared that the right of any individual to freely dispose of their rights is a part of the constitutionally protected personal autonomy, originating from the fundamental right to dignity and therefore a worker cannot be deprived of that option unilaterally by an employer. Thus, the Court invalidated the former text of Article 100 of the Labour Code that permitted an automatic 'pay-off' instead of de facto reinstatement with a few exceptions ([554]) against a payment of the double amount of severance pay. The court abolished the right of the employer to 'pay-off' and put the decision into the hands of the court. Now, upon request by the employer the court may decide not to reintegrate the unlawfully dismissed employee, and also the court decides, between 2 and 12 months salary, how much shall be paid by the employer in exchange of reintegration. This decision clearly reflects the oscillation of the Constitutional Court when its high respect towards new fundamental rights (in this case dignity of the worker) came into conflict with the contractual right of the employer to terminate the employment relationship.

Rules on back pay are also a discouragement to terminate before thorough reflection. Although the launch of the court procedure by the dismissed worker has no impact upon the termination, an always applicable consequence is the award of full lost back pay once the unlawfulness of the termination is established. Considering the frequently protracted court procedure, this can amount to far more than one year's salary. The amount can be decreased in the light of what the dismissed worker earned elsewhere during the period of the litigation, provided that the defendant employer can prove the receipt of such earnings.

In order to avoid the high cost risk of an eventually unlawful dismissal, employers seek agreement with the employees about the termination and are ready to 'buy' the consent of the employee to the termination, having regard to the lower risk of legal action arising in cases of termination by agreement. While some of these cases reflect the outcome of agreement on a 'fair price', in others the employee's consent was not obtained in fair bargaining, but instead, through misleading information, blatant deceit or intimidation. Although in principle invalidation is possible in cases of exculpable mistake or coercion behind a contractual declaration, courts are, apart from conspicuous cases, reluctant to scrutinise and revise the validity of the signature on a termination agreement.

Summary: The overall picture of the traditional institutions of job security (i.e. legal and financial barriers limiting the employer's right to terminate employment) obviously reveals some contradictory effects. All the disincentives to the termination of employment (longer notice period, higher severance pay, prohibitions or limitations to give a notice, no opt out from

([553]) Resolution 4/1998. (III.1.) AB (ABH 1998, 71).
([554]) If the termination was a result of the violation of the prohibition of dismissal, or of the prohibition of discrimination or there was an abuse of a right.

reinstatement) also function at the same time as disincentives to employing persons: the more protection that is offered to a category, the greater the reluctance to employ such persons (i.e. persons with high seniority, elderly or other vulnerable or protected persons.) While it is true that the removal of the termination-disincentives might remove the employment-disincentives, i.e. operate as an incentive to employ, it is also true that the total removal of job security as such would at the same time constitute the removal of guarantees of decent employment. Therefore the solution of the current problems cannot be found merely by a change in the security/flexibility ratio within the employment relationship.

2. Promotion of employability

2.1 The issue of 'employability'

The terms of 'employability' and 'adaptability' are widely used in a variety of senses, frequently as overlapping or interchangeable terms. It seems clear that 'adaptability' is a broader and rather institutional term (see above, Part III. 1.), taken from the point of view of the whole labour market and its actors (the adaptation and adaptability of economic organisations encompassing obviously the adaptation and adaptability of their human resources), whereas 'employability' is a concept that relates to the perspective of an individual.

Thus, 'employability' is used to refer to measures and provisions promoting and speeding up an employee's move to a new job in cases where employment in a previous job or occupation is not possible anymore, or when an employee has been absent from the labour market for a period. The latter case might result from involuntary unemployment or due to a voluntary decision to stay at home either for family reasons, for study purposes or for any other reason.

The concept of employability may refer to the upgrading of existing qualifications, or acquiring new and different qualifications, and undertaking training for the broadening of occupational skill and knowledge that, on the other hand, can enable a worker to take up new tasks or to move even between occupations or professions.

Employability may involve not only 'occupational mobility', i.e. a flexible shift between jobs and occupations, but also 'physical mobility', i.e. a readiness to move between locations and homes. This requires appropriate external conditions supportive of such a move (services, housing loans or assistance etc.) as well as flexibility on the side of the worker.

Last but not least, the employability of individual workers can be enhanced by making the legal and economic environment more receptive — by measures that are, again, external to the worker.

2.3 Education, adult education

2.3.1 General situation

Employability as a European concept is associated with 'lifelong learning'. Although this is only one segment of employability, the concept of lifelong learning itself is broad and multiple. It is,

about ‘enabling people to keep pace with the new skill needs” ([555]) without regard to its institutional framework, the control over the institution and the direction of the studies, its financing and its impact on the existing employment, without regard to the rights and duties of employer and employee deriving from either obtaining upgraded and certified knowledge or from the investment into such upgraded knowledge.

‘Adult education’ was developed in Hungary (as in other post-socialist countries) in a different sense than used in the EU. It was an extension of the regular public education and higher education to make education available, at adult age, to persons who had no access to it at the ordinary, young age. A network of institutions surrounded with adequate labour law and other legal solutions were, for a long while means of social mobility but at the same time they were designed for getting a basic qualification in a vocation and not for continuous — lifelong — learning.

This is why the adult education system has been criticised for the insufficient adaptation of its education and training systems to labour market needs and for the apparently deficient lifelong learning systems. Such systems are expected to ensure the employability of workers.

One of the major imbalances in the education, is that while about 140 thousand persons leave schools every year and the number of participants in the secondary and upper education is growing ([556]), participation in adult education is low. Collection of reliable data is difficult on adult education, with regard to the multiple and flexible forms of adult education, because not all existing and operating institutions are registered and accredited within the system, furthermore, there is a wide variety of non-institutional and non-registered ways of informal education. Nevertheless, a 2003 updated survey by the government has shown that the percentage of the 25 to 64 year old population taking part in formal or informal adult education was 4.86 % (only 2 % taking part in formal, and a further 2.86 % taking part in various ways of informal education) — that is one of the lowest percentages in Europe.

2.3.2 State efforts: legislation on and investment in adult education

The Law on Adult Education has been adopted in 2001 ([557]) and has been amended several times in order to adjust the system (preferences and support) to the labour market needs. It gives a definition of adult education as an education carried out by registered (accredited) institutions, outside the regular educational system ([558]). Adult education might be general, language or occupational training, aimed at obtaining certain qualifications, professional competences, or, services connected to adult education.

([555]) Green Paper on Modernising labour law to meet the challenges of the 21st century (presented by the Commission), Brussels, 22.11.2006, COM(2006) 708 final.

([556]) The percentage of those participating in higher education is about 22 %, which is the double the figures of the early 1990s (Frey,M.: A munkaerőpiac jogszabályi és intézményi környezetének változásai, in: Fazekas,K.– Varga,J.(eds.): Labour Market Mirror. MTA Institute of Economics — National Public Foundation of Employment (OFA), Budapest, 2004, 208–211.

([557]) Act CI of 2001.

([558]) Article 3(2) of Act CI of 2001.

Its main purpose was to make a regulated access available for everyone, and to establish a continuity between studies at various periods of life, by crediting prior learning towards later studies. The legislation provides a system of qualification (accreditation), selection, supervision and support of institutions carrying out adult education. One of the main purposes of the law was to provide financial support in a selective way.

The system was subject to gradual broadening, with special regard to various supports (normative financial support, personal income tax relief, special resources available through application for technical development etc.) Vocational training, the training of disabled adults, or persons over 50 years of age, and training to promote equal opportunities are among the chief targets and target groups of the financial support and also among the main strategic goals ([559]).

For better compliance with EU expectations, a 2003 amendment to the Act on Adult Education ([560]), laid down the legal framework for the National Institute for Adult Education (NFI), with the mission to improve the professional and methodological aspects of adult education, to coordinate adult education research and professional services on a nationwide level, to build relations between adult education and other forms of education. Numerous further legislative and institutional steps have been made in part to broaden adult education and in part to gain control over the quality of the growing private business activity in the field of adult education. The Adult Education Accreditation Body (FAT) awards accreditation status to adult education institutions and programmes after investigating their compliance with set requirements.

Companies and entrepreneurs have a statutory obligation to pay a so-called 'vocational training contribution' (1.5 % of the wage bill) to a central training fund ([561]). Employers may fulfill this obligation by organising practical training and internship for trainees, and, under certain conditions and to a certain extent, accomplish or reduce their contribution liability by covering the training of their own employees in order to improve the quality of their work.

2.3.3 The Labour Code and adult education

There is a several decades long tradition of employer-sponsored participation of the employee in adult education regulated by the Labour Code. Training might be supported by the employer on a contractual basis, however, providing non-paid free time is mandatory for the employer if the employee continues studies in the regular educational system.

Under a contract concluded by the employer and the employee, the employer may undertake to reimburse the costs of the studies (eventual fee, travel or accommodation costs, technical costs, and, last but not least, the wages for the days or hours of absence from work due to studying obligations ([562]).) In exchange the employee undertakes to pursue the kind of studies as required by the employer (can be any kind of study, institutional, accredited, or not) and to stay with the

([559]) Frey,M.: No 556 2003, 179–182., and Frey,M.: A jogszabályi és intézményi környezet változásai, in Fazekas Károly-Koltay Jenő (eds.): Labour Market Mirror, Budapest, 2005, 261–262.
([560]) Act CVI of 2003, effective from January 1, 2004.
([561]) Act LXXXVI of 2003 on the vocational training contribution and the support of vocational training.
([562]) Such costs now might also be considered as support for own workers and decrease the vocational training contribution.

employer for a period proportionate to the support, not longer than five years ([563]). Since the shift to a market economy the conclusion of such contracts has radically decreased.

In the absence of such a contract the employer nevertheless has to provide the employee with unpaid leave of absence or days-off for participation in the mandatory educational activities, in case of enrollment in the school system (general, secondary or upper education). In the case of attendance at a general school, the employer is obliged to pay wages for the time of absence. Furthermore, the employer has to pay for the time spent on studies without a contract, if the employer obliged the employee to accomplish certain studies ([564]).

These provisions, inherited from the state-socialist past, might appear quite 'archaic' under market economies, when employers may hire easily the necessary qualified labour force and especially when the employers are under the pressure of global competition. Indeed, in practice employers reject or avoid providing mandatory leave of absence, even where this is without payment. The affected employees usually work additional hours to make up the absence or to take their annual holidays for the studies. A slight incentive is the opportunity to deduct such benefits from the 'vocational training contribution' paid by the employer.

On the other hand there is an increasing range of employer-initiated training schemes which require employees to undertake studies and exams, and frequently these take place during their daily, weekly or annual rest periods. The Labour Code enumerates among the workplace duties of employees to take part in such courses and training prescribed by the employer, to pass the prescribed exams ([565]). Thus, successful accomplishment of the prescribed studies might lawfully be a precondition of continued employment. In such cases the costs — including the additional time involved — is paid by the employers.

The various opportunities to fulfill the obligation of paying 'vocational training contribution' by serving the company's own human resource interest can promote a long-term strategic approach and competent human resource management — and such projects might also be an area of mutually gainful flexible arrangements between employers and employees, between the business world and adult education.

2.3.4 Subsidised labour market training

Already in the late 1980s, labour market training and retraining had become the primary means of coping with unemployment in Hungary, in part due to the lack of legal instruments to address the newly emerging unemployment. This 'historic start' and a series of new, and changing efforts to find the best institutional and individual ways of labour market training, made it possible to draw on long experience in the regulation of labour market training.

The changing and fluctuating norms (regarding the forms, the entitlements, the control of the labour market authorities over training, paying or non-paying allowance during training periods,

([563]) Articles 110 and 112 of the Labour Code.
([564]) Articles 111 and 115 of the Labour Code.
([565]) Article 103(4) of the Labour Code. Employees are exempted from complying with such instruction, whose personal or family circumstances would make such a duty disproportionately burdensome..

etc.) and frustration about the low success rate (activating effect) of completed training have led to the crystalisation of the current system. This system guarantees a control for labour market agencies over the type and quality of training, establishes concrete duties for the trainee, provides reasonable benefits, and also relies on the financial contribution of the trainee. Last but not least the system provides a broad room for consideration by the labour market authorities in the use of the relevant funds. The current regulations have also some malfunctions (e.g. excluding the most vulnerable groups, being too rigid about the course requirements, and providing financial support only if the trainee does not undertake any work besides the training) **([566]).**

Significant progress was made in 2001 when parents on maternity or childcare leave were allowed to have access to training with a tuition fee waiver. The purpose was to help these parents to maintain or even increase their labour market value during their absence from the labour market. Unfortunately these measures were subsequently withdrawn and replaced by some much narrower and not well targeted measures in 2006 as a part of budget expenditure savings.

2.3 Measures promoting an inclusive labour market

While vocational training and adult education is increasing the subjective employability of individuals, employability may be enhanced by a number of other measures that are 'external' to the worker and objectively enhance the employability of certain categories of workers (such as mobility between locations, financial measures supporting career breaks, facilitation of childcare and the reconciliation of workplace and family duties.)

Active labour market measures were not unfamiliar to the Hungarian legal system: instruments to hide indoor unemployment, regroup, retrain or reallocate redundant labour force had already been introduced before 1989 and long before the increase in unemployment levels. The reason was obvious: the supported forms of employment and job-retainment measures in the 1980s were able to maintain the public feeling of full (or nearly full) employment. When the rise in unemployment became obvious from the beginning of the 1990s, Act IV of 1991 on the Promotion of Employment and Unemployment Benefits ('Employment Act') was to replace the old scattered norms and provide for comprehensive legislation to combat unemployment. In fact, it only enumerated the former measures (e.g. labour market training and retraining, assistance for job-seekers to become entrepreneurs, financial assistance for job-creation and for community service work) and added only one new instrument that was reduced working time, i.e. (short-lived) partial compensation for lost wages if dismissals were avoided by reducing working hours. After 1996 the numbers of the ministerial orders have been speeded up and the Employment Act of 1991 has become a mere framework-legislation, while the substantive details have been regulated in other laws.

At parliamentary level the laws on taxation are the most important further pieces of legislation that provide subsidies related to the taxes and taking over of contributions in order to promote employment of job-seekers, disabled people and other vulnerable groups. Decree 6/1996 (July

([566]) Frey,M.: A munkaerőpiac jogszabályi és intézményi környezete, ['Legal and institutional environment or the labour market'] in: Fazekas,K.–Kézdi,K. (eds.): Labour Market Mirror, Budapest, 2006, 153.

16) of the Minister of Labour on the available subsidies is the basic legal source on details of available subsidies.

Two kinds of such supports can be distinguished with respect to enhancing the receptiveness of the labour market and employability of persons.

2.3.1 Job creating investments — enhancing receptiveness of disadvantaged regions

Regions where long-term unemployment has become widespread have been the main target of labour market subsidies from the late 1990s. In 1996 subsidies were enhanced for regions with an unemployment rate one and a half times higher than the national average. From 1998 the 'modern workplaces' producing 'up-to-date' products with a strong market basis or in new professions and establishing at least 300 new jobs came to the fore. From 2004 the subsidies can be used for construction activity, buying new machinery and technologies ([567]). From 1999 up to 2004, 14 000 new workplaces were established through such subsidies ([568]).

Although the financial subsidies to hire people for community service work in disadvantaged regions (e.g. public place clean-up, ditch cleansing, household assistance to elderly or disabled people, ragweed cutting etc.) might provide temporary engagement and might somewhat alleviate the lack of resources for community services in those communities (the Labour Market Fund assumes the 70–90 % of the direct employment-related costs of community service work), however, in the long run such measures do not bring a solution to employment problems. Thus, they cannot be recorded as measures enhancing employability.

Throughout the transition period employment policy has been encouraging the employers to create new jobs and hire registered unemployed people The available subsidies relieved the employer temporarily — in part or full — from the burdens of wages and taxes. Although the amount and the terms of the support has been changed and decreased through the last decade, at least 20 thousand unemployed people got a job for some time in every year ([569]). These latter measures, however, overlap with the second group of measures promoting the inclusiveness of the labour market, that is directly targeted to the employment of disadvantaged groups.

2.3.2 Subsidised labour costs — increasing employability of disadvantaged groups.

The reimbursement of the wage costs of disadvantaged or vulnerable persons on the labour market have become a targeted instrument of eliminating disadvantages of certain groups on the labour market. Such measures — as a counterpart as well as a counterbalance of labour law

([567]) Laky, Teréz: *A Magyarországi munkaerőpiac 2005 ['The Hungarian labour market']*, Országos Foglalkoztatási Közalapítvány, ['National Employment Public Foundation'] Budapest, 2005, 68–73., Frey, Mária: *A munkaerőpiaci politika jogszabályi és intézményi környezetének piacgazdasági fejlődéstörténete*, ('*The history of development of the legal and instituutional environment of labour market policy.']* in Fazekas, Károly (ed.): Labour Market Mirror, Budapest, 2002, 230–233.

([568]) Laky Teréz: *Munkahelyteremtési támogatások ['Labour Market subsidies']*, in: A magyar foglalkoztatáspolitika átfogó értékelése az Európai Foglalkoztatási Stratégia kontextusában, az elmúlt öt év tapasztalatai alapján, ['A comprehensive assessment of employment policy in the context of the European Employment Strategy on the basis of the past five years' experience'] Hungarian Academy of Science, Iinstitute of Economics, Budapest, 2005, 59.

([569]) Laky, Teréz: *Id.* 61.

protection have become more focused in 2005 and 2006 as a part of responding to the main challenges identified for the National Reform Programme (see above, the introduction to this Part IV.) Within the framework of such measures the employment of job-seekers over 50 years of age, those away for longer periods from the labour market, as well as young school leavers, have been supported through subsidies covering a part of the costs over the wage bill (social security contributions).

It is difficult to assess the effectiveness of measures to increase employment first of all because the statistics can only show the short-term impacts ([570]). The inclusive labour market measures have been changing frequently, as the priorities and the conception of the employment policy have been altered in every four years after the parliamentary elections. It is also a problem that the changes are not confined to the governmental changes, hence the rapidly changing measures are not known by ordinary people. It seems that governments do not have purposive employment policies and inter-ministerial coordination fails to work effectively (or is limited just to information and collection of facts) ([571]). On the whole the measures aimed at increasing employability through active labour market measures have not proved efficient. In spite of growing budget allocations the number of beneficiaries of active labour market measures has decreased from 105 thousand in 2001 to 63 thousand in 2006, and the activation rate among the beneficiaries has gradually decreased from around 20 % to about 14 % between 2001 and 2006 ([572]).

In summary the evolution of labour law in Hungary has successfully progressed from an imbalanced, patchwork-style mix of extreme liberalising tendencies, combined with remainders of the socialist past unsuited to a market economy, to a more consolidated model through the transposition of European principles observing labour protection, fundamental rights and employee involvement as basic values, although the re-contractualisation tendencies in employment have continued. Traditional lack of effective enforcement of legislative provisions may considerably weaken the realisation of the intended protective effect. The focus of legislation from about the turn of the century has started to move from protection inside employment to improve imbalances on the labour market. The re-codification of the material of labour law is a pending task both regarding individual labour relationships and collective relations between the parties of industries. The multiple challenges of maintaining social standards and at the same time increasing the adaptability of employers and the labour market; regrouping budget resources for the purpose of promoting the employability of the labour force as well as observing stringent budget constraints, mean that the legislators and industrial parties are confronted with contradictory demands that are hard to resolve at national level.

([570]) Galasi,P.–Nagy,Gy.: Aktív és preventív intézkedések a munkanélküliek és inaktívak számára, [„Active and preventive measures for the unemployed and the inactive'] in: A magyar foglalkoztatáspolitika átfogó értékelése..etc. see No 568 above, 54.

([571]) Laky,T.:, No 568, pp. 29–32.

([572]) Frey, M.: Evaluation of Active Labour Market Measures between 2001 and 2006 and their change in 2007. In: Fazekas, K.- Cseres-Gergely, Zs — Scharle, Á. (Ed.s): Labour Market Mirror, 2007, (MTA-OFA, Budapest, 2007) pp. 141–142.

The evolution of labour law in Poland

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Part I. Introduction: general characteristics of changes in Polish labour law

1. For Poland, the decade 1995–2005 was a period of increased activity by the legislator within the framework of the labour law. There were various causes of this state of affairs. Firstly, the activity resulted from the unfinished process of adjusting the law to the transformation of an economic system based on the substitution of a centrally controlled economy by an open market economy dominated by private employers. It was accompanied by extensive privatisation, which influenced individual and collective employment relations in enterprises that have undergone this process. Simultaneously, the phenomenon of unemployment increased to reach the highest rate in the EU at the end of the decade. Hence, labour law had to be treated as one of the instruments of solving labour market problems. On 1 May 2004 Poland became a member of the European Union, which demanded the effort of transposing the whole *acquis communautaire* into Polish labour law. Finally, the pressure of employers, demanding lower labour costs in order to increase the competitiveness of enterprises, brought about increased flexibility and the rationalisation of labour law regulations.

These causes were the main influences for change in Polish labour law in 1995–2006. Thus, this study focuses on those tendencies representative for the chosen period in Parts II, III, and IV, which are selected according to merits.

2. What needs to be kept in mind is the fact that the 1995–2006 period is just a snapshot of a longer process, hence, the changes that occurred during that period started beforehand, and developed further on — after exceeding a turning point. Understanding the situation of the labour law in the given period requires a wider perspective. Although the Polish state after the Second World War, took over the achievements of pre-war labour legislation, gradually this legal framework was succeeded by new legislation bearing the mark of the communist system. That new legislation was characterised by a relatively high level of employee entitlements, and — simultaneously — high level of penalisation by the labour law, and unquestionable domination of statutory law, with the indication of marginalisation of non-state legislation (e.g collective agreements). Hence, in that respect there was a breach of continuity of the achievements of the labour law of, so-called, the second Polish Republic (1918 –1939).

The culminating point for those tendencies was the passing of the Labour Code on 26 June 1974, which remains binding today. The Code was positively evaluated by specialists, however, because it reflected employment relations under the former system, many sections had to be changed after the breakthrough of 1989.

After 1989, the continuity of labour legislation was retained with the assumption that in many respects the legal framework would be treated as provisional. The subsequent development of the labour law proceeded in two directions, in order to adapt it to the open market rules of a capitalistic economy. On the one hand, this process of adjustment manifested itself in the afore-mentioned amendments of the Labour Code, and in the parallel creation of a network of non-code acts aiming at the support of changes within the framework of employment relations, and reaction to risks occurring in that area, on the other hand.

The process of non-code labour legislation was faster because of urgent needs, whereas changes in the Labour Code were slower.

Transformation of the labour law needs to be mentioned particularly in connection with the Labour Code because that act was the factor of continuity between the labour law of socialist era, and that of capitalist era — after 1989.

3. The Labour Code is mainly a collection of individual labour laws; the exception is Section 11 concerning the regulation of collective agreements. Hence, the process of change of the Labour Code took two directions: first —within the framework of Section 11, and second — within the framework of remaining sections.

The change in the collective agreement model was preceded by laying the foundations of collective labour law, which practically did not exist previously, in the form of three acts dated 13 May 1991 ([573]). Fundamental amendment of the Labour Code within that respect occurred on 29 September 1994 ([574]). It consisted in a full substitution of previously binding regulations with new ones. The amendment came into force on 26 November 1994. The second extensive amendment of 9 November 2000 of Section 11 of the Labour Code, came into force on 1 January 2001, but did not change the general principles of collective agreements, having an essentially corrective character. The evolution of collective agreements is presented in detail in Part II of this report.

The individual employment dimension of labour law was comprehensively revised as the result of the amendment of 2 February 1996 of the Labour Code ([575]). It affected sections other than Section 11. Section 10, which includes health and safety regulations, and Section 13 — on the liability for offences against employee rights — were regulated from the beginning.

The legislator defined the foundations of the legal order in employment relations through the definition of the catalogue of sources of the labour law, their hierarchy, and their implication for the employment relationship. That way autonomous legislation, among many, gained legal sanction. At the same time the regulations of the Code were adjusted to the provisions of the European Social Charter, as well as to the conventions of the International Labour Organisation (which related mainly to Section 11). The amended Labour Code corresponded, at least partially, to the needs of market economy, while at the same time increasing employee rights.

The second significant amendment of the Labour Code was its change on 26 July 2002 ([576]). The third amendment of the Labour Code that is significant for the shape of the labour law in Poland was the amendment of 14 November 2003 ([577]).

4. The uniqueness of the July amendment manifested itself in the fact that it was the first comprehensive amendment (not counting earlier cases of revision of single regulations, e.g. the extension and further shortening of maternity leave) that resulted in a lowering of employee standards in many sections of the Labour Code; hence, there was a reversal of previous tendencies towards developing those entitlements. Apart from numerous interventions in the details of the Labour Code, the legislator allowed the possibility of a general lowering of employee entitlements by way of in-company agreements that could suspend the application of labour law company regulations more favourable for employees, or even application of clauses of individual employment contracts, where an employer faced a difficult financial situation. The legislator's intention was to make such regulations conducive to greater flexibility within the law and a decrease of labour costs, with the objective of reducing unemployment.

([573]) Those were: Act on Trade Unions — uniform text Journal of Laws of 2001, No 79, Item 854 with further modifications; Act on Employers' Organisations, Journal of Laws of 1991, No 55, Item 235; and Act on Solving Collective Disputes, Journal of Laws of 1991, No 55, Item 236.

([574]) Uniform text, Journal of Laws of 1998, No 21, Item 94 with further modifications.

([575]) Journal of Laws of 1996, No 24, Item 110. New regulations came into force at various dates. According to Polish custom that amendment will be named in the text the '*February* amendment"

([576]) Journal of Laws of 2002, No 135, Item 1146. The amendment is named in the text as '*July* amendment', and the first part came into force on 29 November 2002, and the second on 1 January 2003.

([577]) Journal of Laws of 1994, No 113, Item 547.

5. Another extensive and significant legal change of the Labour Code in that respect was the above-mentioned European amendment. The dominant, although by no means the sole objective of that amendment was to finish the process of adjusting Labour Code regulations to European Union directives within the framework of social law. For example, that 'framework' included regulations that extended detailed regulation of the rule on non-discrimination in employment on other criteria than gender (age, disability, racial or ethnic origins, sexual orientation, religion). In accordance with European law an explicit prohibition on sexual harassment and 'mobbing' defined as activity aiming at, or resulting in, a violation of personal dignity or in the humiliation of an employee, was introduced. The amendment also introduced regulations that created incentives for taking up part-time work, regulations obliging an employer — on a greater scale than before — to inform employees on the conditions of employment, and regulations implementing the provisions of Council Directive 93/104/EC regarding some aspects of the organisation of working time, including the ones that increase minimum period of annual leave from 18 to 20 working days ([578]).

The most significant changes concern Section VI of the Labour Code, which regulates the problem of working time and was given completely new shape with a changed numeration of provisions. The changes brought by the European amendment also consisted in including the matter of some executive acts into the Labour Code, e.g. concerning remuneration exempt from deductions. The situation of persons who avail of maternity leave also underwent significant changes.

6. The network of afore-mentioned non-code acts included mainly acts concerning the termination of employment relations because of reasons not concerning employees, acts defining the fundamentals of employment policy, and the rules of giving support to unemployed persons and persons searching for work.

Those were original acts, which had no equivalent forerunners. Two generations of those acts were created during the period of so-called Third Republic of Poland. Hence, the Act of 28 December 1989 on Special Rules of Termination Employment Relations with Employees Because of Reasons Concerning Employers ([579]) was substituted with the Act of 13 March 2003 on Special Rules of Terminating Employment Relations Because of Reasons Not Concerning Employees ([580]). The Act of 29 December 1993 on the Protection of Employee Claims in the Case of Employer's Insolvency ([581]) was substituted by the Act with the same title of 13 July 2006 ([582]). The Act of 14 December 1994 on Employment and Counteracting Unemployment ([583]) was substituted with the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions ([584]).

All the listed acts are discussed in detail in Part III of the study.

7. In 2002–2006 a Codification Commission for Labour Law, comprised of the representatives of academics and judges of the Supreme Court was set up by the Polish government. Its efforts resulted in the launch of two projects — focusing on the Labour Code including individual law, and the Collective Labour Code dealing with collective labour

([578]) Journal of Laws of 2003, No 213, Item 2081. The amendment named 'the European amendment' came into force on 1 January 1994, with the exception of some regulations that came into force on 1 May 2004, i.e. on the day of Polish accession to EU.

([579]) Uniform text, Journal of Laws of 2002, No 112, Item 980 with further modifications.

([580]) Journal of Laws of 2003, No 90, Item 844 with further modifications. The act came into force on 1 January 2004. It is quoted in the text as'the Act on Dismissals'.

([581]) Uniform text, Journal of Laws of 2002, No 9, Item 85 with further modifications.

([582]) Journal of Laws of 2006, No 158, Item 1121. The act came into force on 1 January 2007.

([583]) Uniform text, Journal of Laws of 2003, No 58, Item 514 with further modifications.

([584]) Journal of Laws of 2004, No 99, Item 1001 with further modifications. The act came into force on 1 May 2004, the day of Polish accession to EU.

relations. To date (the end of June 2007) the projects have not been introduced into legislatory procedure.

According to the assumptions of this report, fundamental tendencies of changes in the labour law are presented in parts entitled: Autonomous Sources of the Labour Law — this part describes the evolution of the model of collective bargaining and collective agreements; Labour Law and Employment — this part presents the evolution of regulations concerning the dismissals of employees and employment policy; In the Direction of Increased Flexibility of the Labour Law — this part reviews some areas of the labour law that are particularly sensitive to the need of flexibility, such as regulation of working time and non-typical employment contracts. The whole study is summed up with Final Remarks, which shows similarities and differences in the lines of development of the labour law in Poland in comparison with EU15.

Part II. Non-statutory sources of labour law. Autonomous labour law

Introductory remarks

Collective agreements are the traditional source of autonomous, non-state, labour law. After the breakthrough of 1989 their model changed radically, but bargaining practice was not developing according to the possibilities created by the law. Apart from collective agreements, it is possible to conclude other agreements with diversified legal character in companies. The most significant of these are the so-called 'social packages' connected with privatisation, under which various guarantees and privileges for the staff of privatised enterprises are negotiated by trade unions with the new owner of the enterprise. This part presents the following issues: 1) The outline of the Development of Law on Collective Bargaining in 1994 — 2005; 2) Some Detailed Issues Regarding Collective Bargaining Regulations; 3) Collective Agreements in Company Practice; 4) Sources of Autonomous Labour Law Other than Collective Agreements; 5) Social Package.

1. The outline of the development of law on collective bargaining in 1994–2005

During the discussed period two amendments of the Labour Code occurred (in 1994, and in 2000) within the framework of its 11th section, which includes regulations concerning the negotiation, conclusion and application of collective agreements. To understand its significance it is necessary to outline the legal situation which had formerly applied.

Until the Labour Code came into force, i.e. until the end of 1974, the pre-war Act of 14 April 1937 on Collective Agreements, which was classified as one of the most modern regulations of its time still remained formally in effect. After the war, during communism, regulations of that Act were either taken into consideration to some extent and then agreement practice was enlivened (directly after the war and in 1956–1974), or the act was totally ignored and agreement practice died out.

With the Labour Code coming into force, i.e. 1 January 1975, the afore-mentioned Section 11 of the Code became the basis for collective agreements. The Labour Code created a restrictive model of collective agreements, which resulted mainly from restrictions imposed on the content. Within the framework of remuneration their role was to specify centrally programmed remuneration policy. Whereas, the possibilities of the standardisation of the conditions of work were left only in the situations justified with the characteristics of the branch of industry or occupation, hence in very narrow framework. The level at which agreements might be concluded was also strictly defined. The possibility of concluding agreements was limited to a branch of industry, and in special cases to occupational groups (e.g. journalists). The possibility of concluding collective agreements on the level of companies was excluded. Only at the end of the 1980s were surrogates for company-level agreements permitted in the form of agreements on company remuneration systems, however, the possibility to negotiate pay and working conditions remained strictly limited by the act.

What also needs to be stressed is the fact that the parties to such agreements during the period of communist rule bore no comparison to the parties that represent labour and capital in market economy conditions. The parties were: adequate departmental minister representing undertakings grouped in a particular industry, and industrial trade union representing exclusively employees employed in the industry. Thus, the parties in the agreement were the state and licensed trade unions, which in reality were an extended arm of the communist party. There was a tendency to uniform labour law and to reduce particular solutions to a minimum. Consequently,

collective agreements were reduced to an auxiliary role in relation to the legislation of the state source of labour law, which resulted in their long-lasting marginalisation.

During the period of system transformation, which began in 1989, the model of collective bargaining was adjusted to the conditions of market economy by giving it distinctive characteristics compared to those which had distinguished the former communist model. The change occurred relatively late, as the result of the amendment of 1994 of the Labour Code, i.e. five years after the fall of communism. It was the result of the necessity to construct collective labour law from basics, which in the previous period did not exist to a large extent, since its previous form was radically different from the requirements of democratic economic order. The creation of the foundations of collective labour law was the result of three Acts of 23 May 1991: on Trade Unions, on Employers' Organisations and on the Solutions of Collective Disputes ([585]). The objective was to create social partner organisations able to negotiate collective agreements. Moreover, allowing employers' organisations to act was also crucial.

The direct event that preceded the amendment of 1994 of the Labour Code was social agreement concluded in February 1993 between the government, trade unions, and employers' organisations, and was named the Pact on State Owned Enterprise During Restructuring ([586]). The package of Acts was agreed, which included legal solutions favourable for employees that resulted in social concession for the advancement of the process of privatisation of the state enterprises' sector ([587]).

Describing generally the direction of changes to Section 11 of the Labour Code in 1994, it needs to be stated that bargaining freedom was achieved on various levels, particularly within objective and subjective frameworks, and at the level of collective bargaining.

Therefore, as far as the acceptable content of agreements is concerned, a formula from the Act of 1937 was restored, according to which an agreement determines the conditions to which the content of employment relation should be adequate (Article 240, Section 1, item 1 of the Labour Code). Simultaneously, previous limitations on the content of collective agreements were lifted, which restored their role as a creative source of labour law. However, some kinds of cases were excluded from agreement regulations, which were not justified with objective reasons ([588]). In 1994 limitations on the scope of collective agreements were also lifted which permitted them, in principle, to cover all categories of employees. What was also significant was that collective agreements could also cover persons employed on civil legal contracts.

Social partners gained the right to bargain on randomly selected levels. Thus, the previous restriction on concluding agreements other than at industry-level was lifted. The creation of the possibility of bargaining at company level deserves particular emphasis. New company collective agreements absorbed the remains of the old agreements on company remuneration systems, used in 1980s.

According to the regulations of Section 11 of the Labour Code in its current shape there are two types of agreements: company level agreements and upper-level agreements (apart from that there are regulations common for both types). The objective of that distinction is not the creation of statutory preferences for one of the kinds but the consideration of particularities of collective negotiations on each of the two levels. Upper-level agreements can be concluded for the

([585]) Journal of Laws No 55 of 1991, Item 236 with further modifications.

([586]) Compare with Wratny, J. „Pakt o przedsiębiorstwie państwowym w traku przekształcenia. Omówienia i dokumenty', Bydgoszcz, 1993.

([587]) However, it was not the change in law on collective labour agreements that had the greatest significance in gaining that consent, but allocating employees with significant advantages resulting from the process of privatisation, which was taken into account particularly by the Pact.

([588]) For example: special protection against termination of employment relations and the protection of remuneration were excluded from agreement regulations.

employees of a specific occupation, employed in companies of a given industry or companies located on a given territory or, alternatively, for employees chosen by the parties according to some other criteria. Since 2001, based on other regulations, the possibility of concluding collective agreements at national level was also permitted ([589]).

As the result of the amendment of 1994 of the Labour Code, the parties to a collective agreement were defined in a different way than previously. At company level employer and company trade union were defined as the parties to an agreement, whereas on an upper level the organisation of employers and adequate trade union structure were the requisite parties. The replacement of state administration organs as a party by an employer's organisation, hence an entity independent of the state, was of particular significance. However, the competencies of ministers and adequate local authorities concerning the conclusion of agreements for state and local government employees of the budget area were retained, which constituted one of the premises of later amendments.

The other previously unknown elements of the new model of collective bargaining were, inter alia, imposing an obligation to start negotiations on agreement at the request of one party, and defining the rules of collective negotiations, whereas previously binding regulations focused only on the 'product' of those negotiations; subsequently — imposing on employers the obligation to provide information on the economic situation of the enterprise to facilitate the conduct of reasonable bargaining; and defining the rules of registering collective agreements, where conformity with the law of the method of concluding agreement and its rules are the only objects of control.

New regulations, given the multiplicity of different trade unions at various levels of collective negotiations, created situations where a variety of organisations wished to become parties to an agreement. The need arose to differentiate representative organisations with greater entitlements from the non-representative ones. In 1994 the legislator regulated representativeness only with reference to upper-level union organisations. The need to define representative organisations at company level became one of the premises of the new amendment.
To supplement comments regarding the model of the collective bargaining agreement, it is necessary to add that amendments to the Labour Code of 2 February 1996 enabled collective agreements to be expressly defined as a source of labour law. However, the provisions of collective agreements cannot be less favourable for employees than the dispositions of the Labour Code (see in particular Article 9, Section 1 of the Labour Code). It allowed them to play the role of a labour law development tool.

The agreement model developed in Poland meant the decentralisation of labour law and its socialisation through the transfer of rule-making competencies previously held exclusively by state organs to the social partners.

The resulting definition of the role of the collective bargaining agreement and its relationship with state labour law sources corresponded to the requirements of the labour law system of a democratic country based on market economy. This was also consistent with international and European law standards.

