## THE CONCEPT OF TAX CULTURE IN CONTEMPORARY TIMES

Elena Neshovska Kjoseva

pdf

## TAX CULTURE: A BIG STEP TOWARD VOLUNTARY TAX COLLECTION

Gordana Ilić Popov

pdf

## LEGAL REGIME OF POSSESSION AND ITS PROTECTION

Tea Lalevska

pdf

## The EU constitutional culture-what is missing

pdf

## THE NEED FOR HARMONIZATION OF THE MACEDONIAN PROPERTY LAW

pdf

The ‘gray’ area between employment and self-employment: legal approaches to formalizing informal work and reducing precariousness in the context of Macedonian labour law

Aleksandar Ristovski

pdf

INDUSTRIAL PROPERTY RIGHTS IN THE LIGHT OF THE LEGAL REGULATION OF THE REPUBLIC OF NORTH MACEDONIA AND THE FEDERAL REPUBLIC OF GERMANY

[redacted]

pdf

COMPARATIVE APPROACH TO JUVENILE JUSTICE

Blerta Ahmedi

pdf

THE RIGHT OF LEGISLATIVE INITIATIVE (Comparative Analysis of Macedonian and Swiss Model of Normative Solutions)

[redacted]

pdf

THE IMPACT OF TRANSITIONAL JUSTICE ON THE RULE OF LAW IN POST-CONFLICT AND POST-REPRESSIVE SOCIETIES

Marko Krtolica.pdf

pdf



## Information

For Readers

For Authors

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# The 'gray' area between employment and self-employment: legal approaches to formalizing informal work and reducing precariousness in the context of Macedonian labour law

The term 'gray area' is commonly used in literature to describe the space that is created between 'dependent' work (employment) on the one hand, and 'autonomous' work (self-employment) on the other, and it usually refers to the following types of work: bogus self-employment or disguised employment relationship; intermediate, i.e. objectively ambiguous forms of work (e.g. dependent self-employment); certain forms of work that involve multiple parties (e.g. contracting-out or labour dispatch) and casual work.

North Macedonia is on the verge of adopting a new Labour Relations Law. In that regard, dilemmas that are becoming increasingly relevant are: 'what is the course taken by the Macedonian labour law system concerning the global debate on redefining the boundaries of the traditional binary system and expanding the protective framework of labour legislation'? 'what types of non-standard forms of work that occupy the gray area between employment and self-employment can be recognized in the Macedonian legislation and practice'? 'whether and what regulatory measures should be taken to address the disguised and objectively ambiguous forms of work and what are the prospects for introducing new non-standard forms of work intended to formalize informal employment and reduce precariousness'? Having in mind the previous dilemmas, the purpose of this paper is to analyze the current situation, but also to address the trends and perspectives of Macedonian labour legislation in the context of contemporary challenges in the world of work.

**Key words:** grey area, employment relationship, self-employment, disguised employment relationship, casual work.

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## Introduction

The world of work for several decades now, has been facing profound changes caused by globalization, changes in the organization of production, increasing importance and share of service-related jobs in total employment and as of recently by digitalization and robotization.[2] Such changes affect not only the personal scope of labour law (i.e whether a person is 'within' or 'outside' of the employment relationship) but also the material scope (i.e what rights are attached to different employment statuses).

The term 'gray area' is commonly used in literature to describe the space that is created between 'dependent' work (employment) on the one hand, and 'autonomous' work (self-employment) on the other.[3] It usually refers to the following types of work: *bogus self-employment or disguised employment relationship* (when false civil law contracts substitute genuine contracts of employment); *intermediate, i.e. objectively ambiguous forms of work* that do not ideally fit into either employment or self-employment (e.g. 'intermediate' forms of work between employment and self-employment such as dependent self-employment, or economically dependent work); *forms of work that involve multiple parties*, where it is not disputed whether there is employment relationship or not, but who is the genuine employer of the employees[4] (e.g. certain forms of contracting-out, i.e. labour dispatch) and *casual work* (temporary or occasional work, intermittent work, on-call work, zero-hours contracts).

The extension of the gray area is not only a problem for workers (who are exposed to poor legal and social protection and precarious working conditions) and trade unions, but also for employers who adhere to legal regulations, as well as for the state, because it causes unfair competition and generates market uncertainty and tax evasion.[5] Hence, it is evident that in order to properly address the problems arising from the gray area, a new, doctrinal, but also regulatory approach to labour law is needed, primarily because the conventional understanding of subordination as a concept based on 'formal' rather than 'substantial' criteria (such as the unequal bargaining capacity between the employer and the employee), is no longer able to cover all forms of dependent labour and economic activity that exist in the world of work.[6]

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[2] See Blanpain.R, *Work in the 21st Century*, (Industrial Law Journal, 1997), 187-194; Hendrickx.F, *Regulating new ways of working: From the new 'wow' to the new 'how'*, (European Labour Law Journal, 2018), 197.

[3] See Perulli.A, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, (The employment Relationship – A comparative overview, Hart Publishing, Oxford and Portland, Oregon, International Labour Office, Geneva, 2011), 140.

[4] See Countouris.N, *The changing law of the employment relationship - comparative analyses in the European context*, (Ashgate, 2007), 163.

[5] Thörnquist.A, *False Self-Employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market*, (International Journal of Comparative Labour Law and Industrial Relations, 2015), 412.

[6] Ameglio.E.J and H.Villasmil, Subordination, *Parasubordination and Selfemployment: A Comparative Overview in Selected Countries in Latin America and the Caribbean*, (The Employment Relationship – A Comparative Overiew, Hart Publishing, Oxford and Portland, Oregon, International Labour Office, Geneva, 2011), 84.

After more than 15 years since the adoption of the Labour Relations Law from 2005[7] and nearly 40 amendments to the basic text of the law, North Macedonia is on the verge of adopting a new Labour Relations Law. In view of the adoption of the new Law, different mechanisms are discussed to tackle informal economy and to regulate certain contractual arrangements in the so called 'grey area' between employment and self-employment and in particular *bogus self-employment or disguised employment relationships and casual work.*

**1. The personal scope of application of labour legislation with particular reference to the term 'worker' in Macedonian labour law**

The rigid boundaries between employment and self-employment are increasingly being re-examined at the universal, regional and national levels. Chronologically, the International Labour Organization has anticipated the rise of persons short of adequate labour law protection since the 1950s.[8] The ILO's activities concerning the regulation of the employment relationship intensified at the end of the 1990s[9], but they did not receive their normative completion until 2006, with the adoption of the Employment Relationship Recommendation (No. 198). Recommendation No. 198 establishes two types of *indicators* for the existence of the employment relationship (indicators related to the performance of work and indicators related to the payment of remuneration to the workers) [10], provides for the *primacy of facts* and establishes general guidelines for the purpose of facilitating the determination of the existence of an employment relationship[11], such as the introduction of a *legal presumption* that an employment relationship exists.[12] A document of paramount importance for the issue of the employment relationship and the personal scope of labour law protection is the Report of the ILO Global Commission on the Future of Work, which, *inter alia*, provides for the establishing of a *Universal Labour Guarantee* aimed at affording adequate protection to all 'workers'. Besides the fundamental principles and rights at work (freedom of association and effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination) to *all workers* (including the self-employed), the Universal Labour Guarantee establishes an additional set of universal 'basic working conditions' (adequate living wage, limits on hours of work and safe and healthy workplaces) applicable to *all workers regardless of their contractual arrangement or employment status*.

[7] Labour Relations Law of the Republic of Macedonia, (Official Gazette, no.62/05).

[8] Marin.E, *The Employment Relationship: The Issue at the International Level*, (Boundaries and Frontiers of Labour Law – Goals and Means in the Regulation of Work, International Institute for Labour Studies, Oxford and Portland, Oregon, 2006), 339.

[9] The agenda of the 85th session of the International Labour Conference in June 1997 foresaw a first discussion on the question of 'contract labour' and respectively on the proposed Convention and Recommendation concerning contract labour. The Proposed Convention provided for two separate forms in which contract labour shall be performed. The *first*, referred to work performed pursuant to a direct contractual arrangement other than a contract of employment between the contract worker and the user enterprise, while the *second*, envisaged work provided for the user enterprises, by a subcontractor or intermediary.

[10] See Employment Relationship Recommendation, no.198, point 13.

[11] See Employment Relationship Recommendation, no.198, point 9.

[12] See Employment Relationship Recommendation, no.198, point 11, b).

In EU law, the notion of 'worker' is usually placed in the context of several different regulatory domains, which in principle refer to three meanings of this term. [13] According to the first meaning which falls within the exclusive competence of EU law, the term 'worker' is defined in the context of freedom of movement in the common (internal) market. It is a product of the long-standing practice of the European Court of Justice/Court of Justice of the EU, and as such is defined broadly enough to cover not only persons in employment relationship (standard subordinated employees[14]) but also those with atypical forms of employment,[15] professional athletes[16] as well as job seekers.[17] The broad scope of the term 'worker' as defined for the purpose of equalizing the conditions for freedom of movement is further reflected in the domains of equal treatment and anti-discrimination legislation, as well as of health and safety at work. According to the second meaning, the definition of the term 'worker', i.e. migrant worker, is intended for the purposes of social security and the coordination of the national social security systems. Finally, the third meaning, which is most relevant in terms of the personal scope of application of the EU labour law directives, actually refers to the subsidiary application of national labour law and the definition of the term 'worker' in accordance with national legislation and practice.