([589]) The parties of those agreements are the employee party and the employer party represented in the Tripartite Commission for Socio-Economic Affairs. The Commission is the social dialogue forum at central level, where the representatives of the government, trade unions, and employers' organisations participate. Compare Article 2 of of the fourth Act of 6 July 2001 on Tripartite Commission for Socio-Economic Affairs, Journal of Laws of 2001 No 100, Item 1080 with further modifications, Tripartite Commission Act in abbreviation.

The second comprehensive revision of Section 11 of the Labour Code occurred on 9 November 2000, and did not undermine the principles of the regulation of 1994 concerning collective agreements. The objective of the amendment of 2000 was to remove deficiencies and shortcomings in the Code which had become apparent in practice, and to create incentives for broader use of collective agreements negotiated by the social partners.

The most significant solutions introduced by the amendment of 2000 of the Labour Code were: firstly, specifying who should be a party in upper-level agreement in the case of complex union structures and the structures of employers' organisations, in order to eliminate practically observed doubts. Secondly, bans on regulations of some issues were lifted because, as mentioned, the objective of this prohibition was unclear. Thirdly, complaints by a third party (i.e. someone who had legal interest), against the incorrect registration of company collective agreement was permitted, pleading violation of regulations on concluding agreements, for example in the case when the representative trade union did not in reality fulfil required criteria. Fourthly, it was accepted that after the transition period only an employer's organisation could be party to an upper-level agreement, also in the budgetary sphere (teachers, administration, military civilian staff etc.). Fifthly, the criteria of the representativeness of company trade unions were defined in order to negotiate and conclude agreements. Sixthly, the possibility of temporary suspension of agreement rules, full or partial, because of an employer's financial problems was permitted in order to save jobs. The overall purpose of these changes was rationalisation and further limitation of the influence of the state on the collective bargaining model.

2. Some detailed issues regarding collective bargaining regulations

A. The role of the state in the collective bargaining system.

The role of the state in the collective bargaining system currently amounts to: firstly, legal regulation concerning concluding and the functioning of collective agreements, secondly, reserve exclusivity of state regulation regarding some, not numerous, employee groups that are not included in agreement regulations, thirdly, to some restrictions concerning agreements for the employees of budgetary units, fourthly, to register collective agreements, fifthly, for the possibility of administrative generalisation of upper- level agreements. Sixthly, parties of some collective agreements during the transitory period remain state and local government administration organs. Lastly, collective agreement has a particular location in the hierarchy of labour law sources.

1) The rules of concluding and the functioning of agreements are defined in Labour Code regulations and some executive acts issued. Agreement parties are obliged to comply with those regulations.

2) Subjective framework of agreements was defined through the exclusion of particular groups of employees, whose status is subjected to statutory regulation. According to Article 239, Section 3 of the Labour Code those are: 1) the members of civilian staff corps, 2) employees of state agencies employed on nomination or appointment, 3) local government employees elected, nominated or appointed in offices and agencies of adequate local government organs, 4) judges and prosecuting attorneys. Hence, the majority are those employees employed in state and local government organs. However, employees employed on employment contract in those organs can be included in collective agreement.

3) Moreover, there are limitations within the framework of bargaining for employees employed in organisation units financed from the budget. It is obligatory for the relevant body to

submit a declaration that collective agreement is concluded within the framework of financial resources at the disposal of a given unit (Article 240, Section 5 of the Labour Code). Until the amendment of 2000 conclusion of company agreements in state units of the budgetary sphere was inadmissible.

4) Collective agreements at upper level are registered with the minister responsible for labour affairs, and company agreements, by a district labour inspector (art. *241§11*). A rejection of an application to have an agreement registered may be appealed to the labour court appropriate for a given level. The organ responsible for registration examines the conformity of the concluded agreement with the law. Registering an agreement is the condition of its coming into force.

5) The minister responsible for labour affairs is entitled to extend the application of upper-level agreement on employees employed by the employers, who are not included in the agreement. In such a case the common application of the organisation of employers and trade unions concerned is required, and it is necessary to fulfil a number of other conditions (Article 241) ([590]).

6) As the result of the amendment of 2000 of the Labour Code a rule was accepted that employers' organisations are to be the legislative party of all upper- level agreements, without exceptions — also those concluded in budgetary sphere, governmental and local as well. That means full withdrawal of the state as agreement party on the upper level. However, as it was mentioned in point 1 ('The Outline of the Development…'), in the transitory period the competencies of ministers and local government organs to conclude agreements for the employers of budgetary sphere that are not associated in employers' organisation, remain; hence, a dualism is admissible: administrative organ or employers' organisation. The transition period was extended a few times and, currently, it is set at 31 December 2008. For, it is not easy to create employers' organisations, particularly in administrative apparatus, who would represent the 'interests' of offices being direct employers with regard to their employees. The project of Collective Labour Code suggests maintaining the current dualism.

7) Collective agreement can regulate any issues within the framework of the labour law; however it cannot infringe the rights of third parties (Article 240, Section 3 of the Labour Code). Collective agreement is viewed as the source of law that in the hierarchy of sources is right after legislation, and before company regulations and statutes (Article 9 of the Labour Code).

B. Collective agreement and employment contract

The relationship between collective agreement and employment contract is governed by the Employee Privilege Principle (compare Article 18, Sections 1 and 2 of the Labour Code). The stipulations of the employment contract cannot be less favourable for an employee than the decisions of a collective agreement. Less favourable stipulations are invalid and are substituted by adequate provisions of collective agreement. However, the stipulations of employment contracts can be more favourable for an employee than those of collective agreement.

C. Representativeness of trade unions.

After the breakthrough of 1989, when trade union pluralism was admitted, an emphasis was put on the equality of rights of all trade unions. However, in the light of developing fragmentation of the trade union movement there began a search for a formula of differentiation

([590]) Until today (end of January 2007) there has been no case of administrative generalisation of collective agreement.

of trade unions considering their entitlements resulting from the law. In Section 11 of the Labour Code amended in 1994 the notion of representativeness for concluding upper-level collective agreements was defined, and as the result of the amendment of 2000 a notion of representativeness for concluding upper-level collective agreements was introduced.

The criteria of representativeness accepted by the legislator refer to the number of members in a given organisation. The legislator did not take into consideration non-statistical determinants of roles of given trade unions. According to Article 241§17, Section 1 of the Labour Code an upper-level trade union organisation, i.e. national trade union, federation or confederation, is representative if it fulfils at least one of three conditions:

1) the criteria of representativeness indicated in the Act on Tripartite Commission or
2) associates at least 10 % of the total number of employees included in the framework of the union statute, but no less than 10,000 employees, or,
3) associates the greatest number of employees, for whom given upper-level agreement is to be concluded.

On a company level, while defining the representativeness of company trade unions, quantitative criteria are also taken into consideration (Article 241§25a of the Labour Code). Hence, an organisation is representative when it covers at least 7 % of employees employed in an establishment, if additionally the organisation is affiliated in an upper-level trade union structure that is considered representative (compare with above), or 10 % of employees, without the requirement of affiliation. If no organisation fulfils those criteria, the attribute of representativeness is vested in the organisation that associates the largest number of employees.

Representative organisations are in a privileged position. Among many, if there is no consensus between all the organisations, representative organisations can conclude collective agreement omitting other (non-representative) ones.

The Collective Labour Code project suggests that representativeness should not depend on the number of union members but on the support of staff for a given trade union. The referendum method of selecting a representative union (American model) in the conditions of decreasing unionisation, gives trade unions more credible legitimacy to act in the name of staff than the criterion of the number of members. The consequence of such a solution will be the occurrence of only one representative trade union in each unionised company.

D. Termination of collective agreements

A collective agreement is terminated based on the consent of parties at the end of a given period, which concerns fixed-term agreements, and by notice of termination, which concerns non-fixed term agreements (Article 241§7 of the Labour Code).

Termination of agreement if parties agree, or at the end of a given period, does not raise any remarks. Whereas, terminating a non-fixed term agreement with notice (which in practice means termination by employer) was the point of the judgement of the Constitutional Tribunal of 2002 ([591]).

The Tribunal struck down one of the provisions of the Labour Code (Article 241§7, Section 4) according to which termination of agreement at the end of the period of notice did not automatically exclude the application of its provisions ([592]). They were to be applied despite the termination, basically until a new agreement came into force. Hence, in extreme cases they could

([591]) Constitutional Tribunal ruling of 18 November 2002 (K 37/01).
([592]) The provision ceased to bind on 26 November 2002.

be binding indefinitely, if no new agreement was negotiated between the parties. The Tribunal deemed that the afore-mentioned regulation of the Labour Code, defined as ‘perpetuity clause’, infringed the voluntary character of collective bargaining and equality of bargaining parties. Currently, on the termination of an agreement, its provisions cease to be binding upon the parties, thereby leaving them with two options: either to conclude a new agreement or to remain in the situation of having employment relations regulated by statutory labour legislation and individual employment contracts, and — on company level — additionally by company regulations (as far as there is the obligation to apply such).

The judgement of the Tribunal has produced some ambivalent effects. On the one hand, it corresponds to the rule of freedom of negotiations; on the other, it has been read by employers as an incentive to terminate collective agreements on a larger scale, thereby deepening the crisis of the union method of regulating employment relations (compare with observations in point 3).

3. Collective agreements in company practice

The legal model of collective bargaining agreements developed in Poland is in principle correct, but social partners do not use its potential to determine labour relationships through agreements. Consequently, only a limited group of employees is covered by agreements.

Key reasons for this situation include the weakness of social partner organisations, including underdeveloped employer organisations. The situation of trade unions deteriorates, as the number of their members radically decreases. They are almost absent in the private sector (the only exception refers to privatised state enterprises). The structure of powers between ‘labour’ and ‘capital’ is not favourable, which can change first of all as a result of a decrease in unemployment rate and an increase in syndication level.

At the end of June 2006, there were 136 upper-level collective agreements in Poland (number of registrations since 1995 equalled 165), including about 700–750 thousand employees. Although 136 valid agreements seem to be a significant number, the analysis of their structure leads to the conclusion that negotiations on agreement at the upper-level are in deep crisis. Only seven agreements were concluded by employer organisations, meaning they can be referred to as industry agreements. Three agreements were concluded by national companies (Telekomunikacja Polska, Orbis, Lasy Panstwowe), and four by ministers. All other upper-level agreements were concluded by local authorities. They include almost similar agreements concluded by local communities, with groups of employees from the educational sector, other than teachers. These agreements, of very narrow subject and territorial range, accounted for 122 in the whole group of 136.

We can also notice a decline in the category of company agreements. As of 31 December 2003, there were 12 535 agreements registered and as of 31 December 2004, 9 132.

In addition to the afore-mentioned reasons for this situation, it is worth referring to the imbalance in the labour market and the resulting dominant position of employers, who are not interested in the development of employee rights. Additionally, the decrease in the number of company agreements resulting from the decision of the Constitutional Tribunal mentioned above.

It is also worth noting the lack of sufficient 'substance' of agreements concluded, namely their limited content. Consequently, regulations regarding labour were dominated by statutory law. This is a result of the previous system, but this domination was strengthened by amendments to the Labour Code in 1996. These amendments involved a significant extension of employee rights recorded in the Labour Code. They were favourable for employees, but extending employee rights meant limited space for labour law regulations through collective bargaining between employers and employees. This confirms the ambivalence of the policy of the state, which while declaring it had left its place of autonomous law-setting, simultaneously occupied it.

Consequently, in order to revive the practice of agreement, propositions are made regarding revising the so-called favourability principle, in accordance to which the provisions of collective bargaining agreements cannot be in any case less favourable for employees than the provisions of statutory labour law. The trend of resigning from this principle, treated as inviolable principium, can be noticed in some contemporary labour law acts, for instance recently in the Portuguese Labour Code. It is believed that this way allows for higher flexibility of solutions in exchange for resigning from an excessive — in the opinion of interested social partners — level of employee rights arising from statutory acts. In such a case, significant care is desired, because it is not difficult to imagine the pressure of employers aimed at 'dismantling' the statutory labour law body.

4. Sources of autonomous labour law other than collective agreements

According to Article 59, section 2 of the Polish Constitution of 1997 trade unions, employers and their organisations have the right to negotiate, particularly in order to solve collective disputes, and conclude collective agreements and other agreements. In consideration of the above, social partners can conclude other agreements apart from collective agreements.

There is a wide range of various agreements, diverse in legal character, and — which additionally complicates the view — apart from social partners listed in the Constitution there are other entities that conclude agreements within the framework of employment relations, both on the capital and labour sides.

According to the Labour Code, normative character — hence, also the character of the source of labour law — is found in agreements (also regulations and statutes) that fulfil two conditions. The first condition concerns the content of agreement. It should define the rights and duties of the parties of employment relation. Secondly, the agreement should be based on a statutory act, hence, it should be a statutory entitlement to conclude an agreement (compare Article 9, Section 1 of the Labour Code). The agreements that do not fulfil the above conditions can be viewed only as binding between the parties to an agreement

Among normative agreements a few categories can be distinguished. The first group is agreements connected with the application of collective agreements, such as the introduction of changes into an agreement in the form of, so-called, additional protocols (Article 241§9 of the Labour Code), agreements on the application of 'foreign' agreement by the partners who are not the parties (Article 241§10 of the Labour Code), and agreements on the suspension of the application of the whole or a part of an agreement because of financial situation of the employer (Article 241§27 of the Labour Code).

The second category of agreements of a normative character are those that terminate collective dispute and are concluded on the basis of the Act of 1991 on the Solution of Collective

Disputes. Such agreements can be the result of negotiations undertaken after the start of collective dispute, which are conducted between parties (Article 9 of the Act) or negotiations with the participation of a mediator (Article 14 of the Act). Those are agreements concluded as the result of obligatory peace procedures that aim at the prevention of strikes. Even though the Act does not create a clear basis for post-strike agreements, through analogy it is viewed that they are of the same legal power as pre-strike agreements. In the project of Collective Labour Code it is suggested that arbitration ruling is to give the character of labour law sources, which — under particular circumstances — could close collective dispute.

Another kind of agreement viewed as normative is connected with restructuring actions, and consists in conducting group dismissals and transfering an establishment to another employer. In the first case, regulations of the Act of 2003 on Dismissals are a legal entitlement for agreement. The agreement defines the rules of conduct in cases concerning employees included in the intention of group dismissal (Article 3, item 2 of the Act). In the second case, regulations of the Act on Trade Unions are a legal basis for agreement. The content of the agreement are actions concerning the conditions of the employment that the previous or new employer is going to undertake towards transferred employees (Article 26§1 of the Act). All the above regulations are the effect of the implementation of EU directives.

A separate category of agreements are regulations defining the rules of union cooperation with employers concerning establishing company remuneration regulations (Article 77^2 of the Labour Code), order and organisation of work performance (Article 104§2 of the Labour Code), and social benefits fund (Article 27, items 1 and 2 of the Act on Trade Unions, and Article 8 of the Act of 4 March 1994 on Company Social Benefits Fund ([593])).

Company sources of labour law also include agreement that suspends the application of company labour law regulations (Article 9§1 of the Labour Code), and the agreement on temporary application of less favourable conditions of employment than those in employment contracts (Article 23§1a of the Labour Code), which are to help an employer in financial difficulties ([594]). Such agreements concluded by non-union representations elected by the staff are currently more and more frequently permitted.

A new situation within the framework of employee participation and sources of labour law arose as the result of the implementation of Directive 2002/14/EC into the Polish law with the Act of 7 April 2006 on the Information and Consultation with Employees ([595]). For information and consultation purposes in economic issues of companies, employee councils were created. In unionised companies, the councils are created by representative company trade unions, and in non-unionised companies they are elected by employees themselves. According to the strong consultation principle, which is required by Community law, the object of consultations with an employee council is to reach an agreement between the council and employer (Article 14, item 2, point 5 of the Act). That agreement, when specific conditions are fulfilled, can be treated as the source of labour law.

To sum up, there is a tendency towards the development of the agreement system in collective labour law, with larger scale normative character. The main cause of this situation is the necessity of implementing EU directives requiring increased introduction of legal solutions in the sphere of information and consultation with the representatives of employees.

([593]) Uniform text of the Act in Journal of Laws of 1996, No 70, Item 335.

([594]) In the case of the suspension of company law, including collective agreement, and stipulations of employment contract there is no necessity to notice the conditions of employment contracts.

([595]) Journal of Laws of 2006, No 79, Item 550.

Assessing that tendency, what needs to be stressed on one hand, is the value of employee participation, and on the other, that the implementation of Community directives falls on insufficiently prepared grounds and is assessed by social partners imposed from outside, and not as the consequence of integral evolution of national law.

The project of Collective Labour Code suggests the creation of work councils elected by the staff in non-unionised companies, that would overtake the competencies of currently operating employee councils within the range of information and consultation rights corresponding to Directive 2002/14/EC. Moreover, company councils in non-unionised companies would be given, with some exceptions, the prerogatives of trade unions. In unionised companies all the entitlements concerning the representation of employee interests, including the competencies of current employee councils, would be given directly to the representative trade union. Shaping of employee participation rules and relations between unions and non-union representations of staff is currently the central point of debate on the future of labour law in Poland

5. Social package

With ownership restructuring of the state sector that begun in 1990, a practice appeared of concluding agreements connected with privatisation.

The parties to these agreements are the trade unions operating in a company (that was created from the restructuring of state-owned enterprise) and the prospective investor, who aims at getting controlling interest from the Treasury. The object of agreements are promises given to the staff that are a kind of price paid by the investor for staff approval (in a social sense) for privatisation and acceptance of the future owner. The provisions of agreements concern various issues: first of all the guarantee of the stability of employment, remuneration, working conditions, company social activity, rights of trade unions, employee participation and employee shareholding — hence, aspects of both individual and collective labour law.

The most important part of the content of agreements are guarantees of employment given to the staff by the future owner of the undertaking. The guarantees are usually between 19 months and five years. During recent years in the power industry there were examples of extremely long guarantee periods reaching ten years (it was not always directly connected with privatisation). If guarantees are in the form of prohibition of dismissals, in the case of infringement, an employer is obliged to pay severance pay usually calculated on the basis of monthly pay and the number of months remaining until the end of the guarantee period.

Moreover, what is also significant for the interests of staff are the provisions concerning remuneration, including: the obligation to pay a so-called 'privatisation bonus' ranging from a few to over ten thousand (or more) zloty, or provisions on additional stocks of the company — exceeding the amount provided by the Act on Commercialisation and Privatisation ([596])— or provisions on favourable conditions of buying employee shares by the owner.

As research of the Institute of Labour and Social Studies shows, there are not many cases of clear infringement of obligations made by investors. Trade unions, the representatives of employees in supervisory boards and management boards of companies watch over the observance of those obligations. Legally, the clearest situation, which concerns all the kinds of

([596]) Uniform text Journal of Laws of 2002, No 171, Item 1397 with further modifications.

unnamed agreements concluded by trade unions, is transferring their content to company collective agreements, which is often practiced.

Part III. Labour law and employability

Introductory remarks

One of the main tasks of Polish labour law in 1995–2006 was to find a compromise between the level of protection of the durability of employment relations, and the necessity of providing an employer with the possibility of shaping employment, which is essential in market economy. The solutions which take into account an employer's interests — who sometimes has to dismiss his employees in objectively justified situations (often on a large scale) — were accompanied by the search for extenuating means, which would alleviate the effects of dismissals. Highly increasing unemployment required the undertaking of active actions on the part of the state for the promotion of employment and the creation of new jobs ([597]). This part presents the following issues: protection against termination of employment contract (1), dismissals because of reasons not concerning employees and support for dismissed employees (2), protection of employee claims in the case of employer's insolvency (3), and promotion of employment and counteracting unemployment (4).

1. Protection against dismissals

The recent decade did not bring any radical changes within the framework of the termination of employment contracts. As far as the regulation is concerned a high standard of protection against the termination of an employment contract is maintained. What is conducive is the institution of common protection against the termination of an unfixed employment contract with notice, which includes the obligation to justify the termination and to consult with a company trade union regarding the intention to terminate the employment contract. The opinion of a trade union is not binding for the employer. The workers employed on fixed-term employment contracts are not included in common protection against dismissal. What is also conducive to the protection of the durability of employment relations is the institution of special protection against the termination of employment contracts. It consists in the fact that in some situations defined by the law, an employer's right to terminate an employment contract is excluded or dependent on the consent of a competent organ.

The changes within the framework of the protection of the durability of employment relations, which took place during the recent decade, aimed mainly at the rationalisation of regulations, and elimination of the regulations that caused unjustified burdening of employers, and excessively restricted the possibility to shape employment by the employer. As far as the regulation is concerned, the changes did not cause a decrease in the level of protection against dismissal.

As early as 1996 the legislator resigned from making the duration of notice period dependent on general, total job seniority, and made it dependent on seniority at a given employer. Two changes

([597]) The problem is highly significant from a practical point of view. Research shows that in Poland until 2004 more jobs were liquidated than created. Hence, average employment in the national economy decreased (in 1999–2004 by 1 200 000 persons), which caused a significant increase of unemployment and poverty. In 2004 (no more recent data) 1 498 500 employees were dismissed, and 1 567 900 were employed. Dismissals on request of employees amounted to almost 300 000 employees, i.e. 1 200 per each working day (M. Kabaj, Założenia umowy społecznej w zakresie tworzenia miejsc pracy i ograniczenia bezrobocia, in:Umowa Społeczna. Ekspertyza IPISS, ed. J. Wratny, Warsaw 2006, pp. 46–48).

which rationalise regulations on termination were introduced by the amendment of 2002. The second stage of consultations with trade unions concerning the intention of the termination of employment contract was liquidated. According to the legal state preceding the change, the employer was obliged to consult his intention to terminate an employment contract with notice with in-company trade unions. However, when it was a part of national trade union organisation the second stage of consultation with trade unions — on a national scale — was obligatory. After the change in 2002 consultations are only single stage and take place only in the company. After using that method the employer can decide to terminate an employment contract. This change should be assessed positively. In practice the second stage of consultation with trade unions was unnecessary and prolonged the process of the termination of an employment contract.

The second change, favourable to employers, concerns awarding days off for job searching during the notice period. Before the change of the Labour Code in 2002 the employer was obliged to award some days off to his or her employees, irrespective of the person who terminated the employment contract, and of the duration of the notice period. Since the introduction of the amendment, days off have been granted only when it was the employer who terminated the employment contract, if the notice period lasted at least two weeks. Employers have been demanding that change for a long time. Their argument was that often employees who terminate employment contracts on their own already have new employment, and in such a case, granting days off in order to search for work is pointless and an unnecessary burden for the employer.

Another significant improvement for employers was the introduction of Article 167§1 of the Labour Code, through the amendment of 2002, which allows an employer to grant an employee annual leave during his notice period, which in the previous legal shape was not admissible without the employee's approval. However, most often the case was that the employee was not interested in expressing such approval because he or she preferred to get the equivalent for his or her unused leave after the termination.

Moreover, a significant change needs to be noted within the framework of the body of rulings of the Supreme Court concerning the justifications of the termination of employment contract by notice. It is developing in the direction of the liberalisation of protection resulting from the necessity to justify the termination, particularly if it concerns employees on independent posts. Gradually, termination was regarded as a regular way for the dissolution of employment relations. The assessment of termination is carried out with a clear consideration of legitimate interests of the employer. A reference to exceptional and special circumstances that justify termination is not necessary ([598]).

2. Termination of employment contract because of reasons not concerning employees

Economic, technological or structural phenomena can occur in the conditions of market economy, which lead to the situation at which from the point of view of employer's interests further keeping an employee, or a group of employees, becomes impossible, aimless or redundant. Hence, actions have been undertaken, which lead to the rationalisation of employment. In such cases there is a necessity to create legal tools, which allow an employer to terminate employment relations ([599]). Professional literature stresses the fact that the regulations,

([598]) M. Gersdorf, K. Rączka, J. Skoczyński, Kodeks pracy. Komentarz., ed. Z. Salwa, Warsaw 2004, p. 237.
([599]) Ł. Pisarczyk, in: M. Latos — Miłkowska, Ł. Pisarczyk, Zwolnienia z przyczyn niedotyczących pracownika, Warsaw 2005, p. 26.

concerning termination of employment relations because of reasons not concerning employees, should be a compromise between a drive towards securing the stability of employment protection of employees, and the necessity to protect an employer's interests. Thus, taking an employer's interests into account, the legislator does not resign from the protection of employees but modifies the protection with regard to the necessity of adjusting to market economy conditions ([600]).

The issue of dismissals because of reasons not concerning employees was regulated in Polish law by the Act of 28 December 1989 on Special Conditions of the Termination of Labour Relations Because of Reasons Concerning Employer. While assessing the act from the perspective of time, one cannot omit either the social and economic circumstances of the time, or the established objectives. At the moment of passing the act its main objectives were: restructuring and rationalisation of state enterprises, which — at the time, after the fall of socialism — were the main form of economic activity; and the creation of conditions conducive to the development of an open market. The passing of the act was one of the first stages of the realisation of the Balcerowicz Plan, which preceded privatisation of the public sector. Thus, the Act of 1989 was addressed mainly to big state enterprises (as there were few other kinds), and the main objective seemed to be the restructuring of the national economy. Social effects of the restructuring were forecasted to a smaller degree — in particular unemployment, which did not occur in Poland on a large scale in 1989.

However, the Act was in force unchanged until 2002, and the situation in the market altered so drastically that regulations were inadequate for the economic and social situation. First of all, during the 12 years since the act of 1989 was in force, deep changes occurred in the labour market. Small and medium enterprises began to dominate, for which the compliance with the regulations of the act became too burdensome. What is more, in connection with increasing unemployment, which became the main social and economic problem, there was a need for an increased protection of employees against the negative effects of dismissals because of reasons not concerning employees. Furthermore, the necessity to protect local labour markets was noted. Finally, another factor that caused the change of the existing legal state was the adjustment of Polish law to the requirements resulting from the 98/59 Council Directive. All those factors resulted in the legislator regulating the issue of dismissals because of reasons not concerning employees in a new Act of 13 March 2003.

In comparison with the old act, the new one attempts to a greater extent to take employee protection into account and local market protection, apart from an employer's interests. Because a detailed analysis of the Act on Dismissals exceeds the framework of this study, only the most important assumptions and directions of changes, from the perspective of this report, will be discussed.

A. The Act on Dismissals applies to employers, who employ at least 20 workers. Hence, minor employers — who employ less than 20 employees — were excluded from the range of the act. Such a solution is undoubtedly favourable for them, for it allows them to avoid the application of extended procedure of group dismissals, in the case of dismissing employees because of reasons not concerning them. Those employers are also exempt from the obligation of giving severence pay because of the termination of an employment relationship because of reasons not concerning employees. However, this also means that employers will not be able to make use of conveniences provided by the act, while dismissing their employees.

([600]) Ibid, p. 29.

B. In comparison with the previous legal state the information and consultation procedure was extended, which is obligatory for every employer who is planning group dismissals. The objective of consultations was defined by a new method, which takes into account employee interests and the problem of the protection of jobs. According to Article 2 of the act, consultation aims particularly at the possibility of avoiding or decreasing the extent of group dismissal, and to employee issues connected with such a dismissal — especially the chance of vocational retraining and gaining other employment. Thus, the first stage of the information and consultation procedure should include actions that aim at avoiding or limiting dismissals, and the second stage should include the search for methods and actions which would alleviate the effects of dismissals. Imposing the obligation of dialogue with the representatives of employees on employers, the legislator is hoping that, among other things, the arguments and propositions of employees will make it possible to avoid dismissals or limit their range, and if this is not possible, to alleviate the effects of dismissals through the use of such means as vocational training or job offers ([601]). It should be noted that during the recent decade solutions conducive to enabling an employer to find solutions to financial problems, that can be used in such cases, were introduced into Polish labour law. In professional literature they are called ‘crisis agreements’ or even ‘suspension agreements’, which allow the suspension of the application of autonomic sources of labour law for some time (Article 9§1 of the Labour Code), and the suspension of the application of employment contracts (Article 23§1a of the Labour Code). Both institutions were introduced to the Labour Code with the amendment of 2002.

C. In comparison to the previous act, the obligation of cooperation between employment organs and the employer who conducts collective dismissals has been significantly extended. In the previous act the obligation was basically limited to giving information about the intention of conducting group dismissals. Currently, the employer who intends to conduct group dismissals has an obligation to inform district employment services in a two-stage information and consultation procedure. First of all, the district employment agency should get a copy of the introductory information given by the employer to the representatives of employees, which is the iteration of the requirement of the directive, and guarantees that the employment organ will get the information sufficiently early. The employer is obliged to inform the district employment agency for the second time after reaching an agreement or issuing regulations, which define the rules of dismissals. Such a requirement was clearly defined in the directive and repeated relatively faithfully in Polish law. The obligation of notification facilitates the application of adequate means extenuating the results of planned dismissals by the employment organ. However, regulations on group dismissals do not specify what kind of actions should be undertaken ([602]).

The act precisely defines the content of information. According to Article 4, item 1 of the act an employer informs the district employment agency in writing on the following issues: accepted agreements regarding group dismissal — including the number of employed and dismissed employees and on the reasons of their dismissal; the period during which the dismissal is to be carried out; and on the conducted consultation about the intended group dismissal with company trade union or employees’ representatives selected in a method customary for the employer. The lack of condition, included in the directive, that an employer is obliged to give all

([601]) Ibid., p. 68.
([602]) Ibid., pp. 103–104.

the important information on planned dismissals and on consultation with employees can inspire some doubt ([603]).

Professional literature also points out the fact that the regulations of the act do not grant the organ any legal means which would allow it to react in the case of noted infringements. The method of shaping the situation of the district employment agency results in its passive role in the sole procedure of employee dismissals. The employment organ can neither intervene in the range of planned dismissals, nor modify their time limits depending on the particular case. Hence, the role of the district employment agency is generally narrowed down to operations in the local labour market ([604]).

D. The rights of employees dismissed because of reasons not concerning employees also underwent some modifications in comparison with the previously effective legal state. The fundamental right resulting from the termination of labour relations because of reasons not concerning employees is severance pay paid both to employees from group dismissals (Article 8 of the act) and dismissed individually (Article 10, item 1 in relation to Article 8 of the act). However, the method of calculating the amount of severance pay changed in comparison to the previously effective legal state. According to the previous act, the amount of severance pay depended on the general (total) job seniority of an employee. Currently, the amount of severance pay depends on job seniority at a given employer. Moreover, currently severance pay is paid irrespective of the fact that an employee gains income from other sources. Therefore, severance pay partly lost the character of social benefit because it is not currently dependent on the financial situation of the dismissed employee and his situation on the labour market connected with age, which is indicated by general job seniority. Currently, to a greater extent than before ([605]), severance pay can be treated as compensation.

The second benefit, to which employees dismissed within the framework of group dismissal are entitled, is the precedence of re-employment. According to Article 9 of the act, in the case of re-employment of employees within the same vocational group, the employer should employ the person, who he or she dismissed within the framework of group dismissal, if the employee reports his intention to retain employment relation with that employer within one year since the termination of labour relations. The regulation expresses the legislative attempt to create a real guarantee for the durability and stability of employment. It is a completion of the rule which says that an employee who performs his tasks well should not lose his job, unless there are circumstances that objectively justify the termination of employment relations. However, if the circumstances cease to exist, the employee should be given a chance to get back to work.

The new act considerably limited the range of entitlements to re-employment, relating them only to the employees who were dismissed within the framework of group dismissals. Employees dismissed individually were not included in the regulations, which is different from the previous act.

The support provided for employees dismissed because of reasons not concerning employees is not limited only to the regulations of the Act on Dismissals. Various forms of support, both financial and organisational, are provided by other legal acts, first of all by the Act on the Promotion of Employment. In the context of employability and protection of local labour markets Article 70, item 1 of the Act on the Promotion of Employment requires particular

([603]) Ibid., p. 105.
([604]) Ibid., p. 106.
([605]) Ibid., p. 142.

attention. According to the article an employer who intends to dismiss at least 100 persons within a three month period is obliged to negotiate the range and form of support for the dismissed employees with an adequate district employment agency, particularly concerning: employment agency, vocational guidance, trainings, and support in active search for work. In the case of a, so-called, monitored dismissal an employer is obliged to undertake actions aiming at providing employees — who are to be dismissed, during termination period or during six months after the termination of employment relations — with labour market services. The programme of such services can be realised by employment agencies or training institutions. It can be financed from various sources: by employers, employer and adequate public administration units, or on the basis of the agreement between legal persons and organisations with the participation of the employer.

Training benefits paid by the employer to persons who undertake actions aimed at retraining (Article 70, item 5 of the Act on the Promotion of Employment) are a concrete form of support for dismissed employees. Training benefits can be paid on the request of employees from training fund resources, if a given employer has one. The benefits are granted by an employer on the request of an employee and are valid after the termination of the labour relationship for the duration of training, but no longer than six months. During the period of training benefit an employee is entitled to support within the framework of vocational guidance. After the granting of training benefit by an employer, the district employment agency reimburses the cost of retirement and social insurance contributions, paid from the employer's resources, to the employer. The employer pays training benefits on a monthly basis, based on a contract concluded with the dismissed employee and beginning with the month in which the employee started his or her training.

3. Employee claim protection in the case of employer's insolvency

A significant support for employees dismissed because of reasons not concerning an employee's own conduct, is the system of employee claim protection in the case of employer's insolvency. Employee claim protection can be guaranteed in two ways — through the creation of a special fund that will guarantee the realisation of employee claims in the case of an employer's insolvency, and through granting employees the right to pursuit and enforce claims in bankruptcy and liquidation proceedings. Until 1993 Polish law only allowed the possibility of judicial enforcement of claims, which soon proved to be insufficient, after the transformation to market economy in 1989. In such circumstances the necessity of shaping new institutions aimed at the protection of employees against an employer's insolvency became a significant problem. With that aim, the act of 29 December 1993 created the Fund of Guaranteed Employees' Claims, which provided money for unsatisfied employee claims omitting bankruptcy, liquidation or enforcement procedures. The act was replaced with the Act of 13 July 2006 on the Protection of Employee Claims in the Case of Employer's Insolvency, which adjusts the existing the legal state — which is in force within that framework — to the requirements of Community Law.

From the point of view of the protection of employees, the most important problems are the scope of situations which would allow for the use of the Fund's guarantee, and the range of claims included in guarantees.

Situations which entitle employees to benefits from the Fund underwent numerous changes during the recent decade. In the primary version of the act the definition of insolvency included: the declaration of bankruptcy and other decisions concerning the application for the

declaration of bankruptcy (e.g. the dismissal of the application for the declaration of bankruptcy because the property of a bankrupt is insufficient even to cover the costs of court proceedings); the exclusion from business activity register on the start of business activity by a natural person; and real cessation of activity by the employer.

The act also created the chance to use the Fund's resources if employees are not paid for their work in connection with temporary financial problems of the employer. The chance to use those resources in the case of temporary insolvency of the employer played a significant role in rational protection of jobs against unjustified liquidation. According to M. Kabaj, that way about 400 000 jobs were saved in the Polish economy in 1994–2001 ([606]).

The amendment of the act of 2002 on the Protection of Employee Claims in the case of Employer's Insolvency, narrowed down the extent of situations which permitted the use of the Fund's resources in the case of real cessation of activity by the employer and in the case of temporary insolvency of the employer.

Further changes within that framework were introduced by a new Act on the Protection of Employee Claims in the Case of Employer's Insolvency. What is special in the new act is differentiation of domestic insolvency and foreign insolvency. Domestic insolvency occurs in the case of the declaration of employer's bankruptcy, which includes the liquidation of debtor's property, bankruptcy with the possibility to conclude an arrangement, the change of decision on the declaration of bankruptcy with the possibility to conclude an arrangement on the declaration of bankruptcy that includes the liquidation of the debtor's property, and the dismissal of the application on the declaration of employer's bankruptcy. The liquidation of the employer was lifted as a cause to use the Fund. In the place of liquidation several more detailed circumstances were introduced, such as the implementation of liquidation proceedings towards state enterprise or the ruling on the dissolution of commercial partnership. The new act also regulates cases in which the Fund can be used by employees employed by foreign employers.

What is more, the extent of claims guaranteed by the Fund also underwent numerous changes during the recent decade. In the original shape of the act the Fund guarantees covered: a one-time compensation for accident at work and occupational disease, remuneration, stoppage compensation, holiday compensation, compensation for the period of inability to work caused by disease, and for other excused absence from work. The amounts were paid according to the rule that the total sum did not exceed an average monthly remuneration. Fund guarantees also included severance pay for dismissals because of reasons not concerning employees, compensation for the reduction of the period of notice, and equivalent for annual leave.

The amendment of 2002 introduced changes unfavourable for employees in the rules regulating the extent of protected claims. Since then, Fund guarantees do not include an equivalent for annual leave and compensation for the reduction of notice period. However, guarantees do include social insurance contributions. The rule that the total amount of benefits from the Fund cannot exceed the amount of average remuneration was maintained.

The new Act on the Protection of Claims repeated the broadening of the catalogue of claims included in Fund guarantees — holiday equivalent and compensation for the shortening of notice period. Based on the new act the amount of paid claims cannot exceed the total amount of average remuneration.

([606]) M. Kabaj, op. cit., p. 46.

4. The promotion of employment and counteracting unemployment

A. The problem of state obligations within the framework of combating unemployment and the promotion of employment was regulated in Polish labour law outside the Labour Code, by another act. In 1994–2004 it was the Act of 14 December 1994 on Employment and Counteracting Unemployment. Its objective was to define the tasks of the state within the framework of alleviating the effects of unemployment, employment and vocational activation of the unemployed and other persons searching for work. The act provided a relatively narrow range of active forms of combating employment — an employment agency, training for the unemployed, intervention works and public works, and granting loans for starting business activity. Insignificant effectiveness of the solutions assumed in the act, increasing unemployment, and the intention of realising European Union policy — Lisbon Strategy in particular ([607]) — within the framework of employment forced the legislator to pass a new Act of the 20 April 2004 on the Promotion of Employment and Labour Market Institutions. The act came into force on the day of the Polish accession to European Union, i.e. 1 May 2004, which emphasises its relation with the realisation of the EU employment policy.

A general tendency visible in new regulations on the functioning of the labour market is a preference for active forms of counteracting unemployment. The Act on the Promotion of Employment provides various forms of support for persons without work, including employees at risk of dismissal or dismissed because of operational reasons ([608]).

The act differentiates labour market services and labour market instruments. Fundamental labour market services are: a) the agency of employment; b) EURES services; c) vocational guidance and information; d) support in an active search for work; e) the organisation of training. Furthermore, the act provides the following labour market instruments aimed at actively counteracting employment, in particular:

1) the reimbursement of the costs, for the entity who runs the business activity, of equipping or adding equipment to a post for delegated unemployed in the amount defined in the contract but not exceeding the quintuple amount of average remuneration;

2) the chance to grant one time resources to the unemployed for starting a business activity, including resources to cover the costs of legal support, consultation and guidance connected with the start of that activity, in the amount defined in the contract, however not exceeding the quintuple amount of average remuneration;

3) a one-time refund of the costs of paid social insurance contributions connected with the employment of the unemployed referred to the employer.

4) apprenticeship, vocational on-the-job training or employment within the framework of interventional or public works.

Labour market tools that support fundamental labour market services are:

a) funding the costs of communication for the employer who offers the work or for the place of work, costs of apprenticeship, vocational on-the-job training, training or classes within the framework of vocational guidance — outside a permanent place of residence — connected with the delegation by the district employment agency;

([607]) Lisbon Strategy (Agenda) was passed at the Summit of the European Council in Lisbon on 23–24 March 2000.

([608]) Compare: J. Jończyk, Promocja zatrudnienia przeciw bezrobociu, PIZS 2004, No 9, p. 2.

b) funding the costs of accommodation on-the-job for the person who took up employment or other gainful work, apprenticeship, vocational on-the-job training or training outside the place of permanent residence, in the case of delegation by a district employment agency;

c) co-financing for the equipment of a post, for starting business activity, the costs of legal support, consultation and guidance;

d) reimbursement of the costs of already paid social insurance contributions connected with the employment of the delegated unemployed;

e) funding activation benefits.

The objectives and means provided by the Act on the Promotion of Employment fall in with the guidelines for Poland presented in the recommendation of the EU Commission of 14 October 2004 on the execution of employment policies of member countries ([609]). The effectiveness of those actions is difficult to assess. However, it needs to be pointed out that the number of employments in 2004 (1 567 900) exceeded the number of dismissals (1 498 500) ([610]).

B. The Polish legislator also introduced solutions that support the employment of persons who are at particular risk of dismissal, and have problems with finding employment.

First of all, employee entitlements connected with parenthood need to be pointed out in that context. The provision of that protection is mainly realised through the prohibition of dismissal and termination of employment relationships with pregnant employees and employees during their maternity leave (Article 177 of the Labour Code). Term contracts which would be terminated after the third month of pregnancy of the employee, are extended by the law until confinement (a contract for a probation period that does not exceed one month and a contract for substitution are two exceptions). Special protection of the durability of employment relationships for pregnant women and women during maternity leave was regulated in Polish Labour Code from the beginning, and did not change significantly. Female employees (and women included in sick leave insurance for other reasons) are paid a maternity allowance amounting to 100 % of their remuneration for the time of their maternity leave.

Regulations on the length of maternity leave underwent significant changes. For a long time, i.e. until 2001, maternity leave amounted to 16 weeks after the first birth, 18 weeks after subsequent births, and 26 weeks in the case of giving birth to more than one child at one time. In 2001 the amount of maternity leave was considerably extended and amounted to 26 weeks after the first and every following birth, and 39 weeks in the case of giving birth to more than one child at one time. However, in the following year (2002) — because of budgetary problems with financing maternity benefits for extended maternity leaves — maternity leave was shortened to the state it had before the change in 2001. This legal state was effective until 2006, when the amount of maternity leave was extended again up to 18 weeks after the first birth, and 20 weeks after every following birth. In the intention of the legislator, the change and financial support of mothers (so-called 'becikowe') is to help halt the declining birth rate.

Simultaneously, several solutions need to be pointed out, which aim at facilitating the reconciliation of professional life with parenthood, and a more even distribution of parental obligations between women and men. First of all, men were given the chance to make use of a part of maternity leave. According to Article 180, Section 4 of the Labour Code, after 14 weeks

([609]) 2004/741/WE

([610]) M. Kabaj, op. cit., p. 48.

of maternity leave after giving birth a female employee can relinquish the remaining part of maternity leave to the male employee, who is the father of the child. Moreover, the amendment of 2002 of the Labour Code introduced Article 186§3 of the Labour Code according to which, on the request of an employee who takes care of a child up to three years old, the employer is obliged to decrease the working time of the employee. That solution, on one hand, allows the continuation of employment and, on the other, to pay more time to childcare. Both men and women are entitled to make use of that solution. The changes introduced by the legislator in the regulations concerning parental leave are also of significance ([611]). First of all, since 2001 both men and women are entitled to parental leave. What is more, currently during parental leave it is possible to work for one's own employer or another, however to such an extent that it will not affect the ability to take care of the child. Still, it seems that the Polish legislator does not pay sufficient attention to the problem of the reconciliation of professional life with parental obligations, and the discrimination of young mothers is an embarrassing problem of the Polish labour market.

The second group of employees, who are vested in special regulations aimed at the promotion and protection of employment, are the disabled. The rules concerning the employment of the disabled are regulated by the Act of 27 August 1997 on Vocational and Social Rehabilitation and the Employment of Disabled Persons ([612]). The act regulates working conditions with preference, considering the state of health of disabled employees. One needs to pay particular attention to shorter daily and weekly working time norm, which is shorter than the generally binding norm; additional annual leave; the right to additional breaks during work; and a ban on the overtime employment of the disabled.

Simultaneously, to balance those privileges and to encourage employers, the Act provides a number of entitlements and privileges for employers who employ disabled employees. The following entitlements can be listed: the decrease or exemption from paying contributions to the State Rehabilitation Fund for the Disabled, the reimbursement of a part of Social Insurance contributions, reimbursement of the costs of the creation of jobs adjusted to the employment of the disabled, and co-financing of the remuneration of those persons.

An alarming increase in unemployment among young persons persuaded the Polish government to implement a 'First Work' programme in June 2002. The fundamental objective of the 'First Work' programme was to increase the chances for young people to gain vocational experience. The 'First Work' programme facilitated, among other things, obtaining knowledge of the contemporary labour market, planning a vocational career, the further increase of vocational qualifications, acquiring practical skills essential for an effective search for work, acquiring vocational experience, and taking up employment.

The programme was aimed at unemployed persons below the age of 25 and to university graduates up to the age of 27 (in the case of persons registered as unemployed during the period until the end of 12 months since graduating, who are referred for apprenticeship). Within the framework of the programme they could also make use of labour market institutions and tools. Simultaneously, in order to encourage employers to employ graduates, the legislator decreased the amount of minimum remuneration for those persons during the first two years of employment.

All of the above described actions of employers are consistent with the guidelines for Poland from the recommendation of the Council of 14 October 2004 on the realisation of

([611]) Unpaid leave is given in order to take personal care of child.
([612]) Journal of Laws 1997, No 123, Item 776 with further modifications.

employment policies of member countries, where attracting an increased number of persons to the labour market and the facilitation of taking up employment by everyone was indicated as one of the priorities.

In the opinion of the government, the Polish employment policy is generally consistent with the guidelines of the Lisbon Strategy. 'The actions undertaken within the framework of programmes as 'Entrepreneurship First' (Przede wszystkim przedsiębiorczość) and 'First Work' (Pierwsza praca) respond to the guideline concerning the facilitation of starting and conducting active forms of counteracting unemployment' ([613]).

([613]) 'Strategia lizbońska. Droga do sukcesu zjednoczonej Europy' (Lisbon Strategy. Road to the Success of United Europe). Developed by European Integration Committee, Warsaw 2006. Compare: Report 2006 on the Implementation of National Reform Programme for the Realisation of the Lisbon Strategy accepted by the Council of Ministers on 13 October 2005.

Part IV. In the direction of increased flexibility of labour law

Introductory remarks

One of the most visible trends in the development of labour law in Poland during the recent decade has been the attempt to increase its flexibility and create the possibility for parties to adjust working conditions to their needs. Particularly stressed within that framework were the needs of employers operating in the conditions of market economy. The attempt to introduce solutions, which would allow employers to adjust the state of employment to the changing labour demand was particularly visible in the change of regulations concerning working time, and the introduction of new solutions within the framework of non-typical employment forms. Moreover, expansive development of self-employment also needs to be noted. The development of non-typical forms of employment and self-employment were also to facilitate the process of the creation of jobs, and were conducive to the restriction of unemployment. This part will present the following issues: working time (1), annual leave (2), fixed term employment contracts (3), part-time employment (4), temporary work (5), telework (6), and self-employment (7).

1. Working time

A very clear drive towards the increase in flexibility and adaptability within the framework of employment relations is evident in working time regulations. During the recent decade the regulations were often amended, in an attempt to adjust to the needs of market economy and the creation of the possibility of shaping working time according to the needs of parties.

However, what needs to be pointed out in the first place is the fact that in 1995–2005 a process of gradual shortening of working time took place, and a departure from a rigid weekly working time norm towards an average norm. Until recently, in 1995, a daily eight hour norm and a weekly 46 hour norm were in force (Article 129 of the Labour Code). The amendment of the Labour Code of February, which was introduced in 1996, shortened the weekly norm to 42 hours, and it was an average norm during a three month reference period. Further amendments led to the shortening of the norm to 40 hours, and to the extension of the basic settlement period to four months (the influence of 2003/88/EC Directive is clearly visible here). Additionally, the possibility to extend the basic settlement period was introduced in the case of agricultural and breeding work, and guard of property or personal guard. In the above cases a settlement period can be extended to six months, and if there is an additional justification for non-typical organisational or technical conditions that influence the process of work, a settlement period can be extended to twelve months (Article 129, Section 2 of the Labour Code).

Moreover, the rule of a five-day working week developed during the recent decade. In the beginning a five-day working week was achieved through the introduction of a defined number of days off (other than Sunday) in working time schedules, and then a five-day working week was accepted as a basic working time norm. Nevertheless, during all that time an eight hour working day remained the norm.

Very significant changes, aimed at making working time rules more flexible, were introduced in the regulations concerning working time organisation. First of all, the wide

admissibility of equivalent working time needs to be noted. Equivalent working time consists of the possibility to extend daily working time, on condition that the employee will be compensated with additional free time, so as not to exceed the average weekly working time norm. Before 1996 equivalent working time was regulated by way of an ordinance of the Ministry of Labour and Social Affaires, had restricted application, and could have been used only in cases enumerated in the ordinance. Extended application was permitted by the amendment of 1996. According to the previous content of Labour Code regulations, if it was justified with the kind of work or its organisation, working time schedules, which allowed for the extension of working time to 12 hours per day were applicable, and in the case of vehicle transport and communication — up to ten hours per day. Working time in those schedules could not exceed 42 hours per week, on average, in the established settlement period amounting to one month. The following years brought further amendments to equivalent working time. Currently, equivalent working time is defined by the Labour Code in three versions. A basic version, regulated by Article 135 of the Labour Code, provides that if justified with the kind of work or its organisation, the extension of daily working time is admissible, however no longer than to 12 hours, during a settlement period no longer than one month. The second version provides the possibility of extending the daily working time norm up to 16 hours in the case of work involving the supervision of appliances or connected with partial readiness to work (Article 136 of the Labour Code). Whereas, the third version provides the possibility of extending the daily working time up to 24 hours with regard to persons employed to guard property or for personal security, as well as the employees of fire departments or emergency services. Labour Code regulations concerning equivalent working time are not used in the case of drivers, whose working time was defined by another act ([614]).

Furthermore, during the recent decade the so-called non-consecutive working time — where daily working time can be divided by a break, which is not included in working time — also underwent significant changes. It was introduced into the Labour Code in an amendment in 1996 but its application was limited only to vehicle transport and communication drivers, where in particularly justified cases non-consecutive working time was applicable, but it could not include more than one break lasting no longer than six hours during a 24-hour working day. Significant changes within the framework of the regulation of non-consecutive working time were brought about by the amendment of 2002 to the Labour Code and considerably extended the range of persons covered by that system, simultaneously regulating the conditions of use of that working time. In its current shape Article 139 of the Labour Code defines that, if justified by the kind of work and its organisation, a non-consecutive working time system can be introduced according to the previously determined schedule, which allowed only one break during 24 hours, which lasts no longer than five hours. The break is not included in working time. However, for that break an employee is entitled to remuneration amounting to half of the stoppage pay. Non-consecutive working time is introduced in the collective agreement. As far as the regulation is concerned, it is not admissible to introduce a non-consecutive working time in any different way, in work regulations or in an employment contract for example. In professional literature the introduction of the principle that non-consecutive working time can be introduced only by way of collective agreement is viewed as a factor that significantly, however unnecessarily, limits the possibility of the real use of that organisation of working time ([615]). Currently, in Poland the level of unionisation is relatively low, particularly in the private sector, which means that there are few

([614]) The Act of 16 April 2004 on the Working Time of Drivers (Journal of Laws of 2004, No 92, Item 879, with further modifications).

([615]) K. Rączka, in: Kodeks pracy. Komentarz, ed. Z. Salwa, Warsaw 2004, p. 524.

collective agreements concluded. Hence, most of the employers cannot make use of non-consecutive working time.

The introduction of working time defined by tasks was a significant step facilitating the flexibility of working time regulations. Working time defined by tasks denotes that the employee is given tasks, which he or she is accounted for, however, the employer does not supervise him or her in the progress of work, and the working time of the employee is not recorded. The system assumes a high degree of employees' independence in the organisation of their working time. Working time defined by tasks was introduced into the Labour Code for the first time with the amendment of 1996. According to the then regulations in cases justified with the kind of work and its organisation, employee working time can be defined by the range of their tasks. The tasks should be defined in such a way that employees can carry them out within the framework of basic working time norms. The amendment of 2002 allows for a broader use of working time defined by tasks. In comparison with the previous shape of the regulation, basic factors for the introduction of working time defined by tasks were liberalised. In the previous shape of the regulation, both factors had to be fulfilled: the kind of work and its organisation, however according to the amendment only one factor suffices — either the kind of work or its organisation. Moreover, an additional and alternative base was introduced — the place where the work is done — which facilitates the use of that working time system in the case of telework.

What also needs to be noted is the fact that the amendment of 2003 to the Labour Code introduced two new working time systems, used only on the request of employees: reduced weekly working time and weekend working time. In the first case, regulated by Article 143 of the Labour Code, the employee works less than five days per week, but the extension of his daily working time to 12 hours is admissible. In the case of weekend working time (Article 144 of the Labour Code) the employee works only on Fridays, Saturdays, Sundays and holidays. Moreover, that system allows for the extension of daily working time to 12 hours. What is more, the possibility of establishing an individual working time schedule in employment contract — on the request of the employee — is clearly forecasted (Article 142 of the Labour Code). However, it has only confirmed previously used practice within the framework of the freedom of employment contracts.

Furthermore, significant changes — aiming at increasing the flexibility of working time — were also introduced in regulations on overtime. First of all, originally restrictive limits of overtime were liberalised. Before the amendment of 1996 they amounted to four hours overtime per day and up to 120 hours per calendar year. In 1996 the limit was extended to 150 hours per calendar year. In 2002 a regulation was introduced, according to which an employer can define another number of overtime hours than 150 per calendar year in collective agreement, work regulations or in the employment contract, if the employer is not included in a collective agreement or is not obliged to establish work regulations. However, the increase in the limit of overtime hours in this mode needs to be carried out with observance of the rule that working time, including overtime work, cannot exceed 48 hours per week on average in a given settlement period ([616]).

The rules concerning remuneration for overtime work also developed. For a long time the basic form of compensation for overtime work was additional pay. The compensation for overtime work through granting additional time off was only admissible on the request of an

([616]) As practice shows Polish employers eagerly make use of overtime employment possibilities. In 2005 the number of hours worked in Poland amounted to 2000. The average number of hours worked in EU 25 amounted to 1 600 — 400 lower than in Poland (M. Kabaj, op. cit., p. 49).

employee. The changes introduced into the Labour Code in 2002 within that framework facilitated granting time off in exchange for overtime also without an employee's request. However, in such a case the employer grants time off up to the end of a settlement period at the latest, in the amount of half as much time than the number of overtime worked; it cannot cause any restrictions in monthly remuneration for full time work.

The amount and rules of paying additional remuneration for overtime work also underwent changes. Until the amendment of 2002 came into force a regulation applied that for the first two hours of overtime work an employee was granted additional pay amounting to 50 % of his regular remuneration, and for successive overtime hours — as well as overtime during the night, Sundays and holidays — an increased rate was applicable amounting to 100 % of the regular pay. The amendment of 2002 brought about significant changes within that framework: the differentiation between pay for the first two overtime hours and the remaining ones was liquidated, and one rate for overtime bonus was established, which amounts to 50 % of pay. Only employees who work overtime during nights and on days off are entitled to the increased rate amounting to 100 % of the regular pay. All the changes contributed to the decrease in remuneration for overtime work.

The changes in working time regulations, which are the manifestation of adjusting Polish working time regulations to the 2003/88 EU Directive also need to be noted. The changes were introduced to the Labour Code first and foremost with the amendment of 2003, and consisted in the introduction of a maximum 48 hour weekly working time norm (Article 130 of the Labour Code); introduction of 11 hours of rest per day and 35 hours of rest per week (Article 131 and 132 of the Labour Code); and changes in the regulation of night work. Polish Labour Code regulations can currently be recognised as fully adjusted to the demands of the Directive.

2. Annual leave

Regulations concerning annual leave underwent numerous changes in 1995–2005. The changes were in two directions. Firstly, an increase in entitlements to leave for employees, and secondly an increase in the flexibility and rationalisation of regulations concerning annual leave.

First of all, the extension of annual leave needs to be stressed. Before the amendment of 1996 the Labour Code determined four thresholds of annual leave: after a year of work, 14 working days; after three years of work, 17 working days; after six years of work, 20 working days; and after 10 years of work, 26 working days. After the introduction of the 1996 amendment, annual leave amounted to: 18 working days after one year of work, 20 working days after six years of work, and 26 working days after ten years of work. Another significant change in regulations concerning the amount of annual leave was introduced with the amendment of 2003 connected with the adjustment to the 2003/88 Directive, and consisted in the liquidation of 18 days of annual leave. *De lege lata* two thresholds are applicable: 20 days if the employee has worked less than ten years, and 26 days if the employee has worked at least ten years.

Moreover, regulations also developed concerning the acquisition of an employee's right to first leave ([617]). Before the amendment of 1996 to the Labour Code, an employee acquired the right to his or her first leave after the first year of work. The amendment of 1996 introduced a rule that after six months of work an employee acquires the right to his or her first leave

([617]) The first leave in an employee's professional career.

amounting to half of the leave, to which he or she is entitled, and the right to the second part of that leave is acquired after working for a full year. Further changes in regulations concerning the right to the first leave were introduced by the amendment of the Labour Code of 2003. In its current shape Article 153 of the Labour Code specifies that an employee acquires the right to the first leave after one month of work in the form of 1/12 of the leave he or she is entitled to. That regulation was introduced in order to adjust Polish law to the guidelines resulting from judicial decisions of the Court of Justice of the European Communities ([618]).

Among the changes favourable for employees is the liquidation of regulations in force before 1996 that determined the acquisition of the right to leave on the method of the termination of employment relations with the previous employer (e.g. employees whose employment relation was terminated without notice through employee's fault or expired because of quitting work, were deprived of the right to leave). Moreover, the number of cases, in which financial equivalent was paid for annual leave decreased, which strengthened the rule of granting actual leave.

The introduction of the institution of proportional annual leave needs to be mentioned among the changes that aimed at the rationalisation and the increase of the flexibility of regulations concerning annual leave. The rule is applicable mainly in cases when an employee changes the employer within one calendar year, and aims at an even and proportionate burdening on both employers with the obligation of granting leave to that employee (Article 155§1 of the Labour Code). According to the regulations each employer is obliged to grant a leave to an employee proportionately to the time worked for each of the employers in a given calendar year.

The regulations concerning the use of annual leave also underwent numerous changes. The changes aimed mainly at the rationalisation of regulations. *De lege lata* is the regulation, effective with the introduction of the amendment of 2003, on giving annual leave only on days which are working days for the employee according to his working time schedule (Article 154§2 of the Labour Code). That eliminated the problem, which occurred in formerly operative regulations on granting leave on working days, concerning granting leave to employees who work on Sundays. Furthermore, leave is granted in hours according to working the time schedule that applies to an employee on a given day. At the same time, the following conversion rate is used — one day of leave is equal to eight hours. It is particularly significant with reference to employees providing work in working time systems with shift daily working time and workers employed part time. By way of example, if an employee employed in equivalent working time system took two days off — during which his or her daily working time amounted to 12 hours — according to the rule of converting leave to hours, during those days he or she was granted 2 x 12 hours of leave. Assuming that one day of leave equals 8 hours, that means the employee used 3 days of leave during that time [(2x12): 8 = 3].

The method of determining the date of using leave by the employee was deformalised. Generally, until the amendment of 2002 came into force all employers were obliged to determine a leave schedule after consulting with company trade unions. The amendment of 2002 introduced significant changes in that respect. First of all, according to the current shape of Article 163 of the Labour Code, the obligation of determining a leave schedule rests currently only on those employers who have company trade unions. The employers who do not have such company trade unions can determine the date of leave in individual agreement with the employee. The

([618]) Case C-173/99 The Queen p. Secretary of State for Trade And Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BETCU), See ruling 2001, p. I-4881.

employers who have company trade unions are still obliged to develop a leave schedule, however they do not have to negotiate it with company trade unions.

3. Fixed-term employment contracts

One of the dominant tendencies present during recent years in the Polish labour market is the rapid increase in interest in concluding term employment contracts, fixed-term contracts in particular. According to Article 25 the Polish Labour Code distinguishes three kinds of temporary employment contracts: the contract for a probationary period, the fixed-term employment contract and the contract needed to perform certain work.

The objective of a contract for a probationary period is to enable both parties to the employment relationship to prove themselves. It cannot be concluded for longer than three months. The contract can be concluded between the same parties only once.

The objective of a contract for the period needed to perform certain work is to facilitate performance of a particular task and to fix the time in which it should be completed. The duration of such a contract is connected with the duration of the particular task for which it was concluded. This type of contract is terminated on the day on which the work is completed. In practice such contracts are rarely used, since these contracts cannot be terminated by notice and are therefore considered to be a greater risk by employers.

Currently the fixed-term contract has the greatest practical significance among temporary contracts. The number of employees employed on fixed-term contracts in 2001 amounted to 1 200 000 (12.7 %), and by the end of 2005 to 2 800 000 (27 %). In this respect Poland currently occupies the second place among 30 OECD countries in the share of employees engaged under fixed-term contracts ([619]). Therefore, this form of employment contract is given most attention in this report.

For a long time, the fixed-term contract was viewed in professional literature as a stable form of employment, one that afforded employees a guarantee that their employment contract would last during the whole period of its duration; this resulted from the fact that the termination of these fixed-term contracts was only permissible in exceptional situations.

However, the perception of the fixed term contract has changed radically with the arrival of an open market economy. Currently, it is viewed by employers as a very flexible form of employment, one which gives them a lot of freedom in shaping employment and adjusting it to their needs.

Polish law does not define the situations in which it is admissible to conclude fixed-term contracts. There is no listing of specific types of work or vocations where a fixed-term contract can be applied. Accordingly, such contracts may be concluded in any of the circumstances where an employment contract is generally possible ([620]). The precondition for a fixed-term contract is an agreement between the parties on the date of its termination.

The fixed-term employment contract is now viewed as a flexible form of employment mainly because of the facility with which it can be terminated under current regulations. The termination of a fixed-term contract does not have to be justified, nor made the subject of consultation with the trade union that represents employees. However, it should be noted that not every fixed-term contract can be terminated by notice. In order for the termination to be

([619]) Compare: M. Kabaj, op.cit., p. 47.
([620]) Ł. Pisarczyk, Różne formy zatrudnienia, Warsaw 2003, p. 66.

admissible two conditions need to be fulfilled, which are defined in Article 33 of the Labour Code:

- The contract must be concluded for a period longer than six months;
- Both parties clearly have to provide the right to termination by notice (clause on the admissibility of termination) in the content of the contract.

If all the above-mentioned conditions are fulfilled each party of the employment relation can terminate the contract by notice before the expiration of arranged date. As practice shows, generally employers do not have problems with imposing such content on employees, and it is usually the case that employers aim at including such clause in the content of employment contract ([621]). At this point it is worth stressing that Article 33 of the Labour Code has been binding in that shape basically since the beginning of the Labour Code operation (i.e. since 1975). However, a significant change in its interpretation was brought about during the 1990s, which contributed to a significant increase in the flexibility of that regulation. Former teachings of labour law were dominated by the view that, according to Article 33 of the Labour Code, the clause on the admissibility of early termination of a fixed-term contract could be introduced into the content of an employment contract only at the point of its conclusion (not later), and the parties could use it only after six months of its duration ([622]). This relatively restrictive interpretation of Article 33 of the Labour Code was changed by two judgements of the Supreme Court in the course of the 1990s. In these judgements the Supreme Court stated that an employment contract of a longer duration than six months might be terminated if each of the parties gave one another two weeks notice before the six months had elapsed (Article 33 of the Labour Code) ([623]), and had forecast the possibility of earlier termination with two weeks notice not only at the moment of concluding the contract but also within its duration ([624]). Hence, the current perception of the fixed-term contract as a flexible form of employment is to a large extent a consequence of judicial decisions of the Supreme Court, which significantly weakened the durability of that contract as originally guaranteed by Article 33 of the Labour Code. What also needs to be added is the fact that the legislator introduced further exceptions to that provision. Article 5 of the Act on Special Rules of the Termination of Employment Agreement Because of Reasons Not Concerning Employees is relevant in this regard. It allows for earlier termination of such contracts in the case of group dismissals and individual dismissals because of reasons not concerning employees (Article 10 in connection with Article 5 of 7th Act).

The increasing popularity of the fixed-term contract, the practice of employers imposing it on employees, and the requirements of the 99/70/EC Directive caused the legislator to consider introducing provisions in the Labour Code to protect employees against the use of successive fixed-term employment contracts. The restrictions are now included in Article 25§1 of the Labour Code and were first introduced through with the amendment of 1996. According to that regulation, concluding another fixed-term contract is synonymous in legal effects to entering into a contract of an indefinite duration, if the parties had already concluded fixed-term employment contracts twice before for two successive periods, inasmuch as the break between the termination of the previous contract and conclusion of the next did not exceed one month. In practice, the

([621]) Z. Hajn, Atypowe formy zatrudnienia in: Europeizacja polskiego prawa pracy, ed. W. Sanetra, Warsaw 2003, p. 72.

([622]) H. Lewandowski, Rodzaje umowy o pracę in: Instytucje stosunku pracy, Studia i Materiały IPISS 1974, nr 7, p. 16; J. Brok i J. Szczerski in: Kodeks pracy. Komentarz, Warsaw 1977, p. 114; A. Filcek in: Kodeks pracy z komentarzem, Warsaw 1979, p. 63.

([623]) Resolution of 7th September 1994 I PZP 35/94OSNAPIUS 1994, nr 11, item 173.

([624]) Resolution of 14 June 1994 I PZP 26/94OSNAPIUS 1994, nr 8, item 126.

restriction did not prove to be very burdensome. Employers often circumvented the regulation by extending the closing date of already concluded contracts (so formally it remained the same contract). Moreover, the Supreme Court's judgements (referred to above) were also conducive to this situation ([625]). However, even after the easing of these restrictions the regulatory position was strongly opposed by employers. Under their pressure, the use of Article 25§1 of the Labour Code was suspended by the amendment of 2002. The suspension was in force until the day of the Polish accession to European Union, at 1 May 2004. During that period Polish law did not provide any restrictions in concluding fixed-term employment contracts. The regulation that restricted the use of such contracts came back in force on 1 May of 2004. Simultaneously — before its 'revivification' — the legislator introduced changes to Article 25§1 of the Labour Code, which were to give it more concrete effect. First of all, a regulation was introduced which explicitly states that extending the duration of a fixed-term contract is equivalent to concluding a new fixed-term contract, thereby significantly limiting the possibility of attempts to circumvent that regulation. At the same time, the legislator introduced some exclusions to the scope of the use of Article 25§1, Section 1 of the Labour Code, which includes contracts for substitutions, contracts for seasonal work, casual labour and cyclical tasks.

A fixed-term contract concluded in order to substitute an absent employee throughout the duration of his absence, the so-called 'contract for substitution', is a flexible solution, introduced by the amendment of 2002. It is different from a typical fixed-term contract insofar as it can be concluded only for the purpose of substituting for another employee during his excused absence at work, and in the way in which the closing date of the contract is arranged. Whereas in the case of a typical fixed-term contract, an exact indication of the closing date is generally required, it is sufficient in the case of a contract for substitution to link the closing date to the anticipated date for the return to work of the substituted employee. The period of employment is determined in relation to the duration of the absence of the substituted employee. A characteristic feature of a contract for substitution is the relative ease of its termination — according to Article 33§1 of the Labour Code such contracts may be terminated with only three days notice.

To sum up the reflections on the changes within the framework of fixed-term employment contracts, the solutions introduced in 2003 under the influence of 99/70/EC Directive are worth mentioning. First of all, the legislator introduced a clear prohibition of discrimination against workers employed under fixed-term contracts. Accordingly, it is prohibited to treat employees on fixed-term contracts any differently than comparable workers on indefinite contracts are treated, as regards their employment relationship, working conditions, conditions of remuneration, access to training and vocational advancement (Article 11§3 and Article 18§3a of the Labour Code).

4. Part-time employment

Another non-typical form of employment, which underwent significant changes during the previous decade is part-time employment. As research indicates, that form of employment is increasingly popular in practice. In 1997 part-time employment was used in 57.6 % of the firms, in 2001 66.3 % of the enterprises decided on that form of employment, and in 2003 63.6 % of the employers ([626]) made such a declaration.

([625]) Z. Hajn, op. cit., p. 71., also in: the sentence of the Supreme Court of 17 November 1997. I PKN 370/97, OZNAPISU 1998, no 17, Item 506.

([626]) W. Dymarczyk, Organizacja czasu pracy, in: Elastyczne formy zatrudnienia i organizacji pracy a popyt na pracę w Polsce, ed. E. Kryńska,

First of all, it needs to be pointed out that, generally, there are no restrictions in Polish labour law regarding the possibilities of part-time employment. Apart from some vocational groups, in which case the law defines some restrictions (e.g. teachers), the reduction of working time by employment contract was and is admissible. The only criterion of the recognition whether an employee is employed part time is a lowered average weekly norm in comparison with the norm of persons employed full time ([627]).

Although, as a rule, Polish labour law did not put any restrictions on the possibilities of part-time employment, for a long time it did not regulate that form of employment. Generally, the same regulations applied to part-time employees, as to full-time employees, only with some minor modifications. At that point the changes were brought about by the amendment of 2003 of the Labour Code, clearly inspired by the 97/81 Directive of the European Union.

The amendment in 2003 of the Labour Code standardised general requirements of the conditions for part-time employees. According to Article 29^2 of the Labour Code concluding an employment contract that provides part-time employment cannot cause the determination of an employee's conditions of work and pay to be less favourable in comparison with employees who provide the same or similar work full time, taking into consideration the proportion of remuneration and other benefits connected with performed work. The regulation requires shaping the rights and duties of part-time employees accordingly to the rule of pro rata temporis. Hence, a disproportionate increase in duties or decrease in the rights of such an employee is forbidden ([628]). The regulation is supported by the prohibition of the discrimination of part-time employees defined in Article 11§3 of the Labour Code. Because of that employees who perform part-time work cannot be treated in a less favourable way than those employed full time, unless different treatment is justified with objective reasons ([629]).

The amendment of 2003 of the Labour Code also introduced regulations concerning overtime work performed by persons employed part time. Formerly, academics and the body of rulings of the Supreme Court held a view that overtime work performed by the part-time employed was not additionally paid, unless working time norms defined for the full-time employed were exceeded. According to the judgement of 9 August 1985 (PRN 643/85, OSNCP 1986, 5, item 79) a person employed part time was not entitled to additional remuneration for overtime work, which exceeded the norm defined in his or her contract. Additional remuneration for overtime work is applicable only when daily or weekly working time norms defined in operative regulations are exceeded. Professional literature stressed that this line of the body of rulings, which was in force for a long time, led to the discrimination of part-time employees ([630]).

The change of that state of affairs came with the introduction of Article 151, Section 5 of the Labour Code, according to which parties define the permitted number of overtime hours of work for a part-time employee in his or her contract, and in the case of exceeding that time the employee is entitled to additional remuneration, apart from regular pay. In practice, employers ensure that the number of hours after which an employee gains the right to additional remuneration is as high as possible, hence, the discrimination of part-time employees is maintained in this respect. The project of the Labour Code provides that work exceeding agreed working time in every case will be treated as overtime work.

Warsaw 2003, p. 175.

([627]) M. Oleksyn, Czas pracy w praktyce, Warsaw 2003, p. 19.

([628]) M. Gersdorf, K. Rączka, J. Skoczyński, Kodeks pracy — komentarz, ed. Z. Salwa, Warsaw 2004, p. 171.

([629]) L. Florek, Europejskie prawo pracy. Warsaw 2003, p. 98.

([630]) M. Gersdorf, Niepełny wymiar czasu pracy (projekt konwencji i zalecenia MOP), PIZS 1994, nr 1, s. 30; Por także M. Oleksyn, Zatrudnienie w niepełnym wymiarze czasu pracy, w: Prawo pracy a bezrobocie, red. L. Florek, Warszawa 2003, s. 49.

The amendment of 2003 of the Labour Code also brought about changes within the framework of the regulation of entitlements to leave for part-time employees. According to Article 154, Section 2 of the Labour Code, the amount of leave of the part-time employee is established proportionately to his or her working time, taking the general amount of leave defined in Article 154, Section 1 of the Labour Code as a base; an incomplete one day leave is rounded up to a full day. Therefore, for example, a person employed part time (1/2), who has 12 years of job seniority will have the right to 13 days of annual leave. A new formula of determining the amount of annual leave for part-time employees is the consequence of accepting an hourly method of granting annual leave· According to Article 154§2, Section 1 of the Labour Code leave is granted on days, which are working days for the employee according to his working time schedule — by the hour — which corresponds to daily working time of the employee. According to Article 154§2, Section 2 of the Labour Code one day of leave corresponds to eight hours of work. Hence, if a part-time employee is employed in such a way that he or she works eight hours only on some days of the week (e.g. Monday, Wednesday, Friday), he or she will be granted leave only on the days which are working days for her/him (i.e. Monday, Wednesday and Friday). That way the total number of days off is higher than the number of the days of leave that was used (e.g. an employee took three days off, which was granted on Monday, Wednesday and Friday — working days for the employee — and owing to that the total number of days off equals 5 — from Monday to Friday). Whereas, if a part-time employee is employed in the system of reduced daily working time — i.e. works every day but for less hours — he or she is granted a leave on all those days but maintaining the rule that one day off equals eight hours of work. Therefore, if the employee employed part-time (1/2) works four hours a day and wants to get three days off — Monday, Wednesday and Friday — he is granted a leave on those days, but four hours each day, which means that he or she will use 1.5 day of leave (3 x 4): 8 = 1.5.

Another change in legal regulation of part-time work is the obligation to inform employees, in a way customary for a given employer, about the possibility of full-time and part-time employment, which was introduced by the amendment of 2003 (Article 94 of the Labour Code). Also Article 29^2, Section 2 is conducive to facilitating such transitions, according to which the employer, if possible, should take into account the changes in working time determined by the employment contract.

5. Temporary work

The regulation of temporary work is an important achievement of labour law during recent years. Before the changes of the political system in 1989 temporary work was unfamiliar in Poland. It did not came to Poland until the 1990s, after the introduction of a market economy. For a long time that method of work was not regulated in any particular way.

The first regulations were limited to the issue of health and safety at work regulations. Article 298^2 of the Labour Code, introduced to the Labour Code in 2001 ([631]), obliged the employer/user to provide his or her employees with safe and healthy working conditions. Moreover, employment agencies — that, among many, refer employees to work in other EU countries —

([631]) Journal of Laws 2001, No 128, Item 1450.

were forced to provide working conditions no less favourable than the conditions in the country where an employee is to provide work ([632]).

Furthermore, through the Act of 20 December on the Change of the Act on Employment and Counteracting Unemployment, and the Act on Educational System ([633]) temporary employment agencies were acknowledged as employment agencies, next to recruitment agencies and personal guidance agencies, and the object of their activity was defined by the act as services within the framework of the employment of workers with the aim to rendering them available to a third party, who can be a natural or legal person called the 'entrepreneur/user'. The provision of that kind of services was clearly reserved for temporary employment agencies. The employer, who wants to use temporary employment is obliged to give the agency information concerning the kind of work, expected qualification of a potential employee, and working conditions. The employer/user also gained the right to give tasks to the employee of a temporary employment agency, and control its execution ([634]).

A new and broad regulation of temporary work was introduced by the Act of 9 July 2003 on the Employment of Temporary Employees ([635]). A model for that act was the 91/383/EWG Directive of the 25 June 1991, and the project of the EU Directive of 2002 concerning temporary employment.

The act standardises in detail the method of concluding a contract between a temporary employee and a temporary employment agency. According to Article 9 of the act the conclusion of an employment contract with a temporary employee is preceded by written arrangements between the temporary agency and employer/user with regard to:

a) the kind of work, which is to be given to the temporary employee;
b) qualifications essential to provide work;
c) working time of temporary employee;
d) the place where temporary work is to be carried out.

What is more, the employer/user informs the agency on the wages of the temporary employee, which are defined in pay regulations at the employer's establishment, as well as on health and safety conditions.

On the basis of those arrangements a temporary employment agency concludes a fixed-term contract or a contract for the period needed to perform a certain work employment contract with a temporary employee, which defines the kind of work, working time, the address of employer — user, pay, and the duration of temporary work (Article 13 of the act).

The act regulates comprehensively the rights and duties of a temporary employee. One of the main points to note is a ban on discrimination of temporary employees. According to Article 15 of the act, during the period of providing work for an employer/user the temporary employee cannot be treated less favourably, within the range of working conditions and other conditions of employment, than employees employed by the employer/user on the same or similar post. The act also regulates the right of temporary employees to annual leave in a special way. A temporary employee is entitled to annual leave amounting to two days for each month of being at

([632]) Z. Hajn, op. cit., p. 75.
([633]) Journal of Laws 2003, No 6, Item 65.
([634]) Z. Hajn, op. cit., pp. 75–76.
([635]) Journal of Laws 2003, No 166, Item 1608.

the disposal of one employer/user or more. Temporary employees are also guaranteed the right to use social services of the employer/user.

A significant aspect of the Act on the Employment of Temporary Employees is the number of regulations aiming at preventing the substitution of permanent work with temporary work. Originally, from the legislator's point of view, temporary work should lead to permanent employment, and not the opposite. First of all, the act introduces temporal restrictions on temporary work provided by a temporary employee for one employer/user. Furthermore, according to Article 3 of the act the employer/user cannot be the employer who conducted group dismissals during the six months preceding the forecasted date of the start of temporary work by temporary employee. The employer/user is also obliged to inform the existing representative trade unions, which operate at his firm, of the intention of entrusting temporary work to the employees of a temporary employment agency.

Hence, it can be stated that the act regulates the employment of temporary employees in a comprehensive way and guarantees them a high level of protection.

In the future, the regulation of temporary work is to be included into the new Labour Code. The guiding principle of that regulation in the Code is, through agreement between agency and employer/user, to allow broadened entitlements and obligations regarding temporary employees.

6. Telework

In recent years with the development of IT and the popularisation of the Internet a new form of employment emerged — telework. Telework is not as popular in Poland as in Western Europe or the United States, however, during recent years an increasing interest in this form of employment has been observed.

Telework was regulated in Polish labour law by the amendment of the Labour Code, which came into force on 16 October 2007. The regulation implements the decisions of the agreement on telework of 17 July 2002 ('Framework agreement on telework') to the Polish labour law. First and foremost, according to the legislator's intentions, the introduction of this regulation is to serve as economic activation of the disabled and facilitation of work–life balance for young mothers.

According to Article 67^5, Section 1 of the Labour Code telework is work carried out on a regular basis outside the company, with the application of electronic communication, in the understanding of the regulations concerning the provision of electronic services.

Permitting telework by an employer requires cooperation with trade unions. According to Article 67^6 of the Labour Code the conditions of the application of telework are defined by way of an agreement between the employer and company trade unions. If the agreement is not concluded within 30 days, the employer defines the rules in the regulation. In the companies, which do not have trade unions, telework is introduced after negotiations with the representatives of employees selected in the course of action characteristic for the employer.

The Polish regulation strongly emphasises the voluntary character of the choice of telework. The parties can determine that work will be provided in the form of telework on the conclusion of an employment contract, and within its duration by way of mutual agreement

(Article 67^7 of the Labour Code). Moreover, during three months from the moment of starting telework both parties can submit a binding application for the revival of previous conditions of labour (Article 67^8 of the Labour Code). The lack of the employee's agreement for the performance of telework, and the cessation of telework in the course of action indicated in Article 67^8 of the Labour Code, cannot be the basis for the termination of work.

An employer who employs an employee in the form of telework ought to:

- Inform the employee to which organisational unit his or her position belongs and indicate the principal (Article 67§10 of the Labour Code);
- Provide the employee with the equipment essential to perform work in the form of telework and cover the costs connected with the installation, service, operation, insurance and maintenance of the equipment. The parties can agree that the employee will use his or her own equipment, on condition that the employer will pay money equivalent (Article 67§11 of the Labour Code);
- Define the rules of the protection of data transferred to the employee and train him in that respect.

The legislator also emphasises the respect for employee's privacy. If telework is performed in the home of the employee, the control of work can be carried out only after previous written consent of the employee, by e-mail or other method of individual distance communication. The controlling activities cannot infringe the privacy of the employee and his or her family or hamper the use of household space in accordance with its intended use (Article 67§14 of the Labour Code)

The employee who provides telework cannot be the object of discrimination caused by the form of work (Article 67§15 of the Labour Code). The legislator also tries to prevent the feeling of isolation of the employee through the guarantee of the possibility to sojourn on the premises of the company with the same rights adopted for all the employees, to contact with other employees, and to use the firm's social facilities and services provided by the employer (Article 67§16 of the Labour Code).

The obligation to provide an employee with safe and hygienic conditions of work was also regulated adequately to this form of employment (Article 67§17of the Labour Code).

7. Self-employment

One of the phenomena that gained popularity on Polish labour market during the recent decade is self-employment. Polish law does not provide a definition for self-employment. Providing services within the framework of conducted business activity, for one contractor or a narrow group of contracting parties is most often understood as self-employment. The direct basis for the provision of such services is one of civil law contracts concluded with the contracting party. The specification of such a contract is connected with the fact that the work is performed within the framework of business activity. It also has specific tax and insurance consequences. Self-employment is also very favourably taxed — persons who conduct non-agricultural business activity, in the sense of tax regulations, pay 19 % flat rate of income tax from the obtained income, and not according to the common progressive scale of: 19 %, 30 % and 40 % of income.

Self-employment is not questionable as long as work provided personally by the entrepreneur for the contracting parties does not have characteristic features of employment relationships. Meanwhile, the phenomenon of fictional self-employment has been observed during recent years. Under pressure from employers, employees register their own business activity and provide services on the basis of civil legal contracts instead of their previous employment relationship, which is less favourable for them.
Labour law tries to prevent fictional self-employment. What is stressed, is the fact that registering business activity cannot be treated as a method which allows automatic excluding from labour law regulations ([636]). In such situations Article 22, Section 1§1 of the Labour Code is applicable, according to which if work has features characteristic of an employment relationship, an employment contract is established even if the parties define the concluded contract as civil legal. Therefore, if work provided by a person who runs a business activity has features characteristic of an employment relationship (is carried out personally, in a continuous manner, in the conditions of subordination to the employing entity) the bond, which exists between them can be qualified as an employment relationship ([637]).
The new draft of the Labour Code envisages granting some employee entitlements to persons who provide work on the basis of a civil legal contract, if it is done personally and if it is continuous and repeated. Such persons are economically dependent on the employing subject, which is similar to the relationship between employer and employee.

([636]) Z. Góral, H. Lewandowski, Przeciwdziałanie stosowaniu umów cywilnoprawnych do zatrudnienia pracowniczego, PIZS 1996, no 12, p. 21.
([637]) Ł. Pisarczyk, Różne formy zatrudnienia, op. cit., p. 135.

Final Remarks ([638])

1. In the period considered for Poland the legislator was exceptionally active. Collective labour law was created from scratch. Almost all non-code acts of the labour law that are currently binding were created after the breakthrough of 1989. The element of continuity with the legislation of the communist period was the Labour Code of 1974; however some sections of that code, including the section on collective labour agreements, were changed from the original. The scale of the changes in labour law carried out in Poland was incomparable with the changes that took place in the EU before the enlargement.

2. One of the priorities of change within the range of labour law was the improvement of the situation in the labour market. On a legislative level the main act conducive to that improvement was the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions. The Polish government followed the guidelines of the European Union regarding employment policy of the Member Countries. The government developed and supervised the implementation of the National Reform Programme for the Realisation of the Lisbon Strategy (2004), which is a part of European Employment Strategy. The currently negotiated Social Pact between the government, trade unions and employers' organisations — 'Economy, Employment, Family, Dialogue' ('Gospodarka, praca, rodzina, dialog') — is mainly concerned with the problem of the increase in employment. It is also one of the central ideas of the project of the new Labour Code ([639]).

3. Similar to western countries Polish labour law entered a state of partial deregulation, hence, a stage of withdrawing from some regulations defined by the state, particularly within the framework of the Labour Code, which sometimes leads to a decrease in the level of employee rights connected with protection against dismissal, for example. However, the primary significance of the protective function of labour law is still stressed, hence, deregulation is selective in character.

4. Following adequate EU directives and the experiences of the 'old' EU countries, Polish labour law focuses *de lege lata* and *de lege ferenda* on the development of non-typical forms of employment (fixed-term employment contracts, part-time work, temporary employment, telework). In some cases stress is greater on the ban on discrimination (part-time work), and in others on the role of a given form of employment in restricting unemployment.

5. One of the central problems of Polish labour law is the statute of persons employed on civil legal contracts, economically dependant on one employing entity; in the case when such a person starts business activity he or she is defined as self-employed. According to the currently binding regulation, employment of such persons in conditions characteristic for an employment contract is deemed to be the conclusion of the employment relationship. The project of the Labour Code forecasts giving those, so-called, independent employees some employee entitlements, which is a new — positive — approach to that problem. In that case there is the convergence of national tendency and the experiences of the 'old' EU countries.

6. Undoubtedly, the difference between the situation of Polish labour law and the labour law in EU 15 is based on the scale of changes, which are not only quantitative (compare remarks in

([638]) With reference to the report of Silvan Scarra on the evolution of labour law in 15 EU in 1992–2003, The evolution of Labour law 1992–2003, Volume 1: General report, European Commission, 2005.

([639]) It needs to be noted that unemployment rate has been decreasing for over a year and currently amounts to 14.9 %.

point 1) but, primarily, qualitative. It was a revolution consisting in leaving a totalitarian model of the labour law — strongly standardised and controlled by the state, linked with a centrally administered economy — to a market model, where private employers and social partners' organisations play the dominant role.

7. The process of privatisation of the state-owned sector on a large scale that was unknown to the western world, caused the shaping of a new segment of labour law regulating employment relations in state-owned enterprises undergoing ownership transformations. What needs to be stressed next to such solutions of employee participation as the membership of employee representatives in supervisory boards and management boards, is concluding the so-called 'social packages' that ensure special privileges for the staff of privatised enterprises.

8. The current discussion in Poland on the proposition to create non-union employee representatives and their role has no equivalent in the labour law of EU 15. In most Western European countries institutions of representatives are elected by staff, a process which has been taking place for years. Low level of unionisation and community law will enforce the introduction of new forms of representations of employees, which is presently the subject of heated discussion.

9. One of the main factors influencing the shape of labour law is the implementation of Community labour law. Because of the date of the Polish accession to the EU, Poland had to do double the work implementing the whole *acquis communautaire* from the years before the accession, as well as current achievements. Currently, all Community legal acts have been introduced into Polish law. However, implementation does not always denote full understanding of EC law and the readiness to observe it. The full assimilation of EC norms needs a longer period of time.

The evolution of labour law in Romania

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I. Structure of labour law relations

During the communist regime period the labour legislation in force was based on the principles of the centralised economy and socialist ideology. The communist regime did not accept the existence of several social phenomena such as labour collective conflicts, unemployment, and disabled persons. The legislation in force did not recognise the existence of distinct interests of employers and, respectively, employees, within collective labour relations. The Romanian communist regime fell in 1989.

In 1990, Romania was opened up to the market economy and began a long and complex process of adapting national legislation to the new economic and social reality. Over the past years, Romania has made remarkable efforts in order to meet the political, economic and *acquis communautaire* criteria for European Union (EU) membership.

1. Overview on regulating work

Generally, the labour relationship between the employer and the employee is governed by the Romanian labour legislation, the collective labour agreement and the individual employment contract.

1.1. Constitution

The Romanian legal system is grounded on the provisions of the Romanian Constitution. The Romanian legislation comprises the Constitution, laws and secondary legislation.

The new Romanian Constitution reflecting the values of the new political regime was adopted in 1991 ([640]). The Constitution of the previous communist regime identified work as an obligation of all Romanian citizens. The Constitution of 1991 only lays down the principle of freedom of work. Moreover, in contrast to the previous Constitution, the new Constitution grants the freedom of association and the right to collective negotiations.

In 2003, the Constitution of 1991 was amended and completed by the Law on the Revision of the Constitution (Law No 429/2003) ([641]). This law did not affect substantially the constitutional principles as regards the labour law and labour relations. The amendments only updated the terminology to be consistent with the legislation adopted in the area of labour law and social protection, and expressly laid down the same rights to the employers' organizations and other professional associations as those granted for the trade unions.

The Constitution is the supreme legislative act and it lays down the basic principles and rules in

([640]) The Romanian Constitution of 1991 was adopted by the Constituant Assembly of 21 November 1991, published in the Official Journal of Romania, Part I, No 233/21.11.1991 and came into force following its approval by national referendum on 8 December 1991.

([641]) The Constitution was modified and completed by Law No 429/2003 on the revision of the Constitution of Romania approved by national referendum on 18-19 October 2003 which entered into force on the date it was published in the Official Journal of Romania, Part I, No 758/29.10.2003. The Romanian Constitution of 1991 as modified and completed was republished in the Official Journal of Romania, Part I, No 767/31.10.2003.

the field of industrial and labour relations: the freedom of work, the right to measures of social protection ([642]), the freedom of association in trade unions and employers' associations ([643]), the right to collective labour bargaining ([644]), the right to strike ([645]).

1.2. Legislation

All the legislation is elaborated and issued on grounds of and in conformity with the constitutional provisions.

Although after the communist regime's fall the Romanian society and economy felt the necessity for new labour legislation, the Labour Code adopted in 1972 survived until 2003. Between 1990 and 2003 provisions of the Labour Code were modified mainly by means of adoption of a very consistent supplementary legislation since 1990 (e.g. Law No 13/1991 on labour collective agreements, Law No 14/1991 on wages, Law No 15/1991 on settlement of collective labour conflicts, Law No 54/1991 on trade unions, Governmental Emergency Ordinance No 98/1999 on collective redundancies, etc.).

The Romanian **Labour Code** in force ('*Codul muncii')* was adopted in 2003 (Law No 53/2003 ([646])), following a preparatory process extending over several years. The adoption of the Labour Code represents a fundamental part of the process of approximating Romania's labour legislation in line with European legislation.

Following Romania's entrance into a programme of reforms of the institutional and regulatory frameworks in order to consolidate the functioning of a market economy through continued development of the private sector, promotion of a business environment, increasing flexibility of the labour market with a view to increase the competitiveness of the Romanian economy and to stimulate economic growth and employment, the Labour Code was amended several times (e.g. Governmental Emergency Ordinance No 65 of July 2005 approved by Law No 371 of December 2005, Governmental Emergency Ordinance No 55 of September 2006 approved by Law No 94 of April 2007 ([647])).

At present, of the most relevant laws in the area of labour relations could be mentioned: the Romanian Labour Code — Law No 53/2003, Law No 54/2003 on trade unions, Law No 356/2006 on employers' organisations, Law No 109/1997 on the organisation and functioning of the Economic and Social Council, Law No 130/1996 on labour collective

([642]) 'All employees have the right to measures of social protection. These concern employees' health and safety, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law' (paragraph 2 of Article 41 — *Labour and social protection of labour*).

([643]) 'Citizens may freely associate into political parties, trade unions, employers' associations, and other forms of association' (paragraph 1 of Article 40 — *Right of association*).

([644]) 'The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed' (paragraph 2 of Article 41 — *Labour and social protection of labour*).

([645]) '(1) The employees have the right to strike in the defence of their professional, economic and social interests. (2) The law shall regulate the conditions and limits governing the exercise of this right, as well as the guarantees necessary to ensure the essential services for the society.' (Article 43 — *Right to strike.*)

([646]) Law No 53/2003 was published in the Official Bulletin of Romania No 72/2003.

([647]) Governmental Emergency Ordinance No 65/2005 was published in the Official Bulletin of Romania No 576 of 5 July 2005, Law No 371/2005 was published in the Official Bulletin of Romania No 1147 of 19 December 2005, Governmental Emergency Ordinance No 55/2006 was published in the Official Bulletin of Romania No 788 of 18 September 2006, Law No 94/2007 was published in the Official Bulletin of Romania No 264 of 19 April 2007.

agreements, Law No 467/2006 establishing the general framework for workers' information and consultation, and Law No 168/1999 on settlement of labour conflicts, etc.

1.3. Labour collective agreements

The collective agreements concluded by the social partners at different levels (employer, group of employers and branch of activity) also provide rules in the area of employment relationships. Collective bargaining, as a type of social dialogue, is the most important way to establish and substantiate the rights and obligations of the social partners, in accordance with the social structure and the economic constraints of the country. The clauses of the collective labour agreements grant to the employees a wider protection than the protection provided by the labour legislation. A very important aspect of the collective labour agreements concluded under Romanian legislation at both national and branch level, is that such agreements have a universally binding character similar to legislation provisions.

1.4. Other sources of regulation

Rules on labour relationships may also be provided by the company's internal regulations and individual labour contracts. Such rules must comply with the provisions of the legislation in force and clauses of applicable collective labour agreements.

Jurisprudence plays a role only as regards the interpretation of the legislation. However, if a judge suspects during a trial that a specific legal provision may be in breach of the constitution, he may refer the matter to the Constitutional Court. A decision of the Constitutional Court to declare a legal provision unconstitutional has *erga omnes* effects.

2. Social partners

2.1. Employers' organisations

Although employers' organisations were established and functioning in the early 1990s, in accordance with the rules of the civil legislation, the first law on employers' organisations ('patronate') was only adopted ten years later — Law No 356/2001 ([648]).

The employers' organisations are autonomous organisations of the employers, without a political character, set up as legal entities, without an economic purpose. They represent, support and defend the interests of their members in relations with the public authorities, with the trade unions and with other legal and natural persons, depending on their activity, object and purpose, both at national and international level, according to their own statutes and in accordance with the provisions of the law.

The employers' organisations are set up per economic activities and organised per sections, divisions, branches and at national level.

([648]) Published in the Romanian Official Journal No 380/12.07.2001.

The employers' organisations designate, according to the conditions of the law, representatives for the negotiation and conclusion of the collective labour contracts, for other treaties and agreements in relation to public authorities and the trade unions, as well as the tripartite structures of management and social dialogue. They are also consulted by the government at the initiation, drawing up and promotion of the programmes for development, restructuring, privatisation, liquidation, and economic cooperation, and shall participate in the structures for the coordination and administration of the programmes with the European Union. At the request of their members, the employers' organisations can represent them in court, in the event of labour conflicts.

There are 12 confederations of employers' organisations ([649]). There are also two associations of the employers' organisations representative at the national level (associations of employers' organisations confederations): the Alliance of Employers' Confederations in Romania (ACPR) and the Union of Employers' Organisations in Romania (UPR) — which is not active at present.

The number of employers' organisations has increased over the past years (from 535 in 1996 up to 1816 in 2004 ([650])).

2.2. Trade union organisations

The first law regulating the new status of the trade unions ('sindicate') was Law No 54/1991 ([651]). This law was abrogated and replaced by Law No 54/2003 on trade unions ([652]) which is presently in force.

The trade unions are independent legal persons without an economic purpose, established with the aim of protecting and promoting the collective and individual rights, as well as the professional, economic, social, cultural and sportive interest, of its members. The trade unions are independent from the public authorities, political parties, employers and employers' organisations.

The trade unions are entitled to protect the rights of their members. The Law No 54/2003 laid down for the first time the right of a trade union to file complaints before a court of law without requiring an express mandate from the employee(s) in question, provided such employee(s) do not oppose such an action or decide to withdraw the complaint.

Under Romanian labour legislation, employers have a general obligation to consult the trade union representatives (or the employees' representatives, as the case may be) in connection with the decisions that might materially affect the rights and interests of employees.

([649]) CONPIROM, CNPR, CNIPMMR, UGIR, UGIR 1903, Co.NPR, PNR, PR, ARACO, CPISC, UNPCPR, UNPR. International affiliation of the trade union confederations: ACPR — UNICE (2004), IOE, ILO; ARACO — ECIF (1994); CNIPMMR — ECSB (1996), UEAPME (1996), WASME (1996); CNPR — UNICE (2004), IOE (2001); CONPIROM — ILO; CPISC — UNICE (2004), IOE (2004); UGIR — ICIE, FedEE (2004); UGIR 1903 — FedEE; UNPR — EBC UEAPME, SME Union.

([650]) http://www.insse.ro/Anuar%202005/CAPITOLE/cap15.pdf, p. 56.

([651]) Published in the Romanian Official Journal No 164 of 7.8.1991.

([652]) Published in the Romanian Official Journal No 73 of 5.2.2003.

Employers have an obligation to invite the elected representatives of a trade union that satisfies the representation requirements to attend meetings of the board of administration where issues of professional, economic, social, cultural and sportive interest are discussed. The trade union representatives have only the right to participate in such meetings; the legislation does not provide a voting right in relation to the decisions that might have an impact on the employment status within the company. The decisions of the board of administration that deal with matters of professional, economic, social, cultural and sportive interest shall be communicated in writing to the trade unions within 48 hours of the date the related meeting took place.

The trade union organisations constituted by association, may delegate representatives to deal with the administrative management of the units, to assist or represent their interests in all cases, at the request of the trade union organisations in their structure.

At the national level there are five trade union confederations: the National Confederation of Free Trade Unions in Romania — FRATIA (CNSLR-FRĂȚIA), having around 800 000 members; the National Confederation of Trade Unions' 'Cartel. ALFA' (CNS Cartel. ALFA), representing over 1 000 000 members; the National Bloc of Trade Unions (BNS), the Confederation of Democratic Trade Unions in Romania (CSDR); the National Trade unions Confederation MERIDIAN (CSN MERIDIAN) ([653]).

Trade union membership rate in Romania decreased from approx. 90 % in the early 1990s to 44 % in 2002 ([654]). However, the number of trade union organisations has increased over the past years (from 2 615 in 1996 to 6 852 in 2004 ([655])).

2.3. Employees' representatives

According to the Labour Code, where none of the employees within a company having more than 20 employees is a union trade member, the employees' interests may be promoted and protected by employees' representatives elected for such a purpose.

The Romanian Labour Code of 2003 sets forth for the first time the conditions for the election of such employees' representatives, and stipulates that the employees' representatives have a special mandate to represent the employees in their relations with the company. It is also expressly provided that the duration of such a mandate may not exceed two years.

The main responsibilities of employees' representatives are set out in the Labour Code and include the following main activities: (i) to monitor the company's observance of employees' rights, as established under the applicable legislation, collective and individual labour agreements and internal regulation; (ii) to participate in the drafting of the internal regulation; (iii) to promote the employees' interests related to salaries, work conditions, work duration and rest duration, as well as other interests; (iv) to notify the territorial labour inspectorate about any identified breaches by the company of legal provisions or the provisions of applicable collective

([653]) International affiliation of the trade union confederations: BNS — ETUC (1996), ICFTU (1995); Cartel. Alfa — ETUC (1996); CNSLR Fratia — ETUC (1996), ICFTU (1993); CSDR — ETUC (1995), WCL (1996).

([654]) See the study' 'Employers and Employees' Organisations', http://www.ugir1903.ro/download/sindicate_si_patronate_in_Romania.pdf, p. 16.

([655]) http://www.insse.ro/Anuar %202005/CAPITOLE/cap15.pdf, p. 56.

labour agreements, etc. The responsibilities of the employees' representatives, the manner in which these should be carried out, as well as the duration and limits of their mandate are set by the general assembly of employees.

2.4. Work councils

The Council Directive 94/45/EC of 22 September 1994 on the establishment of an European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees has been transposed in the Romanian legislation.

The Law No 217/2005 on the establishment, organization and functioning of the European work council applies only to Community-scale undertakings or Community-scale groups of undertakings. The Romanian legislation does not provide the possibility of establishment of work councils in other companies.

3. Social dialogue

During the communist period, social dialogue and the representation of employees in the workplace were deprived of their real meaning and role.

The new legislation adopted in accordance with democratic standards gave back to collective bargaining and labour collective agreements, after a period of 50 years, their real role in the area of labour relationships and created the Social Economic Council and other institutions in order to develop the necessary genuine dialogue between the social partners.

According to the Romanian Labour Code of 2003, the aim of the social dialogue is: 'to ensure the climate of stability and social peace'.

In Romania, the social dialogue is either bipartite, when it is carried on between the representatives of the employers and employees, or tripartite, when it takes place between the representatives of the employers, employees and public (executive) authorities.

3.1. Institutions of social dialogue and their role in regulating work

The new Romanian legislation has created national and regional institutions with the aim of establishing the necessary social dialogue between the social partners.

Economic and Social Council. The Economic and Social Council (ESC) is an autonomous public institution of national interest, established in 1997 for the purpose of facilitating social dialogue at a national level. The ESC has a consultative role and its organisation and functioning are regulated by Law No 109/1997 ([656]). The ESC is a tripartite institution, being composed by an

([656]) Published in the Romanian Official Journal No 141 of 7.7.1997, as amended and supplemented by Law No 492/2001, Law No 58/2003, and Governmental Emergency Ordinance No 41/2006 approved by Law No 451/2006.

equal number of representatives of the employers, employees and the government. In 2006 the number of ESC members was increased from 27 to 45, the principle of equal representation being maintained. Thus, at present, from among the 45 members of the institution, each part appoints 15 members. The representatives of the employers and employees are appointed by the trade unions and employers' associations that meet the criteria for representation at the national level. The members of the ESC are appointed for a period of four years and their mandate may be renewed.

The ESC examines and formulates advisory opinions on draft normative acts (laws, governmental decisions and ordinances) and on draft programmes and strategies, in the areas provided by the law, including labour relations, wage policy and social protection. The initiators of any normative act are obliged by the law to request the advisory opinion of the Council. It also signals to the government the occurrence of social and economic processes that warrant the elaboration of new laws and regulations. In addition, it can elaborate analyses and studies in the area of social dialogue, either upon the request of the government or parliament or on its own initiative.

Initially, the ESC also had an advisory role in the mediation of conflicts occurring between the social partners in circumstances where no other dispute settlement procedure had been invoked. In 2003, the provisions of the Law No 109/1997 regulating the Council's mediation functions were abrogated.

Social dialogue commissions. Social dialogue commissions were created in 1997. At present, their status is regulated by the Governmental Decision No 314/2001 ([657]). The social dialogue commissions functioning within ministries and prefects' offices have a consultative role and facilitate social dialogue between the public administration, trade unions and employers' organisations. This includes collating and sharing information; resolution of the claims and problems raised in the ministries and local administration bodies' areas of activity, as well as consultation on drafts of normative acts related to these areas. The commissions have a tripartite character, being composed of representatives of the employers, employees and public administration. The representatives of the public administration are appointed by the minister or prefect and the representatives of the employers and employees are appointed by the trade unions and employers' associations that meet the representation criteria at the national level.

Other institutions of social dialogue. In Romania there are also other institutions where social dialogue is carried on, although the social dialogue is not their main scope and activity.

Thus, the National Agency of Employment, the National Council of Adults' Training, the National House of Health Insurances, the National House of Pensions and other Social Insurance Rights, and their territorial components are managed in accordance with the tripartite principle. The boards of these institutions are composed of representatives of the employers, employees and public administration. In some of these cases, the parties' representatives are joined by other persons (e.g. pensioners' representatives). All these institutions are meant to facilitate social dialogue at an executive level.

([657]) Published in the Romanian Official Journal No 142/22.03.2001, as amended and supplemented by Governmental Decision No 569/2002.

3.2. Collective bargaining

The legislation adopted after 1990 restored to collective bargaining its role in developing the employment law regime both by raising the legal minimum limits of the employees' rights and creating new rights for the employees.

The first law on the negotiation and effects of collective labour agreements was Law No 13/1991 ([658]). This law provided the possibility to negotiate and conclude collective labour agreements at the company level, group of companies, branch level, and national level. While at the company level the employer and the employees represented by trade unions or elected representatives had the possibility to conclude only one collective labour agreement, at the other levels the conclusion of several collective agreements with different trade unions established at the respective level was possible. This law also ensured the applicability of the collective labour agreement concluded at the company level to all the employees of that company, irrespective of whether or not they were trade union members and the date on which they were hired by the company. As regards the scope of collective labour agreements concluded at any other level, since the employees were represented by their trade union organisations, the applicability of such agreements was established by its clauses.

At present, the procedure of collective bargaining, the conclusion and effects of collective labour agreements, as well as the settlement of conflicts related to the collective bargaining are regulated by the Romanian Labour Code, Law No 130/1996 on collective labour agreements ([659]) and Law No 168/1999 concerning the settlement of labour disputes ([660]).

Collective negotiation — right or obligation? According to the legislation in force, collective labour agreements may be concluded at the employer's level, at the level of a group of employers, to cover a branch of activity and at the national level. The conclusion of such agreements is not compulsory for the social partners, regardless of the level at which the negotiation takes place.

Law No 130/1996 made collective negotiation obligatory for the first time. The negotiation of the labour collective agreement is mandatory only at the level of the employer in the case of employers having more than 21 employees. If the employer fails to initiate the collective negotiation in accordance with the legal provisions he may be fined by the labour inspectors. Negotiation, however, remains optional for employers having less than 21 employees, and also at the level of groups of employers, activity branches and at the national level.

The conclusion of the collective labour agreements is not compulsory. In case no collective labour agreement is concluded at the employer's level, the activity is not blocked because the collective agreements concluded at superior levels are applicable. If no collective labour agreement is concluded at any level, the parties' rights and obligations are nonetheless regulated

([658]) Published in the Romanian Official Journal No 32/09.02.1991.
([659]) Republished in the Romanian Official Journal No 184/19.05.1998, as amended and supplemented by the Labour Code — Law No 53/2003 and Governmental Emergency Ordinance No 9/2004 approved by Law No 218/2004.
([660]) Published in the Romanian Official Journal No 582/29.11.1999, as amended and supplemented by the Governmental Emergency Ordinance No 138/2000 approved by Law No 219/2005.

by the legislation in force and by the individual labour contracts, the conclusion of which is, in all cases, compulsory.

Procedure of collective negotiation. For the employers who have been obliged to negotiate since 1996, the legislation details the obligations they must observe. Such employers are obliged to initiate collective negotiations each year, as follows: (i) after at least 12 months from the date of the previous negotiation, which is not followed by the conclusion of a collective labour agreement, or from the date of coming into force of the collective labour agreement, as the case may be; (ii) at least 30 days prior to the expiry of a collective labour agreement, in case of collective labour agreements concluded for a one year period. The non-observance by the employer of the obligation to initiate collective negotiations is an offence and the employer may be fined by the labour inspectors.

In 1997 the duration of such collective negotiations was limited to 60 days.

Representation of the social partners. Before 1996, in case of collective negotiation at the company level the employees were represented by elected representatives, even if there were one or several trade unions within the company. Only if all the employees of the employer were members of the same trade union organisation could they be represented by the respective trade union. At any other level, the employees were represented by trade union organisations established at the level the negotiation was carried out. In consequence, the collective labour agreements thus concluded were applicable to the members of the trade union organisations involved in negotiating and signing such agreements. The employers were represented by representatives appointed by the Chamber of Trade and Industry.

Law No 130/1996 established the principle according to which the social partners are represented in the collective bargaining by those employees and employers' associations that meet the representation criteria expressly provided by the law referring to the number of employees represented or hired and the territorial distribution of the employees and employers' associations.

The compliance of employers' and employees' organisations with the criteria for legal representation is confirmed by a ruling of the Bucharest Court of Justice, at the branch and national level, and by a ruling of a court of first instance in the jurisdiction in which the employer is located, in case of employees' organisations at the level of an employer, following the request of the relevant association.

Initially, the attribution of' 'representativeness' was valid for the duration of the negotiation and applicability of the collective agreement. Since 1997 a court's ruling on representativeness is valid for any labour collective agreements concluded within four years from the time the relevant court ruling became final.

However, the social partners may be represented by organisations that do not satisfy the representation criteria so long as these organisations are affiliated to an association of employers or to a trade union that has already been recognised as representative at a superior level.

4. Labour collective agreements

Collective labour agreements concluded in compliance with legal provisions bind the parties in the same way as the law does. Since 1991 the legislation provided that the observance of its clauses is compulsory for the parties.

4.1. Relationships between law and collective agreements

The legal provisions concerning employees' rights have a minimal character in respect to the conclusion of the collective labour agreement; the collective labour agreement must comply with the mandatory provisions of the law (e.g. its clauses shall not establish a level of minimum wages lower than that provided by the law). Thus, *the collective labour agreement shall not worsen the employees' statute in comparison with the legal provisions*. If the collective agreement grants the employees more advantages than the law does, the employer is compelled to observe its provisions and grant his employees at least the same rights.

4.2. Relationships between levels of bargaining

The Law No 130/1996 on collective labour agreements lays down that the collective labour agreements shall not contain clauses stipulating for the employees inferior rights as compared to the rights settled by collective labour agreements concluded at superior levels. Those clauses of the collective labour agreements that breach the clauses of the collective agreements concluded at superior levels are affected by *nullity*. In case the parties do not agree upon the nullity, only the court of law is competent to declare such clauses as null and void, following the demand of an interested party.

4.3. Individualisation of employment relationships

A collective labour agreement has the same authority as the provisions of the law and must be respected by the parties when they conclude individual labour contracts. Where the clauses of a collective agreement prescribe minimum rights and obligations, these are automatically carried through into each individual labour relationship. Accordingly, individual labour contracts must not contain any clauses stipulating inferior rights for employees as compared to the rights they already have under the appropriate collective labour agreements.

4.4. Types of collective agreements

Collective labour agreements may be concluded at an employer's level, at the level of a group of employers, to cover a branch of activity and at the national level.

Before 1996 the social partners at the level of a group of employers, branch and national levels had the possibility to conclude several collective labour agreements depending on the number of employees' organisations established at the respective level.

Law No 130/1996 introduced the rule that only one collective labour agreement could be concluded at each one of these levels.

Although the negotiation and conclusion of a collective labour agreement at the national level is not compulsory, since 1996 a collective labour agreement has been applicable every year at the national level. At present, the number of branches of activity listed in the national collective agreement is 32, but not all of them are covered by collective agreements.

4.5. Conclusion and entrance into force of collective agreements

The collective labour agreement is concluded in writing for a determined period, which shall not be shorter than 12 months, or for the duration of a determined performance. The parties may agree to prolong its effects, with the same clauses or with other clauses agreed by them.

Any collective agreement comes into force on the date of its registration. The parties may, however, agree on an application date that follows the registration date. The registration of the collective labour agreements may be refused only in one of the cases expressly listed by the law, i.e. a failure to satisfy the criteria of representativeness, an absence of necessary signatures or insufficient details regarding the employers to whom the contract is to be applied.

Law No 130/1996 introduced an additional obligation to publish the collective labour agreements concluded at national level or at the level of branch of activity in the Romanian Official Gazette within 30 days of their registration. However, the agreements are still applicable from the registration date, irrespective of their publication.

4.6. Effects of collective agreements

A collective labour agreement concluded at the level of an employer provides rights and obligations for all the employees of an employer regardless of the date of their employment or of their affiliation to a trade union organisation in the company.

Under the previous law, collective labour agreements concluded at the level of a group of employers, as well as branch and national levels, were applicable to the members of the employees' organisations established at the respective level that negotiated and signed the agreements. In practice, the scope of such agreements could have been extended to those employees who signed a declaration adhering to the applicability of the respective agreement and filed the declaration with a trade union affiliated to the employees' organisation that signed it.

At present, according to the law in force, the collective labour agreements concluded at the level of a group of employers or branch of activity grant the protection therein for all the employees of the employers who are members of that group or branch of activity. The parties have the legal obligation to determine and specify within the clauses of the collective agreements concluded at the level of a branch of activity and group of employers, those employers to which the agreement concluded is to be applied.

In addition, the collective labour agreement concluded at the national level applies for the benefit of all employees in the country.

Main topics regulated. The legislation in force generally stipulates some of the clauses that may be included in collective labour agreements but, as a general rule, does not limit the contractual liberty of the parties. According to the law, the parties negotiate at least the remuneration, duration of working time, work programme and work conditions. However, the collective labour agreement may regulate other rights and obligations resulting from the employment relationship, including the protection of the persons elected or delegated to serve on the leading bodies of trade unions or designated as representatives of the employees.

As a general rule, Romanian legislation allows reference to be made in a collective agreement to any aspect of labour relations. Thus, the scope of collective bargaining is governed by the principle of parties' complete liberty in settling the content of a collective labour agreement, on condition that the minimum employees' rights established by the legislation in force and the clauses of collective agreements concluded at the superior levels, if any, are not undermined.

As an exception, the negotiation carried on at the level of budgetary institutions shall not refer to the employees' rights which are granted by law and the amount of which is expressly established by legal provisions (wages, holidays, etc.).

5. Settlement of labour conflicts

5.1. Categories of labour conflicts

During the communist regime period, the legislation permitted only the settlement of individual conflicts under the civil procedure rules. This regime did not recognise the collective conflicts, including conflicts related to collective bargaining. The Constitution did not confer a right to strike on employees.

After the fall of the communist regime, Law No 15/1991 on the settlement of collective labour conflicts ([661]) was among the first laws adopted in the area of labour relationships. According to this law, all conflicts between the employer and his employees, or the majority of his employees, that resulted from the labour relationships represented labour collective conflicts. The law stipulated a special procedure for the settlement of such conflicts. The parties were obliged to observe a direct conciliation procedure and, in the event of failing to settle the conflict, to pursue a conciliation procedure organised by the Ministry of Labour. If the parties could not reach an agreement on the settlement of the collective labour conflict, the employees were entitled to continue their strike action. In the event a strike was declared, the law provided the possibility of settling the conflict by means of a special arbitration procedure.

Law No 168/1999 on labour conflicts settlement radically changed the concept regarding the classification of labour conflicts and their settlement.

In accordance with Law No 168/1999 and Labour Code of 2003, labour conflicts/disputes are classified in two categories: conflicts of interests and conflicts of rights.

([661]) Published in the Romanian Official Journal No 33/11.02.1991.

Conflicts of interests: these are defined as labour conflicts arising in the context of negotiations on a collective agreement related to the fixing of work conditions i.e. conflicts regarding employees' professional, social, or economic interests. Under the law on the settlement of collective disputes these may only occur in certain cases related to the initiation and carrying on of the *collective bargaining* (e.g. where the employer refuses to start negotiations on a collective labour agreement, where there is no collective labour agreement concluded, where the previous collective labour agreement was terminated, or where the employer does not accept the claims formulated by the employees).

The law courts do not have the competence to settle conflicts of interests. Such conflicts may be settled only through the specific procedures expressly provided by the law: i.e. conciliation, mediation and arbitration. A strike may be declared only in relation to a conflict of interest. During any conflicts of interests, the law courts may only adjudicate if a strike was declared or continued in breach of legal provisions and may, in such circumstances, require the cessation of an illegal strike.

While a collective labour agreement is in force the parties have a so-called 'obligation of social peace' and the employees may not initiate conflicts of interests. There are exceptions, however, in situations where a collective labour agreement has been concluded for a period of more than one year and the employer is obliged each year to re-negotiate at least on the terms relating to remuneration, duration of working time, work programme and work conditions.

Conflicts of rights: these are defined as labour conflicts related to the exercise of rights or observance of obligations deriving from laws or other regulations, as well as from the collective or individual labour contracts. Thus, a conflict about a *breach* or, for example, the *nullity* of a collective labour agreement or of any of the clauses of such an agreement constitutes a conflict of rights. Conflicts of rights are settled by the competent law courts.

5.2. Settlement of conflicts related to employees' interests

Conciliation. The procedure of conciliation is *compulsory* for the parties. In case of declaring a conflict of interests, the representative trade union or, as the case may be, the representatives of the employees have an obligation to inform the Ministry of Labour, by its territorial departments, in view of conciliation. The Ministry does not have any competence to solve a conflict. It has only an obligation to summon the parties to participate in conciliation and to insist that they strive to reach a settlement.

Mediation. Recourse to a mediation procedure is *optional* for the parties. In the event that a conflict of interests has not been settled in the course of conciliation organised by the Ministry of Labour, the parties may decide, by consensus, to initiate the mediation procedure. The mediators are elected by mutual agreement of the parties. The mediation procedure is established by the collective labour agreement concluded at national level. At the end of his mission, the mediator is required to draw up a report with regard to the conflict of interests and to state his opinion on any unsettled claims. The parties may agree to follow the mediator's recommendations, but they are not obliged to do so.

Arbitration. The arbitration procedure is also *optional* in character. For the entire duration of a conflict of interests, the parties to the conflict may decide by consensus to submit the claims to the arbitration of a commission. The arbitration commission shall consist of three arbitrators appointed by the parties and, respectively, by the Ministry of Labour. The work procedure of the arbitration commission is established by a regulation approved by ministerial order. The arbitration commission delivers a final judgement that may be appealed before a civil law court only with regard to any *nullity* aspects. The judgement of the arbitration commission is binding on the parties and constitutes a part of the collective labour agreement. The conflict of interests is judged to have ended with effect from the date of the judgement delivered by the arbitration commission.

Strikes. Pursuant to the Romanian legislation, the right to take strike action is limited exclusively to employees. Moreover, Law No 168/1999 restricted the possibility of taking strike action to only a limited number of situations.

Thus, the exercise of this right is limited only to the outbreak of conflicts of interests (conflicts related to collective bargaining). Moreover, a strike is permitted only if the above-mentioned procedures provided by the law to overcome a collective bargaining deadlock have been followed. A strike may be declared only if it has been notified to the management of the unit by the organisers 48 hours before and the decision to declare the strike has been taken by the number of employees mentioned by the law.

Lock-out. Neither the Romanian Constitution nor the labour legislation provide for the employers' right to lock-out. Thus, both jurisprudence and doctrine agreed that it is forbidden for an employer to resort to lock-out.

5.3. Settlement of conflicts related to employees' rights

Law No 168/1999 lays down certain specific procedural rules for the speedier settlement of conflicts related to employees' rights (e.g. shorter procedural terms).

In 1999 the role of judicial assistants was introduced into Romanian legislation for the first time following the fall of the communist regime. Conflicts related to employees' rights were to be settled by a panel composed of a judge accompanied by two judicial assistants. In this situation a vote by the two judicial assistants could over-rule the vote (opinion) of the judge, although the former did not have the same status and were not appointed in accordance with the same procedures as those applying to judges. In November 2001 the Constitutional Court declared these provisions to be unconstitutional and they ceased to apply.

Consequently, in 2002, the rules were changed and the panel competent to settle conflicts relating to employees' rights was composed of two judges and two consultant magistrates, who participate in the deliberations and can exercise a consultative vote.

The Labour Code of 2003 provided that the competence to settle such conflicts should be switched from the court in the area of which an employer has his official headquarters/home address to the court in the area of which the plaintiff has his official headquarters/home address.

At present, according to Law No 304/2004 on judicial organisation, Labour Code and Civil Procedure Code, the competence to judge such conflicts at first instance is given to the county courts ('tribunale') or specialised county courts ('tribunale specializate'), where such specialised courts are established in the respective county) in the area in which the plaintiff has its official headquarters/home address. The panel of judges is comprised of two judges and two judicial assistants ([662]). The judicial assistants participate in the deliberations with a consultative vote and sign the decisions passed. Their opinion is mentioned in the decision, and reasons are given for any divergent opinion. The Appeal Courts are competent to judge the labour conflicts at final (recourse) instance. An appellate panel of judges is comprised of three judges.

([662]) One judicial assistant is appointed among those designated by the representative organisations of workers and one judicial assistant among those designated by the representative organisations of employers.

II. From job security to employability

The principle of job security was generally recognised under the previous Labour Code of 1972, in force until 2003. During the communist period, the political system refused to accept the concept of unemployment. All Romanian citizens were obliged to work. Performance of work represented not only a human right but also an obligation and the non-observance of such an obligation could invite legal sanctions. The communist regime offered jobs to all Romanian citizens by means of a repartition system but all the big Romanian cities were declared' 'closed cities' as regards employment.

Beginning in 1990, as the Romanian economy entered into a complex transition process, the majority of the Romanian plants and factories were forced to reduce or to change their field of activity or to close down. In this context, Romanian society faced a very painful process of massive redundancies that resulted in a rapid increase in unemployment. Law No 1/1991 on the social protection of unemployed and their professional reinsertion was introduced at this time. This law focused on granting persons who became unemployed financial compensations paid from the unemployment fund.

Subsequently, the unemployment rate decreased as the Romanian economy gained stability, and as private businesses and foreign investments became established.

In 1990 the employed population was more than 10.84 million persons. A decline in the number of employed persons began in 1992 and only began to increase slightly in 1999. From the beginning of the transition period workplace closures were concentrated in the industry sector. Employment in the services sector is characterised by shifting trends. The agriculture sector played the role of a safety valve by absorbing those made unemployed in the industry sector.

In 1991 the unemployment rate was 1.6 % and this increased to 11.2 % in 2000. The unemployment rate decreased afterwards, due to the progress of the Romanian economy's preparations for entry to the European Union, as well as to the level of labour migration to other European countries, to Canada, and to the United States of America. The unemployment rate was 5.4 % in 2006 and 4.1 % in May 2007 ([663])

The Romanian labour law has shown a complex evolution over the past years as reflected in the change from the original meaning of the job security principle, which continued to be a basic principle under the Labour Code in force since 2003, to the different forms of promoting employability. On the other side, specific legislation has been adopted in order to protect employees in cases of company restructuring or where company decisions affect their rights and interests.

([663]) See the official websites of the National Agency of Employment and Ministry of Labour, Family and Equal Opportunities — http://www.anofm.ro/statistica/evolutia_ratei_somajului_1991_2006.htm; http://www.mmssf.ro/website/ro/

1. Stability of employment terms and conditions

The principle of the continuity and stability of the terms of employment and working conditions of an employee represents an element of the job security principle and has been maintained by the Romanian Labour Code presently in force.

According to the provisions of the Labour Code, employees cannot give up the rights recognised by the law. Any transaction intended to cause a surrender of the employee rights recognised by the law or to limit such rights is rendered void.

In addition, the Labour Code provides that the individual labour contract may be amended only on the basis of the consent of the parties involved. A unilateral amendment of an individual labour contract is possible only in exceptional cases and under the conditions stipulated in the Code.

2. Protection against termination of the employment contract

At present, employment is not made available by the state. It depends on the labour market. However, legislation protects employees against the abusive termination of their employment relationships.

Thus, an employment agreement may be terminated (i) by the effect of the law; (ii) pursuant to an employee's initiative (resignation); (iii) by the parties' agreement; or (iv) pursuant to the employer's initiative.

2.1. Termination by the effect of the law

The termination of the employment relationship by the effect of the law (*de jure*), independently of any party's will, has been regulated for the first time by the Romanian Labour Code of 2003. However, most cases of *de jure* termination have previously been either dismissal cases, or cases of termination not expressly provided for but generally recognised by the literature and jurisprudence.

At present, an employment contract is terminated *de jure* in the following circumstances expressly provided by the Labour Code:

a) on the date of the death of the employee;
b) on the date when a final judgment is delivered either declaring the death of an employee or placing an employee under interdiction;
d) on the date when a decision on an employee's retirement is communicated;
e) as a result of finding the absolute nullity of an individual employment contract, from the date the nullity was found based on the parties' consent, or a final judgment;
f) as a result of the admittance of a petition for the reinstatement of an employee found to have been dismissed unlawfully or on ill-founded grounds, from the date of the delivery of the final judgment;

g) as a result of a criminal sentence of imprisonment, from the date of the delivery of the final judgment;
h) from the date of withdrawal, by the competent authorities or bodies, of the approvals, authorizations, or certifications necessary for exercising one's profession;
i) as a result of the interdiction to exercise a profession or an office, as a safety measure or complementary punishment, from the date the final judgment ordering the interdiction was delivered;
j) on the expiry of the deadline of the individual employment contract concluded for a definite term;
k) from the date of withdrawal of the parents' or legal representatives' consent, for employees whose ages range between 15 and 16 years.

2.2. Termination by parties' consent

The employment contract may be terminated on the date established by parties' consent.

2.3. Employee's resignation

The employee may resign by means of a written notification. He is not obliged to give reasons for his resignation. The term of notice shall be as agreed upon by the parties in the individual employment contract or, as the case may be, the one stipulated in the applicable collective labour agreement, and shall not exceed 15 calendar days for employees in executive positions, or 30 calendar days for employees in management positions, respectively. For the duration of the notice the individual employment contract shall continue to take full effect. The contract shall terminate on the date of expiry of the term of notice or on the date the employer gives up that term entirely or partially. If, during the notice period the individual employment contract is suspended the term of notice shall be suspended accordingly. An employee can resign without notice only if the employer has not met his obligations according to the individual employment contract.

2.4. Dismissal

The instances where employment can be terminated upon the initiative of an employer (dismissal) are strictly regulated by the Labour Code. The employee may be dismissed only in these situations listed by the law. The employer can take the initiative in terminating an employment agreement:

(i) for reasons related to the employee's person — i.e. gross misconduct or repeated misconduct (disciplinary reasons); where the employee is under preventive arrest for more than 30 days; for reasons of physical or psychological inaptitude (only after a decision is issued by the competent medical authority determining such inaptitude); where the employee is not professionally fit for the position held; where the employee fulfils the standard age and contribution quota and has not requested the retirement in accordance with the law or,
(ii) for reasons not related to the employee's person (i.e. redundancy).

In either case, the employer also needs to comply with strict procedural rules.

If the employer fails to comply with the legal provisions regarding dismissal cases and procedural rules, and the employee challenges the dismissal decision in front of the competent law court, such a decision shall be cancelled by the court.

According to the Labour Code, employees may not be dismissed on the basis of criteria such as their gender, sexual orientation, race, colour of skin, or for the exercise, under the terms of the law, of their right to strike.

In some cases the dismissal is prohibited temporarily (e.g. for the duration of maternity leave; a temporary working incapacity, medically certified; quarantine leave; annual holiday leave; during the performance of military service; for the duration of the pregnancy of an employed woman, if the employer was aware of her condition prior to the issuance of the dismissal decision; for the duration of the exercise of an elected position in a trade union body, except when the dismissal is ordered for a serious infraction of discipline or for repeated infractions of discipline by that employee; during the leave taken in order to raise a child — parental leave — or care for a sick child).

The decision to terminate an employment agreement must be issued in writing and, under penalty of being declared null and void, it must be motivated *de facto* and *de jure* and include details of the period within which it can be challenged as well as the court where the complaint may be filed.

In certain cases (e.g. employee's dismissal for being non-professionally fit, for physical or psychological inaptitude, redundancy) the person dismissed benefits from the right to prior notice, which must not be less than 20 working days in accordance with the collective labour agreement at national level.

Any disciplinary sanction including dismissal for disciplinary reasons may be imposed only after a prior disciplinary investigation procedure has been performed. The investigation must be conducted by a person appointed by the employer. During this investigation procedure, the employee must be summoned with the observance of the Labour Code's provisions and may present his defence arguments and can ask to be assisted by a representative of the trade union of which the employee is a member. The disciplinary sanction may be issued by the employer within 30 days from the date the employer's management has been informed about the disciplinary case, but no later than six months from the date the disciplinary act has been performed.

Any employment termination decision due to inadequate performance of work may be imposed only after a prior investigation procedure has been performed. Such a procedure is provided in the collective labour agreement concluded at national level. The investigation must be conducted by a committee appointed by the employer. A workers' representative must be a member of the committee. At least 15 days in advance, the committee must summon the employee, indicating the date, time and place for the meeting as well as the manner in which the investigation will be performed. The examination will take into consideration the activities provided in the

employee’s job description. Inadequate performance may be sustained by the committee by proving improper performance of professional duties, by theoretical or practical examination or by other means. The dismissal decision may be issued by the employer within 30 days from the date the employer became aware of the dismissal reason.
A dismissal for reasons not related to the employee’s person represents the termination of the individual employment contract, caused by the suppression of that employee’s position due to one or more reasons not related to an employee’s person. The suppression of a position must be effective and have an actual serious cause. The dismissal for reasons not related to the employee’s person can be individual or collective. In case of a collective dismissal the employer is obliged to comply with additional information, consultation and notification requirements. As regards the collective dismissal requirements, the Directive 1998/59/EC has been implemented into Romanian legislation.

A failure to observe the above-mentioned procedure and conditions results in the annulment of the termination decision. In such a case, the court shall require the employer to pay an indemnity equal to the indexed, increased or updated wages and other entitlements the employee would otherwise have received. The court which ruled the cancellation of the dismissal may restore the parties to their status prior to the issuance of the dismissal document only upon the employee’s express request.

The employee may receive severance payments as provided by the applicable laws and/or the applicable collective labour agreement. At present there are no legal norms providing the amount of severance payments applicable to private companies. Only the collective labour agreement concluded at national level provides that each employee dismissed for reasons not related to his person (i.e. redundancy) shall receive a severance payment amounting to at least one month’s salary. Although the legislation does not refer to severance payments in other situations of employment contract termination, such severance payments may be granted upon parties’ agreement.

3. Protection of employees in case of company restructuring or other company decisions

3.1. Procedure of collective redundancies

The previous Labour Code did not make any reference to collective redundancies. Collective redundancies were regulated for the first time under Romanian legislation in 1997. Before the enactment of the present Labour Code provisions on collective redundancies, the provisions of Governmental Emergency Ordinance No 98/1999 concerning the social protection of persons whose individual labour contracts are terminated as a result of collective redundancies were applicable. The Labour Code of 2003 overtook these general provisions on collective redundancies.

The provisions of the present Labour Code took into account Directive 98/59/CE on collective redundancies. The Labour Code gives a definition of collective redundancies and stipulates an employer’s obligations and the procedure to be followed in case of collective redundancies. These provisions are applicable to any employer when the dismissals ordered correspond to the notion of collective redundancies.

The subsequent amendment of the Labour Code by means of the Governmental Emergency Ordinance No 55/2006, as approved by Law No 94/2007, aimed at ensuring the complete transposition of EU directives and introduced substantial changes as regards the procedure of collective redundancies.

Collective redundancies are only deemed to occur where an employer has more than 20 employees. Thus,' 'collective redundancies' means dismissals effected by an employer over a period of 30 days, for one or more reasons not related to the employee's person, where the number of redundancies is:

— at least 10 employees in establishments employing more than 20 and less than 100 employees;
— at least 10 % of the number of employees in establishments employing at least 100 but less than 300 employees;
— at least 30 in establishments employing 300 employees or more.

For the purpose of calculating the number of redundancies, account has to be taken of those employees whose individual labour contracts were terminated at the employer's initiative for one or more reasons not related to an employee's person, provided that at least five redundancies are at issue.

The collective redundancies procedure introduced additional obligations for employers. According to the Labour Code, where an employer intends to operate collective redundancies, he is obliged to initiate consultations with the trade union or, as the case may be, employees' representatives, in good time and with a view to reaching an agreement, covering at least:

(a) ways and means of avoiding collective redundancies or reducing the number of employees affected;
(b) mitigation of the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining employees made redundant.

To enable the trade union or, as the case may be, employees' representatives, to make constructive proposals, employers are obliged, in good time during the course of the consultations, to supply the former with all relevant information and notify them in writing of:

(a) the total number and categories of employees normally employed;
(b) the reasons for the projected redundancies;
(c) the number and categories of workers to be made redundant;
(d) the criteria taken into account according to the law and collective agreements for the selection of the employees to be made redundant;
(e) the measures for reducing the number of employees affected;
(f) the measures for mitigating the consequences of the collective redundancies and the redundancy payments the dismissed employees are entitled to according to the law and/or applicable collective agreement;
(g) the date on which, or the period over which, the projected redundancies are to be effected.

The obligations of consultation, information and notification apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

The employer must forward a copy of this notification to both the territorial labour inspectorate and territorial employment agency on the same date as it is communicated to the trade union or, as the case may be, employees' representatives.

The trade union or, as the case may be, the employees' representatives may propose to the employer steps for avoiding the dismissals or diminishing the number of employees dismissed and the employer has the obligation to reply, in writing and stating good reasons, to such proposals.

If following consultations with the trade union or, as the case may be, employees' representatives, the employer decides to implement collective redundancies, he is obliged to notify in writing both the territorial labour inspectorate and territorial employment agency, at least 30 calendar days before the issuance of the dismissal decisions. This notification must contain all relevant information concerning the projected collective redundancies mentioned above in points (a) to (g), as well as the results of the consultations with trade union or, as the case may be, employees' representatives — particularly the reasons for the redundancies, the total number of employees, the number of employees to be made redundant, and the date on which or period over which the redundancies are to be effected.

An employer is obliged to forward to the trade union or, as the case may be, employees' representatives a copy of this notification on the same date as it is communicated to the territorial labour inspectorate and territorial employment agency. The trade union or employees' representatives may send any comments they may have to the territorial labour inspectorate.

Upon receiving a reasoned request from any of the parties, the territorial labour inspectorate may, having previously consulted the territorial employment agency, reduce the period of 30 calendar days without prejudice to individual rights with regard to the notice of dismissal or postpone the date of issuance of the dismissal decisions for a maximum of 10 calendar days.

During this period the territorial employment agency shall seek solutions to the problems raised by the projected collective redundancies and communicate them in good time to the employer and the trade union or, as the case may be, employees' representatives.

Only after the mentioned period expires can the employer issue the dismissal decisions, without prejudice to the provisions governing individual rights with regard to notice of dismissal.

In case of the non-observance by an employer of any of his information and consultation obligations, the dismissal decisions may be declared null and void by the competent court of law to which the employee submitted his/her complaint.

Some specific regulations have been adopted over the past years that are applicable in the case of state owned companies, to mitigate the consequences of collective redundancies mainly by

granting special compensations paid out of the unemployment state budget to the employees dismissed.

3.2. Guarantee fund for the payment of wage debts

The establishment of a guarantee fund for the payment of wage debts was introduced into the Labour Code of 2003. It required employers to contribute to such a fund for the payment of wage debts resulting from the individual labour contracts, according to the law.

The guarantee fund for the payment of wage debts has been implemented by the adoption of Law No 200/2006 on the establishment and use of the guarantee fund for the payment of wage debts ([664]). This law aims at ensuring the transposition of EU Directive 80/987/CEE on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, as subsequently amended by the EU Directive 2002/74/CE.

The guarantee fund is supported mainly by employers' contributions. All employers are obliged to contribute to the guarantee fund by paying a monthly contribution of 0.25 % of the salary fund (total amount of monthly gross salaries to be paid to the employees). The guarantee fund is administrated by the National Employment Agency, the institution responsible for administering the unemployment insurance fund.

The guarantee fund is used for paying wage debts owed by the employer in case of insolvency — unpaid salaries, compensations for paid leave the employees did not take in kind but only corresponding to a period of work up to one year, compensations owed to the employees according to the individual employment contracts and collective labour agreements in case of termination of employment relationships, in case of occurrence of work accidents or professional diseases, indemnities the employers are obliged to pay to the employees in case of temporary interruption of activity. The total amount paid from the guarantee fund shall not exceed three average monthly gross salaries at the national level in case of each employee. Such a payment may be performed only for a period of a maximum of three months. The debts of the employer towards its employees are reimbursed through the amounts paid from the guarantee fund.

The law also provides for the procedure of requesting payment of such wage debts and issuance of the order for establishment of the amount to be paid and performance of such a payment by the competent territorial employment agency, in case of insolvency of both Romanian and trans-national employers.

Where the insolvency procedure is closed due to the fact that an employer's activity has been restored to normality, the employer is obliged to reimburse the guarantee fund the amounts paid to the employees within six months of the date on which a decision to close the insolvency procedure was taken.

([664]) Published in the Romanian Official Journal No 453/25.05.2006.

Failure to comply with the obligation to provide information and data requested in writing by the territorial employment agencies, as well as communication of incorrect or incomplete information, constitutes a minor offence and is subject to fines.

3.3. Transfer of undertakings, businesses or parts of undertakings or businesses

The safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses was regulated for the first time in Romanian legislation within the Labour Code of 2003. The Labour Code laid down only some principles according to which the transferor's rights and obligations, which derive from a labour contract or relationship existing on the date of the transfer, must be fully transferred to the transferee. It also provides that the transfer must not constitute grounds for either individual or collective dismissals on the part of the transferor or the transferee. It also establishes an obligation on both transferor and transferee to inform and consult, prior to the transfer, the trade union or, as the case may be, the employees' representatives, as regards the legal, economic, and social consequences of the transfer for the employees.

More specific and detailed provisions have been adopted by means of Law No 67/2006 on the protection of employees' rights in the event of a transfer of an undertaking, business, or part of an undertaking or business ([665]) which transposes Directive 2001/23/EC. This law applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger, independently of the public or private nature of the capital. According to this law, the transferor's rights and obligations arising from individual employment contracts and collective labour agreements existing on the date of a transfer must be transferred to the transferee.

The law does not provide any definition of the terms' 'undertaking' or 'business'. Moreover, the law does not contain an express provision according to which the transfer of employees is' 'automatic' (i.e., without fulfilment of any further formalities). However, the notion of' 'transfer of undertaking' is to be identified based on the European Court of Justice case law and consequently it should be considered that the employees that are attached to a structure transferred (undertaking, unit, or part thereof) shall be transferred together with the respective structure.

Law No 67/2006 prohibits the termination of the employment contracts protected under the law based solely on the transfer. The law expressly provides that, where the transfer implies a significant alteration in the working conditions of the employee, the employer shall be responsible for the termination of the employment contract.

According to this law, before the transfer date, the transferor is obliged to notify the transferee in respect of all rights and obligations provided by the individual labour contracts and applicable collective labour agreements that are to be transferred to the transferee on the transfer date.

([665]) Published in the Romanian Official Journal No 276/28.03.2006.

The law also provides for obligations of informing and consulting the employees. Thus, where either the transferor or the transferee intends to take measures affecting their own employees, they are obliged to have consultations with the employees' representatives with a view to reaching an agreement within at least 30 days prior to the transfer date.

The transferor and transferee are also obliged to inform in writing the trade union or employees' representatives on the measures envisaged to be taken in relation to the transfer, with at least 30 days prior to the date thereof. Where no employees' representatives exist within the company, the information should be provided directly to the employees. The information should make reference to: the date or proposed date of the transfer; the reasons for the transfer; the legal, economic, and social implications of the transfer for the employees; any measures envisaged in relation to the employees; and the hiring and working conditions.

If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives of the employees affected by the transfer must be preserved, provided that the legal conditions necessary for the constitution of the employees' representation are fulfilled. Where such conditions are not fulfilled, the transferred employees appoint their representatives according to the law.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the employees transferred shall be represented, upon their express agreements, by the representatives of the transferee's employees during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with the law. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the law.

Failure to comply with the requirements of Law No 67/2006 constitutes a minor offence subject to fines upon the decision of a labour inspector. In addition, the employees or the representatives of the employees affected by the transfer are entitled to submit the case to the competent court of law.

3.4. Employers' obligations to inform and consult employees

The general framework for informing and consulting employees is laid down by the Law No 467/2006 ([666]) transposing Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

This law is applicable for the establishments employing at least 20 employees and provides that the employers are obliged to inform and consult the employees' representatives.

According to this law, the practical arrangements for information and consultation are defined and implemented in accordance with the law and collective labour agreements.

In accordance with the directive, the scope of information and consultation is required to cover: the recent and probable development of the undertaking's activities and economic situation; the

([666]) Published in the Romanian Official Journal No 1006/18.12.2006.

situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment; decisions likely to lead to substantial changes in work organisation or in contractual relations, including those related to information and consultation in case of collective redundancies and transfer of undertakings, businesses or parts of undertakings or businesses.

The information must be given at such time, in such fashion and with such content as it is appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

The required consultation must take place: while ensuring that the timing, method and content thereof are appropriate; at the relevant level of management and representation, depending on the subject under discussion; on the basis of information supplied by the employer and of the opinion which the employees' representatives are entitled to formulate; in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; with a view to reaching an agreement on decisions within the scope of the employer's powers.

The employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it. Any such decision must be justified by the employer to the employees' representatives.

In the event of non-observance by the employer of one of his information and consultation obligations he may be fined on the decision of a labour inspector. The same sanction may be imposed where the employer through ill-will provides the employees' representatives with incorrect or incomplete information that prevents the employees' representatives formulating adequate opinions to prepare for further consultation.

Specific information and consultation rules are provided by Law No 217/2005 on establishment organisation and functioning of the European Works Council (EWC) ([667]) laying down rules concerning the establishment of either the EWC or employees' information and consultation procedures in companies of Community-scale. This law has been aimed to transpose Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees and Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

The possibility to establish works' councils as bodies of representation of the employees at workplace level is regulated only for companies and groups of EU dimension that have their central management headquarters in Romania. A company of Community-scale is a company which has at least 1 000 employees in EU Member States, and at least 150 employees in each one of at least two of the Member States.

([667]) Published in the Romanian Official Journal No 628/19.07.2005, as amended and supplemented by the Governmental Emergency Ordinance No 48/2006 approved by Law No 468/2006.

According to this law, the central management of the company of Community-scale is obliged to initiate negotiations with a view to establishing either an EWC or an employees' information and consultation procedure in that company. To this end a special negotiating body is created. Together with the central management of the company of Community-scale, it has the role of setting down within a written agreement the scope, composition, responsibilities and length of office of the EWC or the modalities of application of the information and consultation procedures.

Where the EWC is established, it is composed of employees of the company of Community-scale and its subsidiaries and establishments elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees. The EWC adopts its rules of procedure which lay down rules on the election or appointment of its members. One member is elected or appointed from each one of the Member States where the company of Community-scale has an establishment or subsidiary.

The competence of the EWC is limited to the information and consultation of the employees on questions which concern the entire company of Community-scale or at least two establishments or subsidiaries functioning in two different Member States. The Law No 217/2005 provides for the rules regarding responsibilities, competence and working procedure of EWC in accordance with the provisions of the above-mentioned EU directives.

The company of Community-scale bears the costs of the EWC and provides the body's members with the financial and material resources needed to enable them to perform their duties in an appropriate manner. Unless otherwise agreed, it also bears the cost of organising meetings and providing interpretation facilities and the accommodation and travelling expenses of members of the representative body and the select committee.

4. Protection of employees' representatives

The elected representatives of a trade union benefit from special protection under the Romanian law. This special protection has been expressly provided by specific legislation since 1991. Accordingly, for the entire duration of their mandate, as well as for a period of two years after such a mandate ceased, the employment agreements of elected representatives of a trade union may not be terminated for reasons unrelated to their persons, for professional inadequacy or for reasons related to the fulfilment of the mandate they received from the company's employees.

The Labour Code of 2003 regulated the legal status of the employees' elected representatives for the first time and provided special protection for these representatives under Romanian law. Accordingly, for the entire duration of their mandate, they may not be dismissed for reasons unrelated to their persons, for professional inadequacy or for reasons related to the fulfilment of the mandate they received from the company's employees.

In addition, the members of the elected management bodies of the employers' organisations are protected by the law against all forms of discrimination, conditioning, constraint or limiting of the exercise of their functions, under the sanction of the penalties provided by the law. Neither public representatives, nor the persons holding management positions in the public

administration structures, may belong to the management bodies of employers' organisations.

5. Protection of unemployed persons

While before 2002 the unemployment protection system had been focused on granting financial compensation to the unemployed, subsequently, Law No 76/2002 on the unemployment insurance system and employment promotion ([668]) introduced a range of protections for both employed and unemployed persons.

As regards the classic form of unemployed protection by means of compensations paid out of the unemployment fund, unemployed persons are entitled to receive unemployment indemnity, provided: (i) they contributed to the unemployment security system for at least 12 months within the previous 24 (determined by taking into consideration the date when the unemployment indemnity is requested); (ii) they do not obtain any income or the income obtained is lower than the unemployment indemnity; (iii) they do not fulfil the conditions for retirement, as provided by law; (iv) they are registered with the territorial workforce agency competent in the area where they have their domicile or residence, in case their last place of employment was located in such area; and (v) if their employment relationships were terminated for reasons not determined either by their will or their fault.

The unemployment indemnity is paid for a period varying from six months to one year (depending on the contribution stage of the person requesting the unemployment indemnity: six months in case of a contribution stage of at least one year, nine months in case of a contribution stage of at least five years and 12 months in case of a contribution stage of at least 10 years).

Initially, the amount of the unemployment indemnity was set at 75 % of the minimum gross salary per economy for all unemployed persons who met the legal conditions and 50 % of the minimum gross salary at the national level for the persons who have recently graduated assimilated by the law to the unemployed persons. Although aimed at promoting employment, the payment of a fixed amount for all unemployed persons independently of their contribution amount during the contribution stage has been subject to repeated criticism.

At present, following the amendment of Law No 76/2002 by means of the Governmental Emergency Ordinance No 144/2005 ([669]), the monthly amount of the indemnification is granted in a differentiated manner, i.e.:

(i) 75 % of the minimum gross salary per economy for the persons having at least one year of contribution; and

(ii) a differentiated quota depending on the length of the contribution stage, which quota varies between 3 % and 10 %.

In addition to the compensation paid to unemployed persons, the territorial employment agencies offer different measures to prevent unemployment and promote employment opportunities for job-seekers, as well as measures to encourage employers to hire unemployed persons and create new jobs. These include: information and professional consultancy, mediation on labour market,

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([668]) Law No 76/2002 was published in the Official Bulletin of Romania No 103/2002.

([669]) Governmental Emergency Ordinance No 144/2005 was published in the Official Bulletin of Romania No 969 of 1 November 2005.

professional training, consultancy and assistance for initiating a new business, compensations supplementing the salary income, compensations stimulating labour mobility, subvention of jobs in case the employer hires unemployed persons or persons who have recently graduated or persons over 45 years of age, granting the employers credits for the creation of new jobs, as well as other facilities.

During the period when they receive unemployment compensation, unemployed persons are obliged to present themselves each month at the territorial employment agency to receive support towards their employment, as well as to participate in the activities of employment promotion and professional training organised by the employment agency. These persons may not refuse to be employed in a job offered which is situated less than 50 km away from the place where they have their domicile.

6. Protection against unemployment in the case of individual or collective dismissals

In addition to the above-mentioned measures of protection provided for within the Law No 76/2002 on the unemployment insurance system and employment promotion, some provisions of the Labour Code of 2003 are also relevant.

As regards individual dismissals, if a dismissal is ordered due to physical or psychological incapacity or because an employee is not professionally qualified for the position held, as well as if the individual labour contract has been terminated *de jure* as a result of the admittance of the petition for reinstating in the position occupied by the employee a person dismissed unlawfully or for ill-founded grounds, the employer must suggest to the employee other vacant positions in the company, consistent with his/her professional training or, as the case may be, his/her work capability.

If an employer has no such vacant positions available, the support of the territorial employment agency must be requested to assist the redeployment of the employee according to his/her professional training or, as the case may be, to his/her work capability.

The employer may issue the dismissal decision only in the event the employee does not accept in writing the position proposed within three working days from the date of communication of the employer's offer or, as the case may be, after the accomplishment of its obligation of asking the territorial employment agency for support in the redeployment of the employee.

Moreover, in the case of collective redundancies the employer has several obligations aimed at protecting the employees envisaged from effects of unemployment. The procedure of collective redundancies provided by the Romanian Labour Code has been subsequently amended and supplemented mainly by means of the Governmental Emergency Ordinance No 55/2006 so as to ensure the complete transposition of the EU Directive 1998/59/EC (see section 3.1. above).

The employer who ordered collective redundancies cannot employ any persons for the positions of the employees dismissed for a period of nine months from the date of their dismissal. If, during this period, the employer resumes the operations which had ceased in the context of the earlier collective redundancies, he is obliged to communicate this situation in writing to the

dismissed employees and to re-employ them in the positions they had held previously, without any examination, competition or probationary period. The employees entitled to be re-employed have at their disposal a term of maximum 10 working days to communicate their consent in writing to the employer regarding the position offered. The employer is only entitled to employ new people for the vacant positions if the former employees fail to communicate their consent in writing within the term provided by the Labour Code or refuse the positions offered.

7. Training at work

The Labour Code of 2003 has provided for the first time the obligation of an employer to grant professional training to all of his employees. Following the amendment of the Labour Code by means of the Governmental Emergency Ordinance No 65/2005 the employer is obliged to grant professional training to all of his employees as follows: each 2 years in case he has at least 21 employees and each 3 years if he has less than 21 employees.

8. Employment of retired persons

Governmental Emergency Ordinance No 65/2005 amended the Labour Code in order to promote the employment of retired persons, by enabling employers to hire retired persons, as well as persons who will meet the retirement conditions within five years, by concluding fixed-term employment contracts in any situation independently of the temporary or permanent nature of the activity to be performed — although such fixed-term employment is normally permitted only in exceptional cases.

9. Employment of disabled persons

Governmental Emergency Ordinance No 102/1999 on the special protection and employment of disabled persons ([670]) laid down for the first time an obligation upon employers to hire at least 4 % of their employees from among disabled persons. Previous legislation had only provided for the principle of promoting employment of such persons. Initially the quota fixed by Governmental Emergency Ordinance No 102/1999 had applied only to employers having at least 100 employees. The same obligation was subsequently extended to all employers having at least 75 employees ([671]).

Governmental Emergency Ordinance No 102/1999 was repealed by Law No 448/2006 which maintained the 4 % quota for disabled persons and extended its application to all employers having at least 50 employees. In addition, the new law provides that if employers fail to observe this requirement they must either pay a monthly amount to the state budget representing 50 % of the minimum base salary at national level multiplied by the number of workplaces on which they did not employ disabled persons or buy products or services from protected units (units within which disabled persons perform work) to the value of the amount they have to pay to the state budget.

([670]) Governmental Emergency Ordinance No 102/1999 published in the Official Bulletin of Romania No 310/1999, as subsequently amended and supplemented.

([671]) Law No 343/2004, published in the Official Bulletin of Romania No 641/2004.

III. Labour law and adaptability

Striking a balance between the flexibility of labour relations and the protection of workers has been a very important and intense subject of discussion for employers, employees and government representatives in recent years with regard to amending legislation already in force and the preparation of new legislation.

The transposition of Community law regarding new forms of employment took into account the principle of workers' protection. Thus, Romanian legislation, although in line with European labour law directives, is generally more protective of the position of employees.

1. Fixed-term contracts

Under Romanian labour legislation, fixed-term employment contracts have always represented an exception.

The previous Romanian Labour Code in force until 2003 required that the individual employment contract be concluded for an indefinite term. Employment by means of fixed-term contracts was permissible only in the following situations: replacement of an employee in the event that his employment contract was suspended, as well as activities having seasonal or temporary character.

The legislation did not provide for any other limits on the use of fixed-term employment contracts (such as a total maximum duration, a maximum number of renewals). The fixed term employees enjoyed the same rights and obligations as the employees hired for an indefinite term.

Within the context of approximating Romanian legislation to Community labour law, the new Labour Code took into consideration the provisions of the EU Directive 1999/70/EC concerning the Framework Agreement on fixed-term work.

However, the rules regarding the use of fixed-term contracts became more restrictive. The new Code listed the situations where employment by means of fixed-term contracts is permissible as follows: a) replacement of an employee in the event of his/her labour contract being suspended, except when that employee participates in a strike; b) a temporary increase in the employer's activity; c) seasonal activities; d) based on legal provisions made with a view to temporarily favouring certain categories of unemployed persons; e) in other instances expressly stipulated by special laws.

In addition, the total duration of fixed-term contracts was limited to 18 months and the law set the maximum number of extensions possible after the expiry of the initial term: two consecutive times at the most, but only within the maximum term provided by the Code.

The Labour Code also provided for the exceptional situations when the renewal of a fixed-term contract is possible.

The implementation of the new Labour Code's provisions gave rise to some practical issues. The list of situations when the conclusion of fixed-term contracts might be permitted failed to cover all the cases requiring such contracts. Moreover, the total duration of 18 months was not found to be adequate as a large number of projects/programmes required a longer period.

As a consequence, amendments to the Labour Code have been adopted in 2005 and 2006 to introduce more flexibility into the use of fixed-term employment contracts.

The effect has been to increase the number of cases where the conclusion of such contracts is permitted. At present, fixed-term contracts may now be concluded: when hiring a person who, within five years from the employment date, fulfils the conditions for retirement; entering an eligible position within a union, employers' organization or non-governmental organization, for the period of the mandate; hiring retired persons who, according to the law, can accumulate pension and salary; in other instances stipulated by special laws or for performing certain work, projects, programmes under the conditions provided in the collective labour agreement concluded at national or industry level.

The total maximum duration of fixed-term contracts has been increased up to 24 months. The limit upon the number of extensions of a contract to two consecutive renewals within a 24 month period has been maintained.

The amendments to the Labour Code took into consideration the provisions of the EU Directive 1999/70/EC regarding 'successive fixed-term contracts'. According to these amendments, the parties may conclude up to three successive fixed-term contracts. Fixed-term contracts concluded within three months after the termination of a previous fixed-term contract are considered successive.

The EU Directive 1999/70/EC concerning the framework agreement on fixed-term work has been implemented into Romanian law by virtue of the Labour Code. However, the Romanian Labour Code's provisions are more favourable to the employees since all the alternative measures to prevent abuse arising from the use of successive fixed-term contracts mentioned by the directive have been introduced into the Romanian legislation. Moreover, the Labour Code limits the situations in which the use of such fixed-term contracts is permitted. The Labour Code did not adopt any of the exceptions to the scope of application permitted by the directive.

The Labour Code in force also transposed the directive's provisions on the employers' obligation to inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers, as well as the rule that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relationship unless different treatment is justified on objective grounds.

2. Temporary work agencies

Triangular employment relationships through temporary employment agencies were regulated for the first time in the Romanian legislation by the new Labour Code of 2003.

The Labour Code regulates the work performed by temporary workers who are employed (and paid) by a temporary employment agency and placed at the disposal of a user for the duration necessary for carrying out certain precise and temporary duties. The user may 'hire' such workers only on the basis of an appropriate contract concluded with an authorised temporary employment agency in accordance with the applicable legislation. The Labour Code provides for mandatory rules regarding the work performed by such temporary workers and the agreements that must be concluded by the involved actors.

A temporary employment agency is a trading company authorised by the Ministry of Labour and Equal Opportunities, which places skilled and/or unskilled personnel in temporary employment at the disposal of a user company and pays them for that purpose. The terms under which temporary employment agencies are established and operate, as well as the authorisation procedure, are covered by governmental regulation.

A user company can call on the temporary employment agencies only to carry out a precise and temporary duty — temporary work assignment — and only in the following circumstances:

a) to replace an employee whose individual labour contract has been suspended, for the duration of the suspension;
b) to perform some seasonal activities;
c) to perform some specialised or occasional activities.

The duration of temporary work assignment must not exceed 12 months. That duration of a temporary work assignment can, however, be extended only once for a period which, added to the initial duration of the assignment, cannot exceed 18 months.

The Labour Code transposed the provisions of the EU Directive 1991/383/EEC supplementing the measures to encourage improvements in the health safety at work of workers with a fixed-duration employment relationship or a temporary employment relationship. Moreover, the labour legislation in force lays down more favourable provisions for the Romanian employees.

A user company is obliged to conclude a specific contract with a temporary employment agency in order to avail of the work of a temporary worker hired and sent by the agency. This contract must be concluded in writing and must comprise some specific clauses fixed by the Labour Code (e.g. the reason why the use of a temporary employee is necessary; the term of the assignment; the specific features of the job, especially the necessary qualifications, the place where the assignment shall be carried out, and the work schedule; the value of the contract to the temporary labour agent, as well as the wages to which the employee is entitled, etc.).

The temporary employment agency hires a temporary worker for the duration of the assignment by means of an individual employment contract. The content of such a temporary employment contract is expressly provided by the Labour Code. The temporary employment contract may

also be concluded for several assignments, within the maximum period fixed by the law. Between two assignments, the temporary employee remains at the disposal of the temporary labour agent and is entitled to wages paid by the agency, which cannot be lower than the gross national minimum wage.

During the assignment period, a temporary employee must be paid wages paid by the temporary employment agency. The wages received by the temporary employee cannot be lower than the wages received by the user's employee who performs the same work or one similar to the one of the temporary employee. If the temporary employment agency fails to discharge its payment obligations, the user company is then obliged to discharge them.

Temporary workers have access to all the services and facilities provided by the user, under the same terms as the latter's other employees. As a rule, the user is obliged to provide the temporary employee with individual protective and work equipment. Throughout an assignment, a user company is responsible for providing working conditions for the temporary employee in compliance with the legislation in force.

Any contract clause prohibiting a user company from hiring a temporary employee after an assignment has been completed is null and void. Thus, at the end of the assignment, a temporary employee can conclude an individual labour contract with the user.

The Labour Code also lays down the principle that the provisions of the law and of the collective labour agreements applicable to employees employed under individual labour contracts for an indefinite term with the user company also apply to temporary employees for the duration of their assignment with him.

3. Part-time contracts

Although not expressly provided under the previous Romanian Labour Code, part-time work was generally recognised in employment relationships. However, the collective labour agreements made reference to the employees having a part-time program.

The new Labour Code of 2003 gave express recognition to this form of employment.

Romania implemented EU Directive 1997/81, regarding the framework agreement on part-time work as part of the process of accommodating the domestic legal framework to the *acquis communautaire*.

Initially, the Labour Code of 2003 provided for the possibility to conclude part-time contracts for at least 2 hours per day (respectively, 10 hours per week). Accordingly, it was impossible to hire employees for work of a shorter duration.

An amendment of the Labour Code in 2006 removed this limit. At present, the part-time employment contract may be concluded for a certain number of normal hours of work that are calculated on a weekly basis or on average over a period of employment of up to one year, that are less than the normal hours of work of a comparable full-time worker.

A part-time contract must stipulate the work period and distribution of working hours and the terms under which the work schedule can be modified, and also prohibit overtime work, except in case of absolute necessity or some urgent works meant to prevent accidents or to remove the consequences thereof. If these elements are not mentioned within the contract, it must instead be deemed to be a full-time contract.

Employees hired under a part-time employment agreement must enjoy the same rights as full-time employees under the terms stipulated by law and by applicable collective labour agreements. Part-time employees' wages are calculated *pro rata* to worked hours and relative to the entitlements established for a normal work schedule.

The recent amendments to the Labour Code have also ensured the transposition of the provisions of the directive requiring an employer to give consideration, as far as possible, to: requests by workers to transfer from full-time to part-time work, transfer from part-time to full-time work or to increase their working time should the opportunity arise, as well as the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa.

4. Telework

While telework was recognised in employment relationships under the previous Labour Code, it was not expressly provided for by the Labour Code until 2003.

Teleworkers are employees who carry out, at their home, assignments typical of their positions. Such workers set up their own work schedule. However, as an expression of his authority, the employer is entitled to check a teleworker's activity, under the terms set by the individual employment contract.

The employment contract for telework must comprise: express mention that an employee must work at home; the schedule during which the employer shall be entitled to check his employee's activity, and the actual manner in which such checks are carried out; the employer's obligation to ensure transport, to and from an employee's domicile, and as the case may be, of the raw materials and materials, which he/she uses in his/her activity, as well as the finished products made by him/her.

Teleworkers enjoy all the rights stipulated by the law and the collective labour agreements applicable to employees whose workplace is at the employer's head office. The collective labour agreements may provide for other typical terms and conditions for telework.

5. Organisation of working time

5.1. Duration of working time

In principle, the normal length of working time should be 8 hours per day and 40 hours per week.

According to the Labour Code of 2003 that aimed to transpose EU Directive 93/104/EC concerning certain aspects of the organisation of working time as amended by Directive 2000/34/EC, the maximum legal length of the working time shall not exceed 48 hours per week, including overtime work, calculated as an average over a reference period that increased from 3 weeks up to 3 months following the recent amendments of the Code.

5.2. Work schedule. Flexible working time

The distribution of working time throughout the week is, as a rule, uniform, with eight hours per day for five days, and with two days of rest.

Depending on the typical features of the company, or of the work performed, an unequal distribution of the working time may be chosen, provided the normal length of the working time of 40 hours per week is not exceeded. The manner for establishing an unequal working schedule must be negotiated by means of a collective labour agreement at the level of the employer, or, in the absence of such a collective agreement, it shall be stipulated in the company's rules and regulations. The unequal work schedule may operate only if it is expressly stated in the individual labour contract.

Employers may establish a flexible working programme, with the consent or at the request of the employee in question, if such a possibility is laid down in the collective labour agreements applicable at the level of the employer, or, in the absence of such a collective agreement, in the company's rules and regulations. The flexible working programme represents the division of the length of the working day into two periods: a fixed period during which all the employees are at their workplaces, and a variable, mobile period in which the employee chooses the times of arrival and departure, provided the working time is observed.

The collective labour agreements also provided during the past years different forms of flexible organisation of working time at national level (shifts, fractioned programme) or specific to certain branches of activity (maximum duration of working time of 48 hours per week calculated as an average over a reference period of 12 months).

5.3. Breaks and daily rest

According to the Labour Code, employees are entitled to breaks. If a working day exceeds six hours, employees are entitled to a lunch break and other breaks which, unless stipulated in the collective labour agreement, the individual labour contract and the company's rules and regulations, are not included in the normal length of the working day.

Moreover, employees are entitled to not less than 12 consecutive hours of rest between two working days. A working day of 12 hours must be followed by a rest period of 24 hours.

5.4. Weekly rest

The Labour Code grants a weekly rest over two consecutive days, usually on Saturday and Sunday. If the rest on Saturday and Sunday would be detrimental to the public interest or the

normal evolution of an activity, the weekly rest can also be granted on other days laid down in the applicable collective labour agreement or the company's rules and regulations. Under exceptional circumstances, the days of weekly rest may be granted on a cumulative basis, after a period of continuous activity which shall not exceed 14 calendar days, with the authorisation of the territorial factory inspectorate and the consent of the trade union or, as the case may be, the employees' representatives.

In such cases, when the weekly rest is not granted on Saturday and Sunday, the employees are entitled to wage benefits according to the law and applicable collective labour agreements.

5.5. Holiday and paid leave

According to the Labour Code, employees are entitled to an annual paid holiday, sick leave, maternity leave, paternity leave, and paid leave for raising a child up to the age of two.

The collective labour agreement concluded at national level provides that the minimum duration of the annual paid leave (holiday) must be of a minimum of 21 working days. Employees who work under difficult, dangerous or harmful conditions, blind persons, other disabled persons and young people under the age of eighteen benefit from an additional holiday leave of at least three working days. For the duration of their holidays, employees are entitled to an annual holiday allowance which must not be lower than the average value of the wages received during the three months previous to the month in which the employee takes his holiday leave.

As regards sick leave days, the Labour Code does not provide a minimum number of sickness days, such being left to the competence of the relevant medical entities. However, a time limit of the sickness leave is provided (i.e. 183 days per year). This limit may be extended only upon approval of a special committee of the social security authority. However, the employee may not be dismissed after the expiration of such a period. The employment contract can be terminated by effect of law after the expiration of the 183 days term only in the event that the relevant medical entity decides that the employee must retire for medical reasons. The employer has the obligation to pay an indemnity for the initial five days of sick leave, after which payment shall be performed from the relevant social security system.

As regards maternity leave, female employees are entitled to a minimum leave of 126 days, which is paid by the social security system. The employee is free to decide whether the 126 days of leave are taken before or after the birth, nevertheless a minimum of 42 must be after the birth.

Male employees are entitled to five days of paid leave to help the mother with the child within the first eight weeks from the date the child is born.

Paid leave to facilitate raising children (parental leave) can be taken by one of parents of a child, until the date the child reaches two years of age.

In all the above-mentioned situations, an employment contract is suspended and the Labour Code forbids the employee's dismissal, regardless of the reason for such dismissal.

5.6. Public holidays and other time off

The following public holidays are provided under the Romanian Labour Code: (i) 1 and 2 January; (ii) first and second days of Easter; (iii) International Labour Day — 1 May; (iv) Romania's National Day — 1 December; and (v) 25 and 26 of December (Christmas). Employees who are not Christian are entitled to two free days for each of the two main religious annual holidays, which are declared as such by the officially recognised religions, other than the Christian one.

If the employees work during public holidays they are entitled to take time off during the next 30 days, and if this is not possible they are entitled to wage benefits in accordance with law and applicable collective labour agreements.

The collective labour agreement concluded at national level sets forth the number of days-off the employee is entitled to in case of family events: (i) employee's marriage; (ii) child's marriage; (iii) child birth; (iv) death of a spouse, child, parents, in-laws; (v) death of grandparents, brothers, sisters; (vi) blood donors; and (vii) changing housing facilities in another city.

6. Protection of employees' personal data

The regulatory framework in the field of data protection is ensured by Law No 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data ([672]) and secondary legislation. The law applies to any processing of personal data carried out by Romanian entities (called data controllers) on the Romanian territory.

The law sets out a data controller's main obligations as follows:

(a) to inform individuals about the processing of their data, including their rights, as set forth by law;
(b) to obtain the consent of data subjects regarding the processing and transfer of their personal data, if such is required by law;
[The consent of the employees is not necessary and the employer is not obliged to inform them in respect to the processing if such is carried out on grounds of the individual employment contract, in accordance with the legal provisions. Processing personal data of the employees in any other purpose or modality requires their consent and information.]
(c) to observe the rights recognised by law to the data subjects in respect to the processing, such as the right to have access to the data, to oppose the data processing or to demand the rectification of inaccurate data;
(d) to ensure the confidentiality and the security of the processed data, including by observing the minimum requirements set forth by the secondary legislation enacted by the National Authority for the Supervision of Personal Data Processing;
(e) to notify the supervisory authority in respect of any processing of personal data carried out, as well as any transfer of such data abroad;
[With respect to the notification requirements, the employers are generally exempted from the obligation to file a notification in connection with the processing of their employees' data related

([672]) Law No 677/2001 was published in the Official Bulletin of Romania No 790/2001.

to the conclusion of employment agreements and for payroll purposes. However, employers are not exempted from the obligation to file the transfer notification, in case employees' data is transferred abroad. In case the employer processes its employees' personal data for other purposes than for payroll-related purposes, then the employer would be required to file the processing notification with the competent authority. Also, in case the employees' data is transferred abroad, the employer would be required to file a transfer notification.]
(f) to provide to the supervisory authority, upon request, any relevant information regarding the processing.

Failures to comply with the requirements set forth under the Law No 677/2001 constitute minor offences and are subject to fines.

IV. Discrimination and equal treatment

1. Prohibition of discrimination

The principle of equality among citizens provided by the Romanian Constitution of 1991 has been subsequently detailed by specific legislation, as well as by the Labour Code of 2003.

Specific legislation in the area of combating discrimination and promoting the principle of equal treatment has been adopted since 2000. The constitutional provisions have been further detailed by the Governmental Ordinance No 137/2000 on preventing and sanctioning discrimination ([673]) and Law No 202/2002 on equality of opportunities and treatment between men and women ([674]).

The Governmental Ordinance No 137/2000 defines 'discrimination' and provides for the notion of 'persons in comparable situations' ([675]). This normative act does not mention the term' 'indirect discrimination', but stipulates that: 'Any active or passive behaviour that generates effects liable to favour or disadvantage, in an unjustified manner, a person, a group of persons or a community, or that subjects them to an unjust or degrading treatment, in comparison with other persons, groups of persons or communities, shall trigger administrative liability, unless it falls under the incidence of criminal law.'

According to Governmental Ordinance 137/2000, discrimination is prohibited in relation to all categories of civil and political rights, and economic, social, and cultural rights, among which are the right to work, to equitable and satisfactory labour conditions, protection against unemployment, to equal pay for equal work and to an equitable and satisfactory remuneration.

The Ordinance prohibits discrimination by any natural or legal person, including public institutions that have responsibilities regarding employment (recruitment, selection and promotion); access to all forms and levels of vocational training and advanced training; social protection and security; public services; access to goods and facilities; education system; and enforcement of public order. Administrative sanctions may be imposed for offences, unless an act of discrimination is punishable under criminal law.

However, any measures taken for the benefit of certain persons, groups or communities aimed at ensuring their natural development and equality of opportunities in relation to other persons, groups and communities, as well as positive measures aimed at ensuring protection of disfavoured groups do not represent acts of discrimination.

The Governmental Ordinance No 137/2000 deals with: 'Equal opportunities in economic activities and as regards employment and profession'. It contains special provisions prohibiting discrimination as regards the participation of a person in an economic activity or the free choice and exercise of a profession; labour and social security relations, with respect to conclusion, suspension, amending and termination of employment relationships; establishment and change of responsibilities, workplace and salary; granting social rights other than wages; vocational

([673]) Governmental Ordinance No 137/2000 was republished in the Official Bulletin of Romania No 99/2007.
([674]) Law No 202/2002 was republished in the Official Bulletin of Romania No 150/2007.
([675]) Renate Weber, Report on measures to combat discrimination in the 13 candidate countries (VT/2002/47), Country report, Romania, May 2003, http://www.humanconsultancy.com/ROMANIA%20Final%20ENl.pdf

training, advanced training, conversion or promotion; the enforcement of disciplinary measures; and the right to join a trade union.

In addition, discrimination in job advertising or interviews is made punishable as an offence. However, these provisions could not be interpreted in the sense of limiting the employer's right to refuse to hire a person who does not meet the usual requirements and standards in the respective area.

Law No 202/2002 also provides for definitions of direct and indirect discrimination. It also defines' 'harassment', and 'sexual harassment', as well as 'incentive measures' or 'positive discrimination'. This law expressly refers for the first time to 'work of equal value' in addition to the term 'equal work' provided for by the Romanian Constitution and previous Romanian Labour Code.

Under Law No 202/2002, the special measures stipulated by the law for maternity, birth and nursing protection, temporary incentive measures for protecting certain categories of men or women, as well as the skill requests for activities where gender particularities represent a determining factor, due to a specificity of the conditions and the way of running the respective activities, shall not be considered acts of discrimination.

The employers are compelled to ensure equal opportunities and treatment between employees, women and men, as regards: the choice or free exercise of a profession or activity; employment in every position or job vacancy in all levels of the professional hierarchy; equal pay for equal work value; advice and vocational counselling, learning, training, upgrading and retraining vocational programs; promotion at any hierarchical and professional level; working conditions observing the occupational health and safety provisions, according to the legislation in force; benefits, other than of salary nature and measures of protection and social insurance; employees' organisations and professional bodies, as well as to benefits granted by them.

In addition, the law promotes the principle of equal opportunities between women and men as regards participation in the decision-making process. All legal persons have the obligation to promote and support the balanced participation of women and men in management and decision-making processes at all levels.

As distinct from the previous Labour Code that referred only to the principle of equality between men and women as regards equal pay for equal work and equal access to employment, the Labour Code of 2003 provides for a more general principle of equality of treatment for all employees and employers as regards labour relations.

In addition, the Labour Code now defines and expressly prohibits any direct or indirect discrimination against an employee.

The Labour Code also provides for equal pay between men and women for work of equal value.

2. Sanctioning of discrimination

Governmental Ordinance 137/2000 on preventing and sanctioning discrimination provides for two procedures of sanctioning acts of discrimination.

Under the Ordinance, a National Council for the Prevention of Discrimination has been established and charged with receiving complaints and sanctioning violations. This is an administrative procedure and calls for certain discriminatory acts to be considered as administrative offences and punishment to be sought. The National Council for Combating Discrimination is a specialised state authority, under the control of the parliament, having among its responsibilities the prevention, monitoring, investigating and sanctioning of discrimination acts, etc.

The second procedure provided for by the ordinance is for judicial remedies. The persons who consider themselves to have been discriminated against have recourse to the courts, where non-governmental human rights organisations can appear as parties in discrimination cases, if authorised by the victims concerned. Thus, persons who are found to have been discriminated against have the right to claim compensation in proportion to the damage incurred, and to demand the restoration of the situation that existed before the discrimination or the cessation of the situation that was created as a result of the discrimination, according to the general legal framework. The defendant has the burden of proving that the acts impugned do not represent discrimination.

As regards equality of opportunities and treatment between men and women, Law No 202/2002 provides that employees are entitled, when they consider themselves to have been discriminated against on the basis of gender, to file notices or complaints to the employer, when other employees are involved, or against him, and to request the support of a trade union, or the employees' representatives in the company, to help resolve the situation at the workplace.

If this notice/complaint is not settled at company level through mediation, the employee submitting factual details to support an assumption of direct or indirect gender-based discrimination in the field of labour, based on the provisions of this law, is entitled to send the notice/complaint to the National Agency for Equal Opportunities for Men and Women and also to file the complaint with the court of law competent to settle labour disputes. The burden of proof rests with the defendant.

Such specific procedures of redress were granted to persons who consider themselves to be discriminated against with effect from 2000 when the Governmental Ordinance on preventing and sanctioning discrimination came into force.

V. Concluding remarks

Since 1990, Romania has entered upon a complex reform process with a view to consolidating the functioning of a market economy. Labour relations and labour legislation represent constitutive parts of this reform process aimed at increasing labour market flexibility, promoting the competitiveness of the Romanian economy and stimulating economic growth and employment.

Over the past years, changes in labour legislation have taken into account the necessity to strike a balance between flexibility for undertakings and security for workers, as well as approximation to the requirements of European law.

The *acquis communautaire* in the area of labour law has been transposed into the Romanian legislation. The first important stage of this process was represented by the adoption of the Romanian Labour Code of 2003. The provisions of this Labour Code took into account the following EU directives: Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; Directive 98/59/CE on collective redundancies; Directive 1999/70/EC concerning the framework agreement on fixed-term work; Directive 1991/383/EEC supplementing the measures to encourage improvements in the health and safety at work of workers with a fixed duration employment relationship or a temporary employment relationship; Directive 1997/81, regarding the framework agreement on part-time work; former Directive 93/104/EC concerning certain aspects of the organisation of working time as amended by Directive 2000/34/EC; Directive 2001/23/EC on the protection of employees' rights in the event of a transfer of an undertaking, business, or part of an undertaking or business; and Directive 80/987/CEE on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, as amended by EU Directive 2002/74/CE. All previous directives in the area of non-discrimination were also taken into account.

Subsequently, the Labour Code has been amended several times as gaps have been noticed in the transposition of the *acquis communautaire,* where clarifications were needed for the application of the new legislation and so as to ensure more complete transposition. The most important amendments in this respect have been the Governmental Emergency Ordinance No 65/2005 approved by Law No 371/2005 and the Governmental Emergency Ordinance No 55/2006 approved by Law No 94/2007. These amendments took into consideration the most recent changes of the EU legislation, such as the Directive 2003/88/EC concerning certain aspects of the organisation of working time.

During the past three years, several special laws have been adopted to complete the transposition of EU law requirements: e.g. Law No 217/2005 on establishment, organisation and functioning of the European Works Council (EWC) aimed at ensuring transposition of Directive 2001/86/EC supplementing the statute for a European Company with regard to the involvement of employees and Directive 2003/72/EC supplementing the statute for a European Cooperative Society with regard to the involvement of employees; Law No 67/2006 on the protection of employees' rights in the event of a transfer of an undertaking, business, or part of an undertaking or business which transposes the Directive 2001/23/EC; Law No 200/2006 on the establishment and use of the

guarantee fund for the payment of wage debts transposing Directive 80/987/CEE on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, as subsequently amended by EU Directive 2002/74/CE; Law No 344/2006 on the posting of workers in the framework of the provision of services ensuring the transposition of Directive 96/71/EC; Law No 467/2006 transposing the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

All the new labour legislation, as well as the amendment of existing legislation, have been elaborated and adopted following discussion and negotiation between the government and the social partners. Pursuant to Romanian legislation, the initiators of any normative act are obliged to request an advisory opinion of the Economic and Social Council.

Thus, the process of elaborating and amending labour legislation has taken into account the interests of both employers and employees as formulated and promoted by their representatives. Thus, it has been aimed to strike a balance between employers' interests of getting flexibility in working relations, increasing competitiveness, promoting non-competition clauses, and the employees' interests of job security, working time flexibility, and specific protection in case of unemployment.

At the same time, the evolution of labour legislation has been determined by changes in both employers' and employees' interests. The protection of the employees has known other forms. From protection against dismissal to the employer's obligation of ensuring professional training, of informing and consulting the employees in case of collective redundancies in view of identifying ways and means of avoiding redundancies or reducing the number of employees affected; from compensations in cash in case of unemployment to active measures to prevent unemployment and promote employment by means of increasing opportunities of employment for any person who is looking for a job, as well as stimulating the employers to hire unemployed persons and to create new jobs; and specific protection in case of a transfer of an undertaking, business, or part of an undertaking or business.

New types of employees' interests have been added to the classical ones such as wage payment or protection against dismissal. Thus, the new legislation provides for flexibility of working time due to educational or family reasons, the possibility to transfer from full-time jobs to part-time jobs or, as the case may be, from part-time jobs to full-time jobs, the possibility of agreement on individual and/or flexible work schedules, increased flexibility in programming the employees' holidays, and protection of employees' personal data.

As regards employers, their interests have also been taken into account by expressly regulating the possibility of negotiating and concluding non-competition clauses, the possibility to dismiss the employee at any moment during the probation period — with no other formalities except for a written notification, the limitation of the possibility of initiating conflicts of interests (including employees' right to strike) exclusively to collective bargaining procedures.

In addition, new types of employers' interests have been regulated such as the establishment of a guarantee fund for the payment of wage debts in case of employer's insolvency, the subvention

of jobs where an employer hires unemployed persons or persons who have recently graduated or persons over 45 years of age, and the award of grants to employers for the creation of new jobs or other facilities.

It must be taken into consideration that flexibility in labour relations is in the interest of both employers and employees alike. Thus, new forms of employment have been regulated in detail: fixed-term contracts, part-time contracts, temporary work, telework, apprenticeship contracts; the legislation has been amended so as to increase flexibility of working time in order to reconcile the family and educational interests of employees; the legal regime applying to self-employed persons has been clarified by adopting specific legislation and subsequently improving its provisions, as well as by ensuring the possibility for such workers to partake in health, pension and unemployment insurance in the public system.

Over the past years a major interest of the Romanian authorities has been to increase employment and maintain employment levels. Thus, by taking into account the European Employment Strategy, the National Employment Strategy for 2004–10, the National Action Plan for Employment for 2006 and the Strategic Plan of Social Inclusion have been elaborated and adopted. Promoting employment and reducing the number of unemployed persons is carried out by different economic, social and legislative measures; e.g. reducing the taxes on labour, as well as taxes on business, offering the opportunities of lifelong learning and professional training, fiscal facilities for employers for creating new jobs and hiring unemployed persons, indemnities for unemployed persons who accept employment in other places than the place where they have their domicile, and assistance and training of unemployed persons in appropriate modalities of looking for a job.

Job security has continued to be ensured also by protection of workers against dismissal, modification of employment conditions, discrimination, etc.

The level of protection of employee's rights by means of authorities' actions has been improved by the adoption of Law No 108/1999 on labour inspection. This law and the related labour legislation have been subsequently improved so as to ensure efficiency of its controls and sanctions ordered.

The amendments of the labour legislation, the new legislation adopted over the past years, as well as the improvement of the legislation on labour inspection and actions of the labour inspectors determined the diminution of undeclared work. This phenomenon also ensures the extension of legal protection to an increased number of workers.

Last year, Law No 319/2006 on health and safety at work transposing the Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at work, repealed and replaced the former Law on labour protection in force since 1996. The labour inspectors who have responsibilities in the area of health and safety at work carry out their activity by taking into account a large number of governmental decisions transposing EU legislation in the area of health and safety at work that have general character or have been adopted for specific fields of activity.

Another phenomenon characterising the Romanian labour relations over the past years is represented by workers' migration. The Law on protection of Romanian citizens who work abroad No 156/2000 was adopted in 2000. This law ensures specific protection for Romanian citizens who become employed by foreign employers through Romanian agencies for mediating the employment of Romanian citizens abroad. Workers' migration is one of the factors contributing to a reduction of the unemployment level in Romania.

On the other side, legislation on the employment of foreign citizens in Romania, notably Law No 203/1999 on work permits, has been subject to several amendments. In June 2007, Law No 203/1999 was repealed by Governmental Emergency Ordinance No 56/2007 on the employment and posting of foreign citizens in Romania. According to the new law the foreign citizens may perform work on the Romanian territory only where they hold a work authorisation. Pursuant to this law a 'foreign citizen' is any person who is neither a Romanian citizen nor a citizen of a Member State of the European Union or the European Economic Area. However, the legislation requires that foreign citizens only be employed in circumstances where neither Romanian citizens nor citizens of a Member State of the European Union or the European Economic Area can be hired for that specific job.

It may be concluded that the *acquis communautaire* in the area of labour law has been transposed into the Romanian legislation ([676]). The Romanian labour legislation in force generally ensures a satisfactory balance between employers' interests of getting flexibility in working relations and the employees' interests of job security, working time flexibility, specific protection in case of unemployment and promotion of employment. Thus, over the past years, Romania has taken part in the European Union countries' common evolution in the area of regulating employment and industrial relations.

([676]) The Monitoring Report of the European Commission of September 2006 indicated that Romania had made considerable efforts to complete its preparation for European Union (EU) membership since the Commission issued its last report in May. Thus, according to this report Romania was 'sufficiently prepared to meet the political, economic and *acquis* criteria by 1 January 2007' — Communication from the Commission — 'Monitoring report on the state of preparedness for European Union membership of Bulgaria and Romania' adopted on 16 May 2006, Romania Monitoring Report, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0549:EN:NOT

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The evolution of labour law in Slovenia

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Executive summary

Labour law reforms since the early 1990s and throughout the reference period were aimed at meeting three different challenges:

- The reintroduction of the employment relationship as a bilateral contractual relationship;
- The transposition of the acquis communautaire into the national labour law;
- The adjustment of labour law to the social and economic environment in a way that it would contribute to the restoration of the balance between market constraints and social concerns.

The following trends in the evolution of the Slovenian labour law can be noticed:

- The development of collective labour relations (collective bargaining on different levels, tripartite social dialogue, the introduction of the dual channel of workers' representation at the enterprise level);
- Changes in the personal scope of the (statutory) labour law (separate labour regulation that applies to civil servants and/or the introduction of the subsidiary principle as regards the application of labour law for the category of civil servants; the increased number of persons who perform their work under civil law contracts);
- the development of labour law on the basis of the constitutional provison that Slovenia is a social state and in accordance with the accepted international instruments on human rights and fundamental freedoms, important from the aspect of work.

In the decade being analysed in the report a lot of legislative interventions have taken place. Some of the new statutes are of purely national legislative character and by some of them the EC directives have been transposed into domestic law. In this respect the Employment Relationships Act, 2002, is of special importance.

During the reference period great attention was paid to the situation in the labour market. In this regard, the introduction of different active employment policy measures, the endeavours in the area of education and training systems, and the measures encouraging the employment of vulnerable groups (especially disabled persons) have to be mentioned.

Throughout the report special attention is given to the Employment Relationships Act, 2002. It is important for having enacted the concept of employment relationship as a bilateral contractual relationship. On the other hand it reflects the present demands for more flexibility in labour law.

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Chapter I

Introduction

1. Economic, social and political backgrounds

The study of the evolution of labour law in Slovenia between 1995 and 2005 has to be placed within the framework of economic, social and political changes that were initiated at the end of the 1980s, when Slovenia dissolved from former Yugoslavia and began its preparations to join the EU. The new EU Member States do not form a homogeneous group, for each state is a country with some common and some specific background that had a certain influence on the development of labour law in the period covered in this study. Without going into great detail, the following could be underlined in relation to Slovenia:

Economic, social and political changes. Between the end of the Second World War and the late 1980s the development of labour law in the former Yugoslavia and Slovenia, as its constituent part, was greatly influenced by the socialist self-management system and the existence of the so-called social ownership (677). These two notions influenced the legal nature of employment relationships. These relationships were not viewed as relationships between two parties, i.e. the employer and the employee; instead they were viewed as relationships of 'mutual dependency, reciprocity and solidarity between workers working with the resources in social ownership and, on the basis of the right to self management under the law, deciding themselves on their rights and obligations stemming from work'. It is important that the employment relationship was not established on the basis of an employment contract, safe in a relatively small private sector, and it was not supposed to be a subordinated relationship. In 1986 the process of economic and political reforms was initiated and the transition to a market economy, democratisation and pluralism of political and other relations was accepted as one of the most important aims. The Enterprises Act was passed in 1988, which provided for three kinds of enterprises: socially owned, the so-called mixed enterprises, and private enterprises. Labour law had to be adapted to this new situation. Basic Rights Stemming from the Employment Relationship Act (678), adopted in 1989 by the former Yugoslav Parliament, and the Employment Relationships Act, passed by the Slovenian parliament in 1990 (679), have reintroduced the employment contract and the contractual nature of the employment relationship. These two acts did not regulate the employment contract, as they did also not adjust the individual rights and obligations, emerging from the employment relationships to its contractual nature. In practice the inadequate regulation of the individual rights and obligations caused a number of problems as well as a reduction of the workers' legal security (680). That is why the new Employment Relationships Act that was enforced on 1 January 2003 (681), placed great attention on the regulation of the employment contract.

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(677) Social ownership was defined as a common property of all people working with resources in a social ownership.

(678) Zakon o temeljnih pravicah iz delovnega razmerja, Ur.l. SFRJ (Official Gazette), 60/89, 42/90; It was applied in Slovenia on the basis of Article 4, paragraph 1 of the Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia until 1 January 2003, when the new Slovenian Employment Relationships Act, 2002, entered into force.

(679) Zakon o delovnih razmerjih, Ur.l. RS (Official Gazette), Nos 14/90, 5/91, 71/93.

(680) Nataša Belopavlovič et al., Zakon o delovnih razmerjih s komentarjem (Commentary to the Employment Relationships Act), GV Založba, Ljubljana, 2003, p.25.

(681) Zakon o delovnih razmerjih, Ur.l.RS (Official Gazette), No 42/02).

The transition to a market economy conditioned another system change in labour law, i.e. the introduction of collective agreements. However, provisions on collective agreements in both above-mentioned acts was very general, imperfect, and disputable.

The separation from former Yugoslavia. The intention of this expedition back in time is to draw attention to the fact that labour law reform had started even before the Slovenian declaration of independence. As regards the separation it is important to know that Slovenia decided to continue applying former Yugoslav legislation ([682]) until it would progressively be replaced by the new Slovenian legislation. Slovenia also accepted the international obligations that applied in its territory before it broke away from Yugoslavia.

Slovenian independence is also important as regards its influence on the economic situation of the state. The loss of the former Yugoslav markets had certain negative influences on the economic situation and employment in Slovenia; however the state was relatively successful in adjusting to the situation and tried to restructure the economy.

Preparations for accession to the EU. Already at the end of the 1980s, when the decision to reintroduce a market economy was adopted, the solutions offered by pertinent EC directives were sometimes taken into account when drafting labour legislation. This was based on the belief that the adoption of such solutions would facilitate the goal that has been set, i.e. the transition to a market economy.

The systematic harmonisation of the Slovenian labour law with the EC law began in 1993. At that time the Standing Orders of the Government of the Republic of Slovenia ([683]) laid down the obligation that every draft statute or amendment thereof, should be explained as regards its compliance with the relevant regulations or directives, with the goal of assuring, as closely as possible, conformity with the existing legal acts. Slovenia officially applied for EU membership on 10 June 1996. In July of the same year the Council of Ministers decided to commence the proceedings, as stated in the Treaty, which was followed by the European Commission presenting its opinion relating to Slovenia's application in Agenda 2000. It has been established that the main principles of the EC labour law have already been incorporated within the Slovenian labour law, but certain adjustments or even 'corrections' still had to be made in individual areas.

2. The normative role of the state

The question of the role of the state in forming labour law is closely connected to the relation between the state and the autonomous sources of labour law: is labour law characterised by the strong (detailed and extensive) state law or are the employment relationships mainly regulated by collective agreements? Also important is the issue of whether state regulations merely define the minimum rights that can always be improved by collective agreements. Finally, for the national

([682]) Ustavni zakon za izvedbo ustave Republike Slovenije (The Constitutional Act on the Implementation of the Constitution of the Republic of Slovenia), Ur.l. RS (Official Gazette, No 33/91).
([683]) Poslovnik Vlade Republike Slovenije, Ur. L. RS (Official Gazette), No 13/93.

labour law it is also of importance whether its legislation is codified, or whether the field of employment relationships is regulated by numerous individual acts and other regulations.

For the labour law that was in force in former Yugoslavia it was typical that very often the legislation was not directly applicable. The laws generally foresaw certain rights and obligations but their minimum and/or maximum was not specified. This left the self-management general acts ([684]). A legacy from the regulation of the former regime can still be found in certain labour regulations that were still in force in the period under discussion. As an example, the Basic Rights Stemming from the Employment Relationship Act, 1989, and the Employment Relationships Act, 1990 can be mentioned. They have extensively imposed questions that should be negotiated 'in detail' by the social partners. This approach has been seriously criticised in the labour law doctrine, but the fact is that the autonomy of collective bargaining was limited to a great extent.

At the beginning of the co-called period of transition towards the market economy some were of the opinion that codification of labour legislation should be prepared simultaneously with the introduction of all political, economic and social changes. But it was acknowledged that the conditions for the eventual codification ([685]) were not fulfilled and the idea of codification was rejected. If we compare the old labour law in former Yugoslavia with what has been established in independent Slovenia we can discover certain trends of legislation fragmentation. This fragmentation is most likely to continue in the future as a consequence of the influence of EU law. Namely, individual directives are often transposed into domestic law by separate acts ([686]).

Regarding labour legislation adopted in Slovenia since the declaration of its independence, Slovenia can be classified as a country in which labour law is state directed. On one hand, the stated legislation has certain historical backgrounds. On the other hand, it depends, to a great extent, on how well organised and how strong the employers' and workers' organisations were at the time the process of changing and adjusting the labour law to the new social and economic conditions began. In the field of collective labour law the issue of social relations is of great importance. One has to bear in mind that they are only gradually shaped, developed and adjusted to the economic and social conditions. On the other hand, the role of the legislation, which can provide merely the basis of the development of industrial relations, is important but nevertheless limited. When the discussions on new labour legislation were initiated in 1995, a common viewpoint was adopted that the state should maintain its role in regulating the most vital questions in the field of labour, and establish minimum standards of employment which can be improved by way of collective bargaining ([687]). The trade unions supported such an approach. One of the reasons for this might be that they assessed that at that time they were not strong enough, and were afraid that they would not be successful in the collective negotiations with the employers and in developing the industrial relations as such.

([684]) The law foresaw that it will be used through a filter that was represented by the various provisions in the self-management general acts. The latter were some sort of executive provisions.

([685]) See e.g., The Codification of Labour Law, 9th International Congress, Reports and Proceedings, Munich 12–15 September 1978, Band II/2, Verlagsgeselchaft Recht und Wirtschaft MbH, Heildelberg.

([686]) The prediction is founded on the recently adopted statutes, by which the directives on the participation of workers have been transposed into domestic law.

([687]) Polonca Končar, Delovno pravo — kje smo in kam gremo? (Labour Law — Where we Are and Where Are we going?), Podjetje in delo, 5–6/1995, p. 533.

Constitutional rights and freedoms related to work

The Constitution of the Republic of Slovenia from 23 December 1991 ([688]) defines Slovenia as a state governed by the rule of law and as a social state (Article 2). One of the main principles it underlines is the principle of the separation of power. Its principle aim is to protect human rights and fundamental freedoms. In part II on human rights and fundamental freedoms the following rights and freedoms are, inter alia, guaranteed: equality before the law (Article 14), freedom of work (Article 49), right to social security (Article 50), right to healthcare (Article 51), and rights of disabled (Article 52). The principle of the social state is also confirmed by certain provisions of part III on economic and social relations. The Constitution thus provides security of employment (Article 66), participation in management (Article 75), freedom of association (Article 76), right to strike (Article 77), and special rights of aliens employed in Slovenia (Article 79).

The Constitutional Court, which has the jurisdiction for deciding on the conformity of statutes and other regulations (including local community regulations) with the Constitution, the conformity of the so-called general acts issued for the exercise of public authority with the Constitution, etc., also decides on the constitutional complaints regarding the violations of human rights and basic freedoms in particular acts, with regard to which all other legal means have been exhausted.

State employee protection law

The 1991 Constitution was the basis on which the process of changing and adjusting the Slovenian legal order was initiated. In the field of labour law in the broader sense, a number of pertinent statutes have been adopted so far. The adoption of many of them falls into the period between 1995 and 2005. The following acts may be considered the most important: The Employment and Insurance Against Unemployment Act, 1991 ([689]), Representativeness of Trade Union Act, 1993 ([690]), Workers' Participation in Management Act, 1993 ([691]), Labour Inspection Act, 1997 ([692]), Health and Safety at Work Act, 1999 ([693]), Vocational and Technical Education Act**,** 1996 ([694]), Act Regulating the Minimum Wage, the Method of Wages Adjustment and Reimbursement for Annual Leave in the Period from 1999 to 2001, 1999 ([695]), Employment and Work of Aliens Act, 2000 ([696]), Prevention of Undeclared Work and Employment Act**,** 2000 ([697]),

([688]) Ustava RS, Ur.l. RS (Official Gazette), No 33/91-I, 42/97, 66/00, 24/03, 69/04, 68/06.
([689]) Zakon o zaposlovanju in zavarovanju za primer brezposelnosti, Ur.l.RS (Official Gazette), No 5/91, 17/91, 12/92, 13/93, 71/91, 2/94, 38/94, 69/98, 97/01, 67/02, 42/02, 63/04, 79/06, 107/06-official consolidated text.
([690]) Zakon o reprezentativnosti sindikatov, Ur.l. RS (Official Gazette), No 13/93.
([691]) Zakon o sodelovanju delavcev pri upravljanju, Ur.l.RS (Official Gazette), No 42/93, 56/2001).The proposal to adopt amendments to the Act was adopted in August 2006.
([692]) Zakon o inšpekciji dela, Ur.l.RS (Official Gazette), No 38/94, 32/97, 36/00.
([693]) Zakon o varnosti in zdravju pri delu, Ur.l. RS (Official Gazette), No 56/99, 64/01.
([694]) Zakon o poklicnem in strokovnem izobraževanju, Ur.l.RS (Official Gazette), No 12/96, 44/00: In 2006 the Act was replaced by a new Act with the same title (ur.l.RS (Official Gazette), No 79/06.
([695]) Zakon o minimalni plači, o načinu usklajevanja plač in o regresu za letni dopust v obdobju 1999–2001, Ur.l.RS (Official Gazette), No 39/99, 124/00, 48/01, 69/02.
([696]) Zakon o zaposlovanju in delu tujcev, Ur.l. RS (Official Gazette), No 66/00, 101/05, 4/06-official consolidated text.
([697]) Zakon o preprečevanju dela in zaposlovanja na črno, Ur.l. RS (Official Gazette), No 36/00.
The official translation of the Act is not appropriate as its content covers the prohibition of the illegal performance of the enterpreneurs' activities and the prohibition of the underground work.

Parental Protection and Family Benefits Act, 2001 ([698]), Employment Relationships Act, 2002 ([699]), Equal Opportunities for Women and Men Act, 2002 ([700]), European Works Councils Act, 2002 ([701]) Civil Servants Act, 2002 ([702]), Guarantee and Maintenance Fund of the Republic of Republic of Slovenia, 2003 ([703]), Labour and Social Courts Act, 2004 ([704]), Act on Implementing the Principle of Equal Treatment, 2004 ([705]), Participation of Workers in Management of the Societas Europaea Act, 2006 ([706]), Collective Agreements Act, 2006 ([707]), Workers Participation in Management of the Societas Cooperativa Europaea Act, 2006 ([708]).

Among the acts still to be adopted the Strike Act has to be mentioned. It might be interesting to point out that the Strike Act, adopted in former Yugoslavia ([709]), shall temporarily remain valid until the adoption of the new Slovenian act.

3. International instruments

In Slovenia the monist principle is applied. It has been considered that the ratified and published international norms are automatically integrated into the national legal system. This could result in the possibility of national courts applying international norms and not the national law when ruling on an individual dispute.

Slovenia is bound by most important UN standards (also the international conventions on human rights), by 75 ILO conventions, by the norms of the Council of Europe (e.g. European Convention of Human Rights, European Social Charter (revised) etc.). International norms have had an important influence upon the development of labour law already in former Yugoslavia. They also played a positive role in the adjustment of the labour law to the new social-economic conditions and at the search for the necessary balance between the 'economic and social' on one hand and the 'collective and individual' on the other ([710]).

4. Autonomous collective law

As already indicated the Constitution of RS, 1991, guarantees the freedom to establish, operate and join trade unions (Article 76). It is true that only trade unions are mentioned in the said provision and it might be assumed that the right to organise themselves is assured only to the workers. The general right to association (Article 42) has also to be pointed out. According to

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([698]) Zakon o starševskem varstvu in družinskih prejemkih, Ur.l.RS (Official Gazette), No 97/01.76/03, 47/06, 110/06-official consolidated text.

([699]) Zakon o delovnih razmerjih, Ur.l.RS (Official Gazette), No 42/02; In 2007, that is outside the reference period, the Act has been amendeded. See: Zakon o spremembah in dopolnitvah Zakona o delovnih razmerjih, Ur.l.RS (Official Gazette), No 103/07.

([700]) Zakon o enakih možnostih žensk in moških, Ur.l.RS (Official Gazette), No 59/02.

([701]) Zakon o Evropskih svetih delavcev, Ur.l.RS (Official Gazette), No 59/02.

([702]) Zakon o javnih uslužbencih, Ur.l.RS (Official Gazette), No 56/02, 110/02, 23/05, 62/05, 113/05, 32/06-official consolidated text; The broad personal scope of the labour law that was typical for post 1957 Yugoslavia has been abolished. Separate regulation applying to public-law employees has been introduced. Employment Relationships Act, 2002, applies to civil servants only on the basis of the principle of subsidiarity. See: Arturo Bronstein, Labour Law Reform in the EU Candidate Countries: Achievements and Challenges, Social Dialogue, InFocus Programme on Social Dialogue, Labour Law and Labour Administration, Working paper No 13, ILO 2003, p. 14–15.

([703]) Zakon o javnem jamstvenem in preživninskem skladu Republike Slovenije, Ur.l. RS (Official Gazette), No 26/03.

([704]) Zakon o delovnih in socialnih sodiščih, Ur.l.RS (Official Gazette), No 2/04, 10/04 (revised).

([705]) Zakon o uresničevanju načela enakega obravnavanja,Ur.l.RS (Official Gazette), No 50/04.

([706]) Zakon o sodelovanju delavcev pri upravljanju Evropske delniške družbe (SE),Ur.l.RS (Official Gazette), No 28/06.

([707]) Zakon o kolektivnih pogodbah, Ur.l.RS (Official Gazette), No 43/06.

([708]) Zakon o sodelovanju delavcev pri upravljanju evropske zadruge, Ur,l.RS (Official Gazette), No 79/06.

([709]) Zakon o stavki, Ur.l. SFRJ (Official Gazette), No 23/91, Ur.l.RS (Official Gazette), No 22/91.

([710]) See: Polonca Končar, Die Rolle des internationalen Arbeitsrechtes bei der Änderung des slowenishen Arbeitsrechts, In: Thomas Klebe, Peter Wedde, Martin Wolmerath(Hrsg.), Recht und sociale Arbeitswelt, Festschrift für Wolfgang Däubler, Bund-Verlag, p.952–964.

this right everyone has the right to association. In addition, Slovenia is bound by the most important UN, ILO and European Council's instruments on human rights that cover the right of employers and workers to association. The right to association is interpreted in a way that assumes both aspects: the freedom to organise and the freedom of action. By this the right to bargain collectively is included in the constitutional right to freedom of association. The Constitution protects the workers' right to strike as a special constitutional right (Article 77).

Trade unions and employers' associations

The democratisation and pluralisation of political and other relations in Slovenia at the end of the 1980s and the beginning of the 1990s resulted in trade union pluralism. There are currently seven federations and/or confederations in Slovenia: Zveza svobodnih sindikatov Slovenije (Association of Free Trade Unions Of Slovenia) ([711]), Konfederacija sindikatov Slovenije PERGAM (Confederation of Trade Unions of Slovenija PERGAM) ([712]), Konfederacija sindikatov 90 Slovenije (Trade Union Confederation 90 of Slovenia) ([713]), Neodvisnost, Konfederacija novih sindikatov (Independence, Confederation of new Trade Unions of Slovenia) ([714]), Slovenska zveza sindikatov ALTERNATIVA (The Slovenian Association of Trade Unions ALTERNATIVA) ([715]), Zveza delavskih sindikatov Slovenije — SOLIDARNOST (Association of workers' trade unions — SOLIDARNOST) ([716]), Konfederacija sindikatov javnega sektorja Slovenije (Confederation of Trade Unions in the public sector) ([717]). In addition, there are 27 trade unions that act as representative trade unions in an individual branch or profession ([718]). Trade unions can also be formed on the enterprise level.

As a consequence to trade union pluralism conflicts between individual trade unions appeared. These conflicts arose especially during the collective negotiations on the level of companies as well as on higher levels. In order to reduce the tension and unhealthy competition between the trade unions, the Representativeness of Trade Unions Act was passed in 1993. According to this act the attribute of representativeness of a trade union may be obtained by a trade union which: a) is democratic and respects the principle of freedom of association, b) has been active for an uninterrupted period of at least six months, c) is independent of state bodies and employers, d) has its own funding and e) meets the quantitative thresholds stipulated in the Act. The act also stipulates that a trade union shall become a legal person on the day the decision on the deposition of the statute or other founding act is issued by a competent administrative body.

In Slovenia, membership in trade unions has declined during the transition period. In the period between 1993 and 2003 the trade unions did not make their membership data public, or some of them merely gave estimations as regards their numbers. According to the data found on the European Industrial Relations Observatory online the current level of trade union density in Slovenia is 41.3 % ([719]).

([711]) Comprises of 19 representative trade unions of various branches and professions.
([712]) Comprises of seven representative trade unions of branches and one representative trade union of a profession.
([713]) Comprises of 12 representative trade unions of various branches and professions.
([714]) Comprises of 9 trade unions of branches an 1 trade union of a profession.
([715]) Comprises of 2 representative trade unions of branches.
([716]) Comprises of 2 representative trade unions of branches.
([717]) Comprises of 6 representative trade unions of branches.
([718]) The list of all representative trade unions can be found on: http://www.mdzzsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/
([719]) Figures for the period 1991–2001 have not changed significantly.

When the labour legislation from 1989 and 1990 enforced the collective negotiation system, the role of the party in collective negotiations was handed over to the Chamber of Commerce and Industry of Slovenia. The Chamber of Commerce and Industry Act, 1990, defined it as an independent professional/business organisation with compulsory membership. In 1994 it was joined by the Chamber of Crafts of Slovenia, also an organisation with obligatory membership. At first the trade unions did not oppose the fact that both chambers participated in the drafting of collective contracts, but as time passed by they started to undermine their legitimacy of acting as the employers' representatives because of their obligatory nature. Warnings that the principle of free association should be respected also when dealing with employers' organisations started arriving from ILO and Brussels. Apart from this certain employers also started to demand that the Chamber of Commerce and Industry should be reorganised into a voluntary organisation. All of these pressures resulted in the new Chambers of Commerce and Industry Act, 2006 ([720]), which foresees the transition of the Chamber of Commerce and Industry into a voluntary association of legal and natural persons that play a role in the profitable economic activities ([721]).

Collective agreements

In Slovenia collective negotiations started to be reinforced on the basis of the Basic Rights Stemming from the Employment Relationship Act, 1989 ([722]), and the Employment Relationships Act, 1990 ([723]), which represented the legal basis for drafting collective agreements until April 2006, when the Collective Agreements Act was adopted. Both acts indicated the contents of collective agreements (the part covering the rights and obligations of the involved parties as well as the part setting the legal norms) and determined the parties and the levels of collective bargaining (national, branch level, and also possible local and enterprise level). Under this legislation the so-called advantage principle could be applied not only as regards the relation of an act versus the collective agreement or the relation of collective agreements versus the employment contract, but also when the relations between different levels of collective agreements were concerned. Both acts provided for an erga omnes effect of collective agreements.

In practice, the following system of collective agreements that was in use also in the discussed period was established: two so-called general collective agreements were signed — one for the economic and one for the non-economic sector. Apart from these two, another 23 collective agreements for economic activities and three collective agreements for the public sector (electricity, mining, rail transport) were signed. Five collective agreements have been signed for the activities performed predominantly within the framework of public institutions (training and education, health and social services, healthcare, research activities) ([724]). Certain collective agreements have also been signed for individual professions (e.g. physicians and dentists,

([720]) Zakon o gospodarskih zbornicah, Ur.l.RS (Official Gazette), No 60/2006.
([721]) Because it was not clear for quite a long period whether the law would establish a voluntary membership in the Chamber of Commerce and Industry, the Collective Agreements Act from 2006 defined that the employers' organisations with obligatory membership can sign collective agreements merely in the transition period of three years.
([722]) Art. 85–88.
([723]) Art. 112–119.
([724]) The collective agreements that are run by the Ministry of Labour, Family and Social affairs, can be found on: http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_inpravice_iz_dela/

journalists, casino employees, etc) ([725]). The number of collective agreements on the enterprise level is unknown.

Workers' representation on the enterprise level

The general characteristic of the system introduced in Slovenia by the Workers Participation in Management Act, 1993 ([726]), is the dual channel of workers' representation on the enterprise level. Trade union representation as well as representation through workers' participation bodies (voluntary workers' council, workers' representative in small enterprises) and participation through management bodies is foreseen. It is stated that through exercising the right to participate in management, the rights of trade unions and employers' organisations to protect the interests of their membership shall not be encroached. The act compels the workers' councils to refrain from any activity that is characteristic for trade unions. So far the coexistence of both forms of workers' representation within a company has shown that it can contribute to the better operation of a company and to the prevention of social conflicts within it, which is of course very positive. The dual system of workers' representation cannot be shown in greater detail ([727]). However, I am mentioning it in this place mainly to draw attention to the fact that the Worker Participation in Management Act foresees the possibility of a new kind of autonomous bilateral source of labour law, i.e. written agreements between the employer and the workers' council, with which the modes and methods of workers' participation in management can be autonomously stipulated. It also allows for additional co-determination rights of workers to those already provided by the act. Such written agreements should also regulate and specify, in detail, the manner of implementing the rights of workers' representatives stipulated by this act.

The role of a tripartite social dialogue

The review of labour law developments after Slovenia became an independent state and an EU candidate and, in particular, during the 1995–2005 period, would be incomplete without mentioning the system of tripartite cooperation between the social partners and the state ([728]).

From 1992 onwards the political exchanges between the left-centre governments and the social partners are one of the more important features of the Slovenian transition, for they enabled adjustments of market reforms to their social acceptability ([729]). An important turning point in the tripartite dialogue was presented in 1994 when the social partners from the economic sector established the Economic Social Council (ESC) with their agreement on salary policy for

([725]) See: Mark Carley, Industrial relations in the Member States and candidate countries, European Foundation for the Improvement of Living and Working Conditions, 2002; The system of collective bargaining has been assessed as a highly centralised one. This may be true if the dominant wage bargaining level is taken into consideration. From the point of view of patterns of working conditions bargaining, the system is less centralised.

([726]) The so-called umbrella act applies to all commercial companies, cooperatives, public-sector commercial companies as well as banks and insurance companies unless otherwise provided by a special statute. Workers' Participation in Management of Institutions Act has not been adopted yet.

([727]) For more see: Polonca Končar,Employee Involvement in Slovenia, in: Manfred Weiss, Michal Seweryński (Eds.), Handbook on Employee Involvement in Europe, Kluwer Law.

([728]) Apart from the tripartite dialogue described in the continuation there are also other forms of tripartite dialogues between the social partners and the government. Polonca Končar, Le droit social en Slovenie au regard de l'acquis communautaire, Bulletin de droit comparé du travail et de la sécurité sociale, COMPTRASEC UMR CNRS, Université Montesquieu-Bordeaux IV, p. 180–181.

([729]) Miroslav Stanojevic, Social dialogue and EMU in Slovenia. In: Social dialogue and EMU in the acceding countries, European Foundation for the Improvement of Living and Working Conditions, 2003, p.243–257.

1994 ([730]). ESC comprises of 15 members, five from the government, five from the trade unions and five from the side of the employers. Within the ESC the partners regularly discuss the issues and measures related to the economic and social policies as well as other issues that deal with special areas agreed upon by the social partners and the government. They pass proposals related to the new legislation which could have some repercussions on the workers and employers and form standpoints and opinions on the budget memorandum and the national budget. So far several tripartite social agreements have also been adopted by the ESC, and they have covered all important economic and social areas such as social policy, health and safety at work, employment and unemployment, competitiveness, wages, etc. The last social agreement (for the period 2002–2005) was adopted in 2003 and a new social agreement is currently being discussed within the ESC. The result of the sometimes very pragmatic dialogues was a relatively smooth transition into the socially acceptable market economy. In more recent times the cooperation between trade unions, employers' organisations and the current right-wing government has not always proven to be successful. Some firmly believe that the government sometimes does not feel itself bound to take part in the dialogue as the ESC has been established by the agreement between social partners and not by an act. Thus we can expect that a state regulation on the ESC shall be adopted in the near future.

The tripartite dialogue also takes place outside of the frames of the economic-social council. As an example I can state the formation of the proposals for certain acts that are especially important for the employees, amongst them the Employment Relationships Act, 2002. The proposal for this act was at first drafted by an expert group. Even before the draft was sent into parliamentary procedure, negotiations — as they called them — took place between the social partners and the party that proposed the act, i.e. the Ministry of Labour, Family and Social Affairs. Only when the three of them reached an agreement as regards the draft proposal of the act and signed it, did the draft go to parliament. Thus we could say that the act is a '*loi negociée*'. The described procedure was an important precedent, with some other draft proposals for acts important for the employees also being formulated in this way. The above-mentioned shows that the tripartite dialogue plays an important part in Slovenia.

5. General acts of the employer as an unilateral source of labour law

The reintroduction of collective agreements is not the only novelty that has been introduced in the system of legal sources in the field of labour law. The possibility of unilateral regulation of employment relationships by the employer has also been enacted by the Employment Relationships Act, 2002. The act has laid down that the employer may adopt the so-called general acts and on his own determine the working conditions that are otherwise set by collective agreements if the following two preconditions are met: a) that there is no trade union organised with the employer ([731]) and b) that the rights are more favourable for workers than those laid down by law or agreed upon by collective agreements which bind the employer. Prior to the adoption of these acts the employer is obliged to directly inform his workers of the contents of

([730]) The agreement was accepted as a separate part of the social agreement. Some see the fact that the establishment of the economic social council does not have a legal basis as the reason why the operation of the council is not always in line with expectations, and that the government especially does not always show enough interest for a tripartite dialogue.

([731]) According to Article 208 the trade union at the employer is the trade union that has members employed by the employer, and that can name or elect a trade union representative to represent members with the employer.

the general act ([732]). Employers' general acts are of normative nature. The fact that the law allows that under certain conditions employers' general acts supplant the enterprise collective agreements is interesting from the aspect of the development of the so-called collective labour relations as well as from the aspect of the development of the democracy in the sphere of labour within a certain society. In an historical perspective, the replacement of an unilateral by a bilateral way of regulation of working conditions can be assessed as the democratisation of the sphere of labour. In the development of the labour law the normative power of the employer has been reduced very much in accordance with the idea: the greater the extent of the bilateral regulation of working conditions, the more democratic the sphere of work is. In this aspect the currently valid legislation on general acts of employers can be assessed as a step backwards in the development of our labour law ([733]), as it allows the replacement of the so-called collective autonomy with the autonomy of an individual. In cases where workers are not unionised it would be much more appropriate to lay down that representatives of the workers duly elected and authorised by workers would be allowed to conclude the enterprise collective agreements.

([732]) Apart from the general act, with which the working conditions are set, the employer also adopts other (as regards their contents) general acts. In short we call them 'organisational acts', because they deal with the organisation of labour or with the ways of fulfilling the duties in relation to health and safety at work, and similar. Nataša Belopavlovič et al., Employment Relationships Act with Commentary (Zakon o delovnih razmerjih s komentarjem), GV, Ljubljana 2003, p.62–71.

([733]) Polonca Končar, Neue gesetzliche Regelung individuelle Arbeitsverhältnisse in Slowenien stärkt die normativen Befugnissen des Arbeitsgebers, In: Armin Höland, Christine Hohmann-Dennhardt, MarleneSchmidt, Achim Seifert (Hrsg.), Arbeitnehmeemitwirkung in einer sich globarisierenden Arbeitswelt, Liber Amicorum Manfred Weiss, BWV, 2005, p. 383–391.

Chapter II

From job security to employability

1. Individual protection against termination of employment/redundancy

Following the Slovenian declaration of independence, one of the central issues relating to the labour law reform and its adaptation to the market economy was the substitution of the old system of the protection against termination of employment with a new system that would be adjusted to the contractual nature of employment and the characteristics of the market economy.

Legislation in force until the end of 2002 distinguished the individual and 'collective' termination of employment relationships. It was adopted in accordance with the Constitution of the former Yugoslavia that still guaranteed the right to work. In accordance with this right it was forbidden to terminate a worker's employment relationship against his will, except in cases laid down by an act. That is why the legislation excessively regulated valid reasons for the mandatory termination of employment, as well as setting out examples of the circumstances in which the termination of employment might be permissible. Wherever such circumstances had not been specifically sanctioned in advance, a termination of employment was not legal. Termination of employment as a disciplinary measure was included among the valid reasons for the termination of employment.

The mentioned legislation did also foresee the so-called protection of redundant workers ([734]). The Employment Relationships Act, 1990, differentiated temporary and permanently redundant workers. The position of temporary redundant workers was similar to the so-called 'lay-offs' known in other countries but they were not dismissed. They had the right to: retraining, temporary work at another employer, a compensation of wage in the case of waiting for work at home, etc. The permanently redundant workers could also be dismissed. In accordance to the law and the programme for solving the problems of redundant workers (social plan), adopted after dialogues with the trade union, certain rights had to be ensured in order to reduce the number of workers affected by the termination of employment and to mitigate the consequences of the termination of employment and the difficult situation that occurs due to unemployment. To a certain extent the ILO Convention No 158 on the termination of employment on the initiative of the employer has been taken into consideration. On the other hand the regulation was very disputable and obviously carried over a legacy from regulation under the former self-management regime — particularly in the presumption that in the event of technological changes, whether for structural reasons or related reasons, the workers have to be ensured some employment protection. In the self-management system the changes for economic, technological or other reasons were decided upon by the workers' council and it could be expected that workers would not opt for technological improvements and other organisational changes in their companies if they considered they would lose their jobs because of it.

([734]) The term 'workers, the work of which becomes unnecessary at the employer due to operational reasons' was used by the legislation. From the point of view of the structure it was interesting, for the provisions on the discussed protection were not included within the frame of provisions on the termination of employment.

In discussions on the new Employment Relationships Act, employers criticised the outlined system of employment protection and in accordance to neoclassical ideas demanded to abolish it. ([735]). On the other hand it was often emphasised in the theoretical discussions that the new system should be set in such a way that it could be adjusted to the contractual nature of employment but nevertheless assure an acceptable level of protection in accordance with the international instruments that are binding in Slovenia.

In the Employment Relationships Act, 2002, the principle of restricting the right of the employer to terminate the employment contract was accepted instead of the principle of the right of the employer to unlimited termination of employment typical for the 'employment at will' system. Such an approach is also based on the constitutional provision on the security of employment (Article 66). As regards the new, current legislation on the termination of employment ([736]) the following issues should be stressed:

The Employment Relationships Act, 2002, has laid down the following modes of termination of the employment contract: upon the expiration of the fixed-term contract, upon the death of the worker or the employer (natural person), consensual cancellation, ordinary and extraordinary termination, termination by a court judgement, and cases stipulated by the Employment Relationships Act or any other act.

As regards the termination of the employment contract (by the worker or employer) the aforementioned Act distinguishes ordinary termination, whereby the employment contract terminates when the period of notice expires, and extraordinary termination, in the case of which the contractual parties may terminate the employment contract without a period of notice (Article 80). In the case of an ordinary termination the worker may bring the employment contract to an end without explanation (Article 81). The employer may only terminate the employment contract if there is a so-called 'founded" ([737]) reason for ordinary termination. There are three founded reasons provided by the act: so-called business reasons (operational reasons) ([738]), reasons of incapacity of the worker and so-called 'fault reasons' (Article 88). The reasons which shall not constitute for founded reasons are also provided by the act (Article 89). The employers are limited in their power to terminate the employment contract not only by 'founded reasons for termination', that belong amongst the substantial issues, but also by some formal requirements (i.e. the right of the worker to defend himself against allegations, the trade union's role in the procedure prior to ordinary termination, a shifting of the burden of proof) (Article 82–85).

As regards the ordinary termination of the employment contract due to business and incapacity reasons it has to be pointed out that the regulation in force is based on the principle that the

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([735]) As a reason for the increase in the number of contracts for a limited period the employers often stated that the system of protection of the employment was too high. About the impact of dismissal on employment see: Termination of Employment Digest, ILO, Geneva 2000, p.11–14.

([736]) The legislation has defined the contract of employment from its beginning to its termination. Thus it no longer speaks about the termination of the employment relationship but of the termination of the employment contract.

([737]) Taking into account the fact that international agreements that bind Slovenia, in relation to the termination of the contract of employment, use the term 'valid reasons' (on the initiative of the employer) there have been numerous viewpoints whether it is right and/or appropriate for the Employment Relationships Act to use an expression that could be translated with the word 'founded'. Janez Novak, Resni in utemeljni razlogi za odpoved pogodbe o zaposlitvi (Serious and substantiated reasons for terminating the employment contract), Podjetje in delo 6–7/2002, p 1326–1338.

([738]) Barbara Kresal, Odpoved pogodbe o zaposlitvi iz poslovnih razlogov (Termination of the employment contract for business reasons), Podjetje in delo, 6–7/2002, p. 1347–1358.

termination of the employment contract is only *ultima ratio.* In the event of termination of the employment contract due to business or incapacity reasons, the employer is obliged to verify whether it is possible to employ the worker under different conditions or transfer him to another post, or whether additional training or retraining is possible. If this is possible, the employer will offer the worker a new contract (Article 88/3). Employers employing ten or less workers are exempted from this obligation (Article 88/4).

In the event of termination of the employment contract upon the initiative of worker, the notice period provided by the act is 30 days. If the contract is terminated by the employer due to business reasons the minimum statutory notice period is 30 days (if the worker has up to five years of service with the employer). This period may be gradually increased up to 150 days (for at least 25 years of service with the employer). If the termination of the employment contract is founded on the incapacity of the worker, the statutory notice periods are between 30 and 120 days. If the contract is terminated by the employer due to fault reasons, the minimum period of notice is 30 days (Article 92). The minimum statutory periods of notice may be increased by the employment contract or by a collective agreement ([739]).

Within the frame of ordinary termination of the employment contract the Employment Relationships Act, 2002 — in a special sub-chapter — now also deals with collective redundancies. It preserves the concept that in the past applied for the termination of employment of the so-called permanently redundant workers, however in certain characteristics it also differs from the old legislation. Thus the legislation no longer recognises the category of temporary redundant workers. The Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies and the ILO Convention 158 concerning the termination of employment at the initiative of the employer were transposed into the act. The so-called collective redundancies are defined and the following obligations of the employer or the rights of the workers in relation to the termination of the employment contracts due to a business reason as follows are stipulated: obligation to inform and consult workers' representatives, elaboration of the dismissal programme for redundant workers, consultation with trade unions with the intention to conclude an agreement on the selected criteria for determining redundant workers, obligation of informing the Employment Office as regards the introduction of the respective procedure.

Some important changes introduced by the Employment Relationships Act, 2002, relate to the termination of employment in the case of insolvency or liquidation proceedings. In the past the introduction of bankruptcy proceedings represented ground for *ex lege* termination of the employment. According to the new legislation, insolvency itself is no longer a valid reason for the termination of an employment contract. Rules on the termination of an employment contract due to business reasons (individual or collective) apply. However, there are some special provisions regarding, for example, a shorter period of notice ([740]).

([739]) In relation to the present discussion on the changes of the legislation in force, attention can be drawn to the demands of the employers and the proposal of the Minister of Labour to reduce the above stated periods of notice, which should result in greater flexibility in the labour market.

([740]) Barbara Kresal, Prenehanje delovnega razmerja v primeru stečaja (Termination of the Employment Relationship in the Event of Bankruptcy), Podjetje in delo,1/1998, p. 16–29; Barbara Kresal, Odpoved pogodbe o zaposlitvi iz poslovnih razlogov (Termination of the Employment Contract due to Business Reasons), Podjetje in delo, 6–7/2002, p. 1356–1357; Luka Tičar, Vloga upraviteljev insolvenčnih postopkov pri odpuščanju delavcev (The Role of Insolvency Receivers at Dismissing Workers from their Employment), Podjetje in delo, 6–7/2006, p.1406–1416.

The employer who terminates the employment contract due to business reasons or due to reasons of incapacity is obliged to pay the worker a severance payment. The level of the severance payment depends on the period of service with the employer. As the basis for the calculation of the payment, the average monthly wage received during the last three months is taken into consideration (Article 109).

Some groups of workers benefit from particular protection against the termination of the employment contract by the employer. These groups are: workers' representatives, older workers, parents, disabled workers, and workers absent from work due to illness (Articles 113–117).

The worker or the employer may trigger an extraordinary termination of the employment contract if there are reasons for this and if such reasons are stipulated by the Employment Relationships Act. However, the circumstances and interests of both contractual parties must be taken into account and it must be clear that it is not possible to continue the employment relationship until the expiration of the notice of termination or until the period for which the employment contract was concluded. The permitted reasons for the worker or the employer to start the proceedings for an extraordinary termination of the employment contract are listed in the Act (Articles 111–112).

2. Active employment policy measures

Active employment policy was first initiated in the 1980s ([741]), however this policy area gained in importance with the transition to the market economy. The legal basis for the active employment policy can be found in the Employment and Insurance against Unemployment Act, 1991, which has been changed and amended on a number of occasions. The most substantial changes were adopted in 1998 ([742]). These stated that the inclusion of an unemployed individual into an active employment policy programme is a basic right of such an individual. An unemployed person enters an active employment policy programme on the basis of the employment plan and after signing a contract with the performer of such a programme.

According to the legislation the measures of active employment policy can be intended for:

- employers ([743]),
- individuals (still employed or unemployed job seekers), who are enrolled into the active employment policy programme ([744]).

([741]) Within the frame of security in the event of unemployment, the unemployed had not only unemployment benefits but also some other rights, such as the right to preparations for employment, that would today be considered to belong amongst the measures of an active employment policy.

([742]) Zakon o zaposlovanju in zavarovanju za primer brezposelnosti, Ur.l. RS (Official Gazette), Nos 5/19991, 12/1992, 71/1993, 38/1994, 69/1998, 67/2002.179/2006, 107/2006-official consolidated text.

([743]) According to the legislation these can be the following: co-financing the opening of new work posts, supplementing a part of the costs for preserving productive work posts**,** a loan for investments into new production capacities, help with training new workers, co-financing education and similar.

([744]) The legislation stipulates for the following measures: covering the costs of running informative programmes, professional counselling and educational programmes, covering the costs of insurance for accidents at work and professional diseases, wage compensation for certain groups of unemployed, help with self-employment, co-financing the costs for starting up a business, co-financing the adaptation of working premises so that they are suitable for the disabled, public works.

As an important novelty the law foresees that the unemployed can perform various public service works on the basis of special employment contracts. Until the changes in the law in 1998 the unemployed did not sign employment contracts in order to perform public service works.

With the 1998 changes and amendments to the law, the operation of the temporary employment agencies became feasible ([745]).

As stipulated in the individual strategic documents concerning the field of active employment policy and the measures of active employment policy adopted on their basis, the problems of unemployment should be solved predominantly by the following: a) increasing the employability of citizens, b) encouraging entrepreneurship and an entrepreneurial manner of thinking, c) encouraging and promoting the adaptability of the individuals to the needs of the companies and d) equalising employment possibilities. The active employment policy should not be intended merely for encouraging employment. With certain measures it is also possible to prevent the occurrence of unemployment, which means that the preventive function is also important ([746]).

A number of strategic documents in the area of active employment that intended to enhance the employability of the population have been adopted. These include: Active Employment Policy Measures Programme in RS for the individual year (since 1999), National Employment Programme for 2000 and 2001, Guidelines of the Active Employment Policy for 2002 and 2003, National Programme for Labour Market Development until 2006 and the Employment Policy and Programmes for its Implementation. In these documents it can be clearly seen that the government is continuing to pursue measures aimed at achieving full employment. Within the framework of inclusion in the active employment policy programmes, the following categories are given priority: young unemployed persons, older unemployed persons, unemployed persons with low levels of education, long-term unemployed persons, unemployed recipients of social security benefits (e.g. social assistance), and persons employed in industries that are being restructured. As regards the measures aimed at equalising employment opportunities, measures intended for disabled persons, women, the Roma population, and other minority groups should be underlined.

Generally speaking, active employment policy measures ([747]) have a positive result. Indicators on the basis of which we can assess the employment and unemployment situation in the country have improved. There is an increase in the employment rate (from 61.6 % in 1996 to 65.3 % in 2004). The youth employment rate is also on the rise (33.8 % in 2004). The employment rate of older workers is assessed to be too low ([748]). The unemployment rate has fallen from 6.9 % in 1996 to 6 % in 2004. In both cases the rate was lower than the EU average. The long-term unemployment rate is still high, but it has been on a decline since 2002. For example, in 2003 almost 80 % of all registered unemployed were involved in various education and training programmes that contributed to an improvement in the unemployment structure. Namely, the proportion of long-term unemployed was reduced.

([745]) The law foresaw that the relationships deriving in relation to this have to be defined by the labour legislation. The provisions for employment through the mediation of temporary employment agencies can be found in the 2002 Employment Relationships Act.

([746]) In the event of collective redundancies important measures are education and training that enable the workers to perform a different task or find employment with a new employer.

([747]) The ratio between active and passive policy expenditures has changed from 1:3 in 2003 to 1:1.5 in 2005.

([748]) See: Council Recommendation on the Implementation of Member States' Employment Policies, (2004/741/EC), OJ L 326, p. 47, 29.10.2004.

3. The prevention of undeclared work

From the aspect of new legal measures with which the state intervenes in the labour market and tries to encourage employment, the endeavours of the state to reduce the extent of underground work should be mentioned. The period covered by this report is the period during which Slovenia paid special attention to the problem of underground work, which was in full swing during the 1980s and during the transitional period that followed the declaration of independence ([749]). In 1997 we have adopted the Programme for Detecting and Preventing Undeclared Labour and in 2000 we passed the Prevention of Undeclared Work and Employment Act ([750]). This act enabled a systematic monitoring of the phenomenon as well as harmonised activities of the inspectorates and other administration bodies, which contributed to the reduced extent of the underground work that has, inter alia, negative effects on the labour market. Regardless of the positive changes in the disclosure and prevention of underground work, the EU Council suggests that it would be possible to increase the employment of older people by, inter alia, measures aimed at reducing undeclared work ([751]).

4. Bridging the gap between education and training and the labour market

4.1. Introducing a dual system of vocational training

In the framework of endeavours oriented towards improving the training system and adapting it to the changing demands in the world of work, the Vocational and Professional Training Act was adopted in 1996 ([752]). Pursuant to this act Slovenia reintroduced a dual system of vocational training after a 16-year break ([753]). The system was introduced on the initiative of craftsmen and small businesses who believed that only such a training system could guarantee an appropriate balance between the theoretical knowledge and practical skills required in certain trades. From the aspect of promoting employment the fact that employers prefer to employ individuals who underwent training with them was also strongly underlined.

Without entering into a technical analysis of the system and the legal position of apprentices ([754]), it might be interesting to mention that the apprenticeship established on the basis of learning contracts does not constitute an employment relationship. A learning contract can be regarded as a *sui generis* contract. Its content is provided for by the act. In addition, the protection of

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([749]) According to certain estimations the grey economy amounted at that time to 38 % of the total GNP. Later measurements, performed by various authors, showed different levels of grey economy, i.e. between 16 % and 21 % of the total GNP. More recent research, performed as a GNP revision for the period between 1995 and 2005 shows that the scope of the grey economy represents approximately 6.5 % of GNP. Summarised from: Poročilo o aktivnostih in učinkih preprečevanja dela in zaposlovanja na črno za leto 2005, Komisija vlade RS za odkrivanje in preprečevanjedela in zaposlovanja na črno (Report on the activities and the results of preventing illegal work and employment for 2005, Government Committee of RS for discovering and preventing illegal work and employment, April 2006.

([750]) Zakon o preprečevanju dela in zaposlovanja na črno, Ur.l.RS (Official gazette), No 36/2000; As regards the use of the term 'illegal' see the footnote 20.

([751]) See: Council Recommendation on the Implementation of Member States' Employment Policies (2004/41/EC), OJ L 326, p. 47, 29.10.2004.

([752]) Zakon o poklicnem in strokovnem izobraževanju, Ur.l. RS (Official gazette), No 12/96, 44/00.

([753]) The apprenticeship system was in force between the end of the Second World War until 1980 when the Oriented Education Act was adopted.

([754]) In July 2006 a new Vocational and Technical Education Act (Ur.l. RS. 79/06) was adopted. This act, amongst others, defines that the citizens of EU Member States have the same rights to vocational and technical education as the citizens of Slovenia, but it has left out the word 'apprentice' and uses the term 'pupils'.

apprentices in relation to their working hours, daily and weekly rest period, paid annual leave, health and safety at work, etc. is provided by the Employment Relationships Act, 2002.

4.2. Student work

For decades student work has been a peculiarity of the Slovenian labour market. In 1978 the Employment and Unemployment Insurance Act permitted special agencies ([755]), founded by students' associations and the Universities, to assign students for temporary or occasional work opportunities with employers. This type of work has never been regarded either as an employment relationship ([756]) or as an example of undeclared work but has been treated as a form of work performed in the framework of a special triangular relationship ([757]). The main purpose of such student work has been to allow university students, and subsequently also secondary school students, to get acquainted with 'working life', to acquire practical experience, to develop contacts with possible future employers and also to earn some pocket money.

Student work has continued on this basis up until the present. Notwithstanding a number of attempts to restrict student work, its extent has actually increased over the last decade for a variety of reasons ([758]). From the viewpoint of a well-functioning labour market, however, student work is questionable. Students are very often undertaking work which is neither temporary nor occasional and which should instead be performed in the framework of an employment relationship ([759]). Such work may be undertaken over a lenghty period of time, sometimes extending throughout a year. Student work undoubtedly assists the financial/social situation of many students and can reduce social tensions among the student population. It can also, however, have negative consequences for students especially when it is undertaken on a full-time basis and over extended periods ([760]).

In the framework of economic and social reforms for increasing the welfare in the country, proposals were initiated in 2004/2005 to abolish the existing system of student work and/or regulate student work so as to ensure that it would not result in unfair competition vis-a-vis other forms of employment. It should above all assist the transition between studies and work and facilitate the transfer of knowledge between universities and the workplace. However, students strongly opposed any change and employers failed to explicitly support reforms ([761]). Despite

([755]) Agencies were called 'Students Services'. Nowadays students' work may be referred by Employment Service of RS and by Students Services or an organisation/employer which has concluded an appropriate concession contract.

([756]) Due to the fact that they are not in an employment relationship they do not have the usual labour law protection with the exception of the right to health and safety at work. They are compulsorarily insured for the contingencies of disability, impairment or death resulting from an employment injury or occupational disease.

([757]) There is an agreement on 'cooperation ' between the agency and the employer. Secondary school and university students have to become members of agencies. They perform work with an employer on the basis of a referral slip issued by the agency. Work without the referral slip represents undeclared work.

([758]) E.g.: In the 1990s the Employment and Unemployment Insurance Act laid down that labour market activities may be performed by a free public employment service and by private employment services. This resulted in the appearance of many private agencies which are as a rule all acting as agents referring work to students. TheEmployment Relationships Act, 2002, tried to limit the students' work by giving a time limitation of a temporary or occasional work which may be carried out without interruption with an individual employer in an individual calender year. On the other hand, the Act laid down that each work, performed by students, is to be regarded as a temporary or occasional work. The practice showed that instead of limiting the students work, the act promoted it.

([759]) This applies not only to private employers but also to those in the public sector, whereby it is especially worrying that this is also happening in state administration.

([760]) Due to the fact that some students perform their work on a full-time basis, they often fail to meet their obligations as students.

([761]) There is no doubt that student work is in the interest of employers as it enables them to operate with lower work costs.

some changes in the legislation ([762]) the system of student work as such has not been significantly changed and one can expect the persistence of disorder in the labour market.

4.3. The importance of lifelong learning

Knowledge should be considered to be an important production factor**.** Even prior to the adoption of the Lisbon strategy many individuals in the country emphasised that only a society and economy based on knowledge can contribute to permanent economic growth, increased employment and greater social cohesion within an individual country as well as in the broader area. The goals of education can differ**.** They can be linked to employment, protection of employment and prevention of unemployment on one hand, and the individual's personal growth on the other. Due to the difficulties in the market great importance is put on the 'curative' role of education and training. Within the frame of the active employment policy measures, a relatively strong emphasis is placed on the education of first time job seekers and the unemployed. This should enable a professional integration or rather reintegration into the job market. The question is whether enough emphasis is placed on education in its preventive function. It is an issue whether the employers take into account education as an essential element of their managerial and instructive power and ensure conditions in which workers can adjust their knowledge to the needs of technological advancement, economic and structural changes, and the demands for greater competitiveness of the individual employer as well as the national economy. This is how dismissals could be prevented and a contribution to the fulfilment of the principle of continuous employment could be made.

As regards the legal regulation of schooling and education in RS, legislation on education of adults and on training of workers can be mentioned, which completes the general legislation in the fields of primary, secondary and university education.

In 1996 the Adult Education Act was passed ([763]). The act is based on certain important principles such as the principle of lifelong learning, the principle of equal access to education, the principle of freedom and autonomy in education, and similar ([764]).

The Employment Relationships Act, 2002, covers the workers' training. It deals with the issue in a very general way. The act emphasises the principle of permanent education and training in accordance to the needs of the work process ([765]). Training is defined as the worker's right and duty ([766]). The act also mentions training in the interest of the worker. For the otherwise modest legal regulation it is typical that it leaves the detailed regulation of the worker's training to collective agreements**.**

([762]) Employment and Unemployment Insurance Act amended in 2006 has annuled provisions of Employment Relationships Act, 2002, on student work. Student work has not been abolished. It is regulated only by the Employment and Unemployment Insurance Act and some regulations adopted on the basis of the said act.

([763]) Zakon o izobraževanju odraslih, Ur.l.RS (Official gazette), No 12/96, 69/06, 110/06- official consolidated text).

([764]) The act is not applicable for adult education in university institutions.

([765]) The purpose of this education is supposedly to broaden the capabilities for work at the workplace and preserve employment.

([766]) Due to the over generalised legal organisation it is impossible to differ when education is the worker's right and when his duty. See: Polonca Končar, pogodbenost delovnega razmerja ter pravica in obveznost delavca do izobraževanja, V:Delovno pravo in socialna varnost,, (Contractibility of the Employment Relationship and the Right and Duty of the Worker for Employment, in: Labour Law and Social Safety), Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljana 2003, p. 93–102.

4.4. Vulnerable groups in the labour market: disabled persons

It is appropriate to point out what has been undertaken during the reference period as regards encouraging the employment of disabled people as a particularly vulnerable and disadvantaged population group in the labour market.

In the first half of the reference period the disabled were mainly employed with the aid of active employment policy measures and by companies for the disabled that trained and employed those disabled persons who — due to their disability — could not be employed under the same conditions as other persons.

In May 2004 the Vocational Rehabilitation and Employment of Disabled Persons Act ([767]) was adopted. This act establishes some new solutions relating to the employment of disabled persons. These are the following: the so-called sheltered and supported employment ([768]), a quota employment system ([769]), encouraging the creation of appropriate working posts for the disabled and financial incentives for employing the disabled — incentives for the disabled as well as the employer. The act also provides the legal basis for setting up the RS Fund to encourage the employment of disabled persons and also foresees the formation of employment centres, where severely disabled persons will be able to find employment in sheltered work posts. The disabled that are not employable due to their disability should be included in social inclusion programmes intended for the support and maintenance of the working capabilities of the disabled ([770]).

It is expected that the quota employment system for disabled persons, combined with supported and sheltered employment, will increase employment within this category of the population. Of course, the labour market needs to be opened for the disabled persons. The quota employment system, provided by the Vocational Rehabilitation and Employment Act has in fact been introduced in 2006 and as indicated in the report prepared by the Employment Service of Slovenia, its implementation already confirms and/or exceeds expectations ([771]).

([767]) Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov, Ur.l.RS (Official gazette), No 63/04, 78/05, 100/05 — official consolidated text.

([768]) Sheltered employment is employment at a protected work post, i.e. a work post and working environment that is adjusted to the working capabilities and needs of the disabled person who cannot be employed in a regular work post. Supported employment is employment at a workplace in a regular working environment with expert and technical assistance to the disabled person, employer and working environment.

([769]) The quotas for employing disabled persons are defined by the Uredba o določitvi kvote za zaposlovanje invalidov, (Decree establishing employment quota for disabled persons) Ur.l. RS (Official gazette), No 111/2005.

([770]) The realisation of these programmes should contribute to the realisation of the EU recommendations as regards employment policy as a means of social inclusion.

([771]) See e.g.: Report on the state of the unemployment of disabled persons and on the implementation of measures for the promotion of the employment of the disabled in RS for the period between 2002 and 2004, Employment Service of Slovenia, February 2006. According to the existing data the percentage of disabled persons employed in 2006 increased by 40 % compared to the employment in 2005.

Chapter III

Labour law and adaptability

The above title allows for numerous questions: The capability to adapt to what? Changes in work organisation? Demands for greater competitiveness of an individual employer and the national economy? Generalised demands for flexibility of labour law? And if it is adjusting towards flexibility ([772]), what can we understand by flexibility? And further on, is it possible to draw parallels between the terms 'non-standard', 'atypical' or 'flexible' employment and 'precarious' employment (job uncertainty in employment ([773]))? Without entering a discussion on these well known dilemmas ([774]), we shall examine in the report only the situation related to working time and the various forms of non-standard working forms ([775]), known in the Slovenian labour law system. Some forms of work, known in other EU Member States, shall not be dealt with here as they do not exist either in Slovenian law or in Slovenian practice.

1. Working time

1.1. Flexible arrangements in labour legislation which were in force till the end of 2002

Labour legislation in force up till December 2002 was characterised, inter alia, by the following: 1. it did not contain the definition of working time, 2. it stipulated that the full-time working hours may not exceed 42 hours per week, 3. it also stipulated that a statute or a collective agreement may provide for full-time working hours less than 42 hours per week, but not less than 36 hours per week, 4. the flexibility in organisation of working time (work could be performed below or above the weekly limit, but could not exceed the average of weekly limit in the 12 months reference period). The majority of collective agreements signed in accordance with that legislation stipulated a reduction of the working time to 40 hours per week.

In the organisation of working hours, flexibility was achieved through the use of overtime, shift work, flexi-time, and the possibility of granting a worker, who was obliged to work on a weekly rest day, a compensatory rest day in the next week, etc.

1.2. The influence of the Working Time Directive

The Working Time directive has been transposed into domestic law in the first place by the Employment Relationships Act, 2002 ([776]). The effect of the transposition has been particularly

([772]) Silvana Sciarra, The evolution of labour law (1992–2003), Volume I: General report, Employment & Social affairs, European Commission, 2005, p.37.

([773]) Polonca Končar, Job uncertainty: Which actors for which norms?Actes du Seminaire International de Droit Comparé du Travail, des Rélations Professionnelles et de la Sécurité Sociale, COMPTRASEC UMR CNRS, Univertité Montesquieu, Bordeaux 2000, p. 83–96.

([774]) Compare: Andries De Grip, Jeroen Hoevenberg, Ed Williems, Atypical employment in the European Union, International Labour Review, ILO, Geneva 1/1997, p. 51; The regulation of working conditions in the Member States of the European Community, Vol. 1, Social Europe, Supplement 4/92, Commission of European Communities, p. 19; and Precarité et conditions de travail dans l'Union européenne, Fondation européenne pour l'amélioration des conditions de vie et de travail, SF-12–98–821-FR-C.

([775]) The term 'precarious' could be used for some of them.

([776]) Employment Relationships Act, 2002, applies to all persons in an employment relationship, unless stipulated otherwise by a special act. For this reason requirements of the directive have been taken into consideration by some special acts, too.

important as regards the provisions on the definition of working time, night work, annual leave and the reference periods for the calculation of the average.

Pursuant to the Employment Relationships Act, 2002, working time is defined as the time comprising the effective working time, rest break (of 30 minutes during the working day) and the time of justified absences from work in accordance with statutes, collective agreements or employers' general acts. Effective working time shall be any time, during which a worker carries out his work, which means that he is at the employer's disposal and fulfils his obligation arising from the employment contract.

The statutory full-time working hours have been reduced to 40 hours per week. An act or a collective agreement may provide for full-time working hours of less than 40 hours but not less than 36 hours per week. An act, other regulation in accordance with act or collective agreement, may stipulate a full-time working week of less than 36 hours for jobs which involve greater risk of injury or damage to health.(Article 142)

Under normal arrangements, full working time may not be distributed to less than four days per week. Due to the nature or organisation of work or the needs of users, the working time may be distributed irregularly. In the case of irregular distribution or temporary redistribution of full-time working hours, the working time may not last more than 56 hours per week. In both cases one has to take into account full-time working hours as an average work obligation in a period, which should not exceed six months.(Article 147).

The Employment Relationships Act, 2002, has in accordance with the directive explicitly introduced the category of 'night worker', a person who is entitled to special guarantees and health and safety protection.

The circumstances in which a worker is obliged to perform overtime work are stipulated by the act. In addition, they may also be stipulated by a special act or a collective agreement. No changes were needed in the regulation of the duration of overtime work. As in the past, overtime may not exceed eight hours per week, 20 hours per month and 180 hours per year. In the case of overtime work a working day may not exceed ten hours.

Paid annual leave has been prolonged from at least 18 days to at least four weeks.

Like elsewhere, the transposition of the Working Time Directive gave rise to lively debate relating to its interpretation and especially to the understanding of the definition of working time and its organisation in some sectors such as health, retail, road transport, etc.

2. Fixed-term employment contracts

Fixed-term employment could not be seen as a novelty in our system. Labour legislation in the territory of today's Slovenia has allowed for such employment since 1957 ([777]). However, it is true that the legislation as regards this type of employment was not always as specific as it is today and the extent of such work was also not as great in the past. The introduction of the market economy, the emergence of new activities and professions, the introduction of new technologies, employers' attempts to lower their labour costs and improve their competitiveness and, last but not least, the increased level of unemployment at the beginning of the transitional period all favoured fixed-term work ([778]). Employers justified the increase of fixed-term employment contracts by the fact that the labour legislation in force at that time overprotected the workers (in relation to dismissals) and was not adapted to the new socioeconomic relations. It is true that fixed-term work also increased as a result of the ignorance of the law, the low legal culture of the new entrepreneurs, and intentional law violation ([779]). Many 'new' employers were convinced that a quick profit could only be achieved by lowering the terms and conditions of employment. Sometimes it appeared that by concluding fixed-term contracts, the employers simply tried to transfer their own business risks over to the workers.

Regardless of the fact that the old labour legislation already permitted fixed-term contracts and that we were in a comparable situation as regards such employment to certain other European countries ([780]), some demands of the Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP had to be brought into domestic legislation. The Employment Relationships Act, 2002, contains a special chapter that deals with the various employment contracts characterised by special features. These are: fixed-term employment contract, employment contract between the worker and the employer who provides the worker's work to another user (elsewhere known as a temporary employment contract), part-time employment contract, employment contract for public works, employment contract for home work and employment contract with managerial staff.

The Employment Relationships Act, 2002, provides numerous cases ([781]) in which an employment contract can be concluded for a definite period of time. It is important to add that other cases in which fixed-term employment is allowed are provided for by other statutes and branch collective agreements (Article 52). The branch collective agreement may stipulate that an employer, employing ten workers or less (smaller employer), can conclude a fixed-term contract regardless of the restrictions defined in Article 52. The novelties in the act further deal with certain measures of abuse prevention. Thus, the maximum duration of one or more successive fixed-term employment contracts has been defined ([782]). The act determines the conditions under

([777]) Labour legislation in Slovenia has always been based on the principle of an open-ended employment relationship. Fixed-term employment has been deemed to be an exceptional form of employment, conditioned by the nature of work or by other objective conditions.

([778]) The percentage of fixed-term employment contracts out of total employment increased from 4.8 % in 1990 to 10.6 % in 1999 and to 17.8 % in 2004.

([779]) For example the practice of offering work on a probationary basis was/is often replaced by fixed-term employment.

([780]) Katarina Kresal Šoltes, Pogodba o zaposlitvi za določen čas in pogodba o zaposlitvi s krajšim delovnim časom (Fixed-term and part-time employment contract), Delavci in delodajalci, 2/2002, p.203.

([781]) Work which is by its nature of a definite duration, replacement of a temporarily absent worker, temporarily increased work volume, employment of aliens, employment of managerial staff, seasonal work, vocational training, public works, seasonal work, project work, work relating to the introduction of new programmes or new technology, work of elected and appointed officials.

([782]) The period of two years is provided for, except for the transitional period during which this period may last three years. In order to make the system more flexible the 2007 amendments of the Employment Relationships Act abolished time limitation in the case of project work.

which a fixed-term employment contract shall be regarded as successive. If a fixed-term employment contract is contrary to the law or a collective agreement, or if the worker continues to work even after his contract (signed for a definite period of time) has expired, it shall be assumed that the employment contract has been concluded for an indefinite period of time (Article 54). The same assumption applies if the fixed-term employment contract is not concluded in writing.

Many people expected that due to the new system of the termination of the employment contract provided for in the Employment Relationships Act, 2002, the reasons for concluding a large number of fixed-term employment contracts (which some considered to be a consequence of legislative rigidity) would disappear. These expectations were not fulfilled, even though the legislation in force protects the worker with a fixed-term employment contract almost as much as the worker having an employment contract for an indefinite period as regards the termination of employment. The relatively high share of workers with fixed-term employment contracts already represents a special problem in our labour market. This is why the planners of the Framework of Economic and Social Reforms for Increasing the Welfare in Slovenia (adopted in 2005), proposed changes to reduce the obstacles to permanent employment in the future ([783]).

3. Part-time employment contracts

Similar to fixed-term employment, part-time employment does also not represent a novelty in our labour legislation. It was enacted in 1965. The extent of such work was never great. In the reference period the share of part-time workers rose from 6.8 % of total employment in 1996 to 9.3 % in 2004. Part-time workers were always treated in the same manner as full-time workers and in accordance to the pro rata temporis principle.

The Employment Relationships Act, 2002, defines part-time working hours as a working time that is shorter than the full-time working hours in force with the employer. The principles of non-discrimination and pro rata temporis have been maintained by the act. Part-time workers also have the right to a paid annual leave in a minimum duration of four weeks (Articles 64 and 159). This right is criticised by the employers. According to them it is not in accordance with the idea of making the labour market flexible, as it contributes to the disproportionably increased labour costs ([784]). In no way does the act indicate when the part-time employment is appropriate or permitted. In this aspect the act is extremely liberal, facilitating the realisation of the intention emphasised by the Council Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC, namely ‘to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner that takes into account the needs of employers as well as workers’.

Part-time workers are allowed to conclude employment contracts for part-time work with several employers and thus fulfil full-time working hours as stipulated by the act (Article 65). The employer employing part-time workers and recruiting for full-time work must inform these

([783]) The Framework of Economic and Social Reforms for Increasing the Welfare in Slovenia, fourth development priority: a modern welfare state and higher employment, measure 54: Increasing the flexibility of the labour market and facilitating employment, Government of RS, Government Office for Growth, 2006, p.126.

([784]) The amendments of the Employment Relationships Act, 2007, have set forth that part-time workers are entitled only to proportional part of holiday allowance.

workers in due time of the vacant positions or of the public notice of vacancies on the noticeboard at the employer's head office (Article 23, paragraph 4) ([785]).

If a worker is working part-time pursuant to the regulations on pension and disability insurance, the regulations on health insurance or regulations on parental leave, he/she shall be entitled to pro rata temporis payment and will have the same rights and obligations as full-time workers, unless otherwise stipulated by the act. The worker will also have the same rights arising from social insurance as if he was working full time (Article 66).

The Pension and Disability Insurance Act ([786]) laid down the possibility for partial retirement. The Employment Relationships Act, 2002, complements the regulation of this possibility by stipulating the right of an older worker to enter part-time employment or the right to begin working part-time if he has partially retired (Article 202). This has not however yielded the expected results in practice, accordingly the government is contemplating (within the frame of economic and social reforms) even greater encouragement for the possibility of combining retirement and continuing activities on the part of the elderly.

4. Agency work ([787])

Agency work can be dealt with from two aspects. On one hand it is linked to the abolition of the public monopoly in the field of non-fee-charging employment. In Slovenia the system of fee-charging employment was introduced by the Employment and Unemployment Insurance Act, 1991. In accordance with the act the so-called private employers were given the possibility to conclude a concession contract and to act as intermediaries for the purpose of procuring employment. On the basis of the 1998 amendments to the act, the possibility for procuring employment on the basis of a concession was broadened with the possibility of mediating the work of a worker to another user. This, on the other hand, may be accepted as a reaction to the economic situation as well as the situation in the labour market and the demands of the employers for greater flexibility in the labour market.

The Employment Relationships Act, 2002, defined the position of the worker who works at a user for a certain time as a typical triangular relationship established: a) between the worker and the employer by the open-ended or fixed employment contract, b) between the employer and the user (agreement on the mutual rights and obligations of the user, as well as on the rights and obligations of the user and worker for the duration of the temporary work), and c) between the user and the worker (worker performs work under the user's instructions).

Taking into account that temporary employment agencies were totally unknown and that it was hard to predict the eventual problems in the sense of the potential exploitation of the workers ([788]), the starting point of the drafters of the Employment Relationships Act was that caution is

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([785]) By this provision paragraph 3c of clause 3 of the directive has been transposed into the internal legislation.

([786]) Zakon o pokojninskem in invalidskem zavarovanju, Ur.l.RS (Official Gazette), No 106/99, 72/2000, 124/01, 108/02, 26/03, 135/03, 72/05, 69/06, 109/06 — official consolidated text.

([787]) In this paper we use the term 'agency work' that is an established term in other countries in the sense as used by Silvana Sciarra in: The evolution of labour law (1992–2003), Volume I: General report, p. 23. The Slovenian Employment Relationships Act, 2002, regulates this field under the title 'Employment contract between the worker and the employer who carries out the activity of providing the workers' work to another user'.

([788]) For this type of work some started to use the term 'leasing of people'.

necessary and that workers have to be ensured appropriate protection. This is why it was at first proposed that workers could only sign an open-ended employment contract with the employer (agency). The proposal was not accepted and thus the act allows fixed-term as well as open-ended employment contracts. A premature termination of the user's need for the worker's work does not represent a ground for the termination of the employment contract (Article 58). A time limit for the work with the user is also foreseen. The same worker can perform the same work at the same user without a break or with a break up to one month for a maximum of one year (Article 59). The act also provides for some cases in which the employer is not permitted to send his workers to work at the user (for instance, during an industrial action at the user, in the case of collective redundancies effected in the past 12 months, or if workers would be exposed to danger and risks at work). The act stipulates that these cases can also be stipulated by branch collective agreements. In order to ensure the principle of equal treatment for agency workers and workers employed by the user it is explicitly provided for by the act that the level of wage of agency workers depends on the actually performed work with the user and that it has to be fixed in accordance with collective agreements and the employer's general acts that bind the user. That means that agency workers are entitled to the same wages as apply to workers employed by the user.

According to the data of the Ministry of Labour, Family and Social Affairs there are 78 concessionaries with a so-called general concession, however there is no specific data on how many concessionaries perform only agency work.

5. Work under civil law contracts

The situations in which one performs work can be very different. We differentiate between so-called formal and informal work. Underground work as one of the forms of informal work has already been mentioned above. As regards formal work, the legal basis on which such a work is performed can also vary. Work can be performed on the basis of an employment contract or on the basis of civil law contracts. The emergence of new activities, the introduction of new technologies, changes in the organisation of production and work proper, internationalisation of economy, attempts by employers to lower their labour costs and improve competitiveness by avoiding labour law protection, increased unemployment — all these factors have led not only to an increase in the variety of forms of work which, from the labour law perspective, are regarded as non-standard, atypical forms of employment reationships, but also to an increase in independent work. Civil law contracts are used for the work carried out by self-employed persons and are also used to cover the work of other persons, for whom an employment contract would be more appropriate.

Self-employed persons ([789]) represented 16.7 % in the structure of actively working people in Slovenia in 2004 ([790]). It is interesting to mention that many self-employed persons do not employ any workers and thus perform their activity alone on the basis of their own personal work. Business partners are supplied with their products or services on the basis of civil law contracts. In the case of a long-term business relationship with a single partner, elements of economic or other dependency appear in relation to their contractual partner in spite of a declared contractual

([789]) Self-employed persons are defined by the Pension and Disability Insurance Act.
([790]) It rose from 12.6 % in 1996.

independence. The public is familiar with cases of independent artists, writers or journalists, some of them denominated with the term 'freelancers' , whereas not much attention has been paid until now to cases in the business world, in which self-employed individuals also find themselves in a situation of economic or other dependency as regards another person to whom they provide their services. Despite the existence of such situations, the concept of economically dependent work has not been developed in the Slovenian labour law system.

Employment Relationships Act, 2002, laid down a rule according to which work may not be carried out on the basis of civil law contracts if the elements of employment relationship exist ([791]). Exceptions are allowed in cases laid down by a special act.(Article 11) In practice, disguised employment relationships exist and represent one of our labour market's problems. One of the reasons for such a situation might lie in the fact that in the past a temporary or occasional work contract (locatio conductio operis contract) was envisaged by labour law and by civil law ([792]). Contracts under labour law were concluded relatively often and obviously it is difficult to change this practice.

The Health and Safety at Work Act, 1999, has to be mentioned here. Due to its broad personal scope it applies not only to workers in dependent employment but also to all persons performing their work on the 'employer's' premises on the basis of civil law contracts. This is important from the point of view of endeavours to extend some elements of labour law protection, at least, to workers who are not dependent workers.

([791]) Elements can be found in the definition of the employment relationship (Art.11). The following are mentioned: participation in the organised working process, work in person, work for payment, work continiously carried out, work according to the instructions and under the employer's control.

([792]) Differentiation between the two contracts was difficult, but nevertheless differences existed and concerned the following elements: the (in)dependence of parties, whose account the work is performed on, remuneration, the (non)permanence of the legal relationship, work in person.
Barbara Kresal, Pogodbeno delo:med civilnopravno in delovnopravno ureditvijo (Contractual work:between the civil and labour law regulation), Podjetje in delo, 1/1999, pp. 90–91.

Chapter IV

Promoting equal opportunities

1. General legal framework

The Constitution of the Republic of Slovenia, 1991, guarantees each individual equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other beliefs, financial status, birth, education, social status or whatever other personal circumstances. All persons shall be equal before the law (Article14). In 2004, Article 14 of the Constitution was amended and among the personal circumstances, disability was expressly included.

Equality before the law is in Slovenian legal theory understood as non-arbitrary application of law in relation to legal entities, namely: legistature, the judiciary and administration agencies. The controlling function over the legistator is performed by the Constitutional Court. The legislator is by way of the principle of equality before the law obliged to regulate equal and/or similar relations alike and different relations in a different manner. In accordance with Constitutional Court case-law and legal theory the principle of equality is violated when the legislator's distinction can be qualified as arbitrary. Distinctions made by the legislator must always be assessed as to whether or not they are (objectively) justified.

The general prohibition of discrimination in respect of access to employment also derives from the Constitution (Article 49), which assures the freedom of work.

In 2004, the Implementation of the Principle of Equal Treatment Act ([793]) was adopted, which guarantees equal treatment of everyone in the exercising of his or her rights and obligations and in realisation of his or her fundamental freedoms in any area of the life of society. This includes, in particular, the spheres of employment, labour relations, membership of trade unions and other interest associations, education, social security, access to goods and services and provision of the same, irrespective of personal circumstances such as national origin, race or ethnic origin, gender, state of health, disability, language, religious or other belief, age, sexual orientation, education, material standing, social status or any other personal circumstance.

The Equal Opportunities for Women and Men Act, 2002 ([794]), represents a legal basis for creating equal opportunities for women and men in the political, economic, social, educational and other fields of society.

2. Equal opportunities and treatment in employment and occupation

In the past labour legislation did not contain any provision which would explicitly prohibit discrimination in employment and occupation. It has always been presumed that the

([793]) Zakon o uresničevanju načela enakega obravnavanja, Ur.l. RS (Official Gazette), No 50/2004; An ombudsman and/or ombudswoman for the principle of equal treatment has been laid down by the Act. He/she operates in the framework of the Office of Equal Opportunities.

([794]) Zakon o enakih možnostih žensk in moških, Ur.l.RS (Official Gazette), No 59/2002.

constitutional equality relating to human rights and fundamental freedoms, the equality before the law and the freedom of work also covered the area of employment relationships.

The provision on a general prohibition of discrimination in employment and occupation on the grounds of sex, race, colour of skin, age, state of health or disability, religious, political or other conviction, membership of a trade union, national or social origin, family status, financial situation, sexual orientation or any other personal circumstances has been included in the current Employment Relationships Act, 2002 (Article 6, paragraph 1). In addition to this general prohibition of discrimination, applicable to job applicants as well as to those already employed, the said act contains special provision stipulating that women and men must be guaranteed equal opportunities and equal treatment as regards access to employment, promotion, vocational training, advanced training and retraining, remuneration, absences from work, working conditions and termination of employment contract (Article 6, paragraph 2). ([795])
Having regard to the respective EC directives on equal treatment, it has to be underlined that the Employment Relationships Act prohibits direct as well as indirect discrimination and gives the definition of the indirect discrimination. The Act also incorporates the rule according to which burden of proof for non-discrimination rests within the employer in judicial or out-of-court procedures related to discrimination in employment and occupation. For the first time the Act regulates the issue of sexual harassment in the workplace (Article 45) and explicitly provides for the principle of equal pay fo men and women.(Article 133) Employer is expressly forbiden to advertise a vacant post as exclusively for men or exclusively for women, save for those particular jobs for which sex of a worker constitutes a determing factor for performing the job.(Article 25) Race, colour of the skin, sex, age ([796]), disability, personal status, family obligations, pregnancy, religious and political conviction, national or social origin shall be deemed as unfounded reasons for ordinary termination of employment contract.(Article 89)

The Employment Relationships Act and other above-mentioned acts providing for equal treatment in general or on the grounds of sex specifically, reflect the significant impact of the EC equality treatment law on the domestic law. The whole set of the above-mentioned provisions is important not only from the point of view of the development of labour law but also from the point of view of the existing level of democracy in society. One must be aware that democracy is built on the principle of equality.

Irrespective of the above-mentioned positive developments from the aspect of legal formality, it has to be underlined that litigations on the grounds of discrimination are still very rare. Obviously, the formal enactment of numerous provisions relating to discrimination in employment has not yet been reflected in actual enforcement.

([795]) The double prohibition of discrimination is the result of the fact that EU representatives, who were engaged in the harmonisation of the Slovenian labour law with the EC law, regularly pointed out the importance given to the equal treatment of women and men in the EC law. They also proposed a special chapter on this issue in the Employment Relationships Act. In Slovenia the view prevailed that this would not be appropriate as the act covers the entirety of indidividual employment relations and also as dicrimination de facto occurs not only on the grounds of sex but also on other grounds.

([796]) It might be interesting to point out that the current Employment Relationships Act no longer provides for the possibility of terminating an employment relationship on the grounds that a worker is fulfiling the eligibility requirements for an old-age pension.

Chapter V

Concluding remarks

On one hand the description of labour law between 1995 and 2005 has to be put within the broader framework of changes and adjustments to the social and economic upheaval that Slovenia — as a young transitional country — had to face; on the other hand it also needed to be placed within the context of the transposition of the *acquis communautaire* into domestic law, which was linked with Slovenia becoming an EU member.

The Employment Relationships Act in force is one of the most important elements of the new Slovenian labour law system. The drafting procedure of the act was of long duration. The legislator was aware of its importance having regard to the sensitivity of the act from the aspect of economic and social progress, and its influence on employment and ensuring human dignity at work as some of the basic values of a contemporary civilised society.

The adoption of the new Employment Relationships Act reflects the view, never contested in the expert debates, that state intervention is necessary in the sense of ensuring minimum protection for the workers. As regards the relationship between the legislation and the collective agreements, the so-called advantage principle has been established.

The main characteristic of the new labour law system is the introduction of the concept of the employment relationship as a bipartite contractual relationship and the reintroduction of collective agreements as an important source of labour law. Alongside the collective negotiations, the establishment of the social dialogue deserves a special mention.

From the systemic aspect it is important to mention the change as regards the personal scope of the labour legislation for civil servants. The principle of unity in regulation of different types of employment relations, with us since 1957, was abandoned. The Employment Relationships Act applies with respect to 'private-law employers'. It applies to public sector as well, unless stipulated otherwise by a special act (e.g. Civil Servants Act).
It could be assessed that the old legislation already regulated certain rights and obligations in a flexible manner (some non-standard forms of work, overtime, and flexible patterns of the organisation of working time). However, under the influence of the EC, this flexibility in the currently valid Employment Relationships Act has been strengthened and increased. In certain cases the transfer of the EC Employment Law into domestic legislation resulted in more precisely regulated working conditions. For some individual rights stemming from the employment relationship, more favourable provisions have been enacted. The influence of the EC employment law can also be traced in the provisions covering issues that have not been the object of the labour law regulation up till now (transfer of enterprises).

Labour law has to take into account and adjust to the work organisation in companies. The situation in relation to the forms of new work organisation is not satisfactory in Slovenia. It has not yet adjusted to the new demands that appeared with the introduction of the market economy and globalisation. For this reason, for example, the present labour law system does not recognise

some forms of work and working time arrangements that are known in some other European countries.

Adjusting labour law to the social and economic environment is a never-ending process. In Slovenia the discussions as regards the (in)flexibility of labour law reappeared relatively quickly after the Employment Relationships Act was introduced in 2003. These debates appeared especially in relation to the Framework of Economic and Social Reforms for Increasing the Welfare in Slovenia that was adopted by the current Slovenian government in November 2005. They were initiated by a group of economists who argue, sometimes in too simplistic a way, that Slovenian labour legislation represents the weakest link in the international competitiveness of Slovenian companies as it is too rigid. According to them the over-protection of certain employee groups and high labour costs deter employers from creating new work posts. On the basis of generalisations derived from sometimes outdated figures they call for the state to refrain from, for example, regulating working hours and to reduce the level of employee protection.

In the more concrete debates the demands for greater flexibility are often reduced to demands for lowering redundancy payments, shortening the notice periods and reducing the protection in the case of collective redundancies. There is a possibility that some of these demands might have a fair grounding. Regardless of this it still points towards a problem that seems to be common in a number of European counties. There is no doubt that nowadays labour law in its broadest sense can by no means be limited merely to its protective function. Its function in the sense of encouraging employment is becoming increasingly important. Nevertheless the discussion on the deregulation and flexibility of labour law tends to over-emphasise the influence of labour law on the labour market. Various analyses ([797]) question whether the protection of workers has such a direct influence on the labour market. There would appear to be an excessive degree of simplification underlying assumptions about how a reduction of employment protection law would contribute to the creation of new jobs.

It is exactly because of these disputable conceptual views about the influence of labour law on employment that continued intensive debate on the future development of labour law can be expected, on the national as well as the international level.

([797]) See for instance Marco Biagi, Michele Tiraboschi, The Role of Labour law in Job Creation Policies: an Italian Perspective, In: M.Biagi (Ed.), Job Creation and Labour Law, Kluwer Law International, 2000, p.179–192.

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