The Labour Relations Law of North Macedonia (hereinafter LRL), defines the terms '*employment relationship*' and '*worker*', while the definition of the term '*employment contract*' is left to the domestic labour law theory. [18] The employment relationship, pursuant to LRL is defined as '*contractual relationship between the worker and the employer whereby the worker voluntarily joins the work process organized by the employer, for salary and other remunerations, and performs the work in person and continuously according to the instructions and under the supervision of the employer'*[19]. The normative 'anatomy' of this definition refers to the existence of several significant elements of the employment relationship, among which the most significant is the element of subordination. Similar to many comparative labour law systems of European countries, the notions 'employment relationship' and 'employment contract' are also considered equal in terms of Macedonian labour law as well. [20] However, the key difference between the Macedonian and labour law systems of many European countries is that, in those labour law systems, the employment contract is not confined to a strict formality as a condition for its validity.[21] Conversely, in the Macedonian labour legislation, the employment contract is defined

[13] Giubboni, S. *Being a worker in EU la*w, (European Labour Law Network, 2018), 225.
[14] See CJEU, 3 July 1986, Case C-66/85, Lawrie-Blum v Land Baden-Wiirttemberg.
[15] See for instance, the judgments in the following cases: C-53/81, Levin v Staatssecretaris van Justitie, of 23 March 1982; C-139/85, Kempf v Staatssecretaris van Justitie, of 3 June 1986; C-357/89, Raulin v Minister van Onderwijs en Wetenschappen, of 26 February 1992; and C-197/86, Brown v Secretary of State for Scotland, of 21 June 1988.
[16] See Case C-415/93, *Union Royale Belge des Societes de Football Association (ASBL)* v *Bosman* [1996]; Case C-176/96, *Jyri Lehtonen and Another* v *FRBSB* [2000] 3 CMLR 409.
[17] See Case C-292/89, The Queen v Immigration Appeal Tribunal, of 26 February 1991.
[18] See Starova.G and T.Beličanec, *Labour Law*, (Универзитет „Св.Кирил и Методиј"-Скопје, Правен факултет, 1996), 128; Kalamatiev.T, *Establishing an employment relationship*, (докторска дисертација, Скопје, 1996 година), 242.
[19] LRL, art 5, para 1, point 1.
[20] See Waas.B and Heerma van Voss.G (eds). *Restatement of Labour Law in Europe* (Hart Publishing, 2017), xxiii.
[21] In many European countries (Cyprus, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Malta, Portugal, Switzerland, etc.), there is no formal obligation for the employment contract to be concluded in writing. On the other hand, even in countries where the contracting parties are obliged to conclude an employment contract in writing

as a strictly formal contract entered into in writing. [22] The contract that is not entered into in writing does not produce a legal effect, since the written form is primarily its constitutive element and validity condition (*ad solemnitatem*), and concomitantly, a proof of the existence of the employment relationship (*ad probationem*). Pursuant to the LRL, employment relationship shall be established by signing of an employment contract[23], and the worker cannot start with work before concluding an employment contract and before the employer registers the worker for social insurance[24]. Moreover, the Law provides for a rather detailed content, which must be stipulated in every employment contract.[25] In practice, it is typically considered that an employment relationship is non-existent, unless the employer and worker have entered into a formal employment contract (in writing) and/or the employer has failed to register the worker for mandatory social insurance, regardless if both contractual parties have entered into a 'factual' relationship that might be equalized with employment relationship. Equalization between the employment relationship and employment contract, in terms when the written form is a condition for validity of the employment contract, leads to a significant narrowing of the personal scope of labour legislation and protection of workers, primarily to the detriment of undeclared (informal) workers and workers in a disguised employment relationship. Additional confirmation of the formal equalization between the terms employment relationship and employment contract, can be found in the existing definition of the term 'worker', which, is defined in the LRL as '*any natural person employed on the basis of a concluded employment contract'*.[26] Despite the fact that LRL nominally provides for a broader term 'worker', it can be inferred that in fact the narrow notion of 'employee' (as subordinated worker in an employment relationship) is applied.

Considering the traditional position in Macedonian labour law and views of the social partners, it is expected that the new Labour Relations Law will preserve the 'mandatory written form' of the employment contract as a validity condition of the employment relationship. However, the legal void is expected to be bridged and the rigid approach mitigated by the introduction of a legal presumption for the existence of an employment relationship (and thus an employment contract in written form), in conditions where the employment contract was not concluded in writing and/or the employee was not registered in mandatory social insurance, but considering the factual circumstances in which the work has been performed, it has been determined that the elements of an employment relationship are fulfilled. The purpose of the legal presumption, and thus the protection of the undeclared worker, would come to the fore in its entirety, if the competent authority, e.g. the State Labour Inspectorate, one of its main competences is the fight against undeclared work, provided that it will succeed to determine the moment of

(Latvia, Estonia, Croatia, Luxembourg, Norway, Poland, Russia, Slovakia, Slovenia, Turkey, etc.), the legal consequences for non-compliance with such an obligation is limited and the contract is deemed to exist if the employee started working in exchange for pay. See Waas.B and Heerma van Voss.G (n 20) xxix – xxx.

[22] See LRL, art 15, para 1.

[23] LRL, art 13, para 1.

[24] LRL, art 13, para 7.

[25] For example, the existing Labour Relations Law, in Article 28, paragraph 1, provides for 12 mandatory elements (clauses) that should be contained in each employment contract. Among them, there are provisions, which are considered to have no status of essential elements of the contract (essentialia negotii), such as the obligation of the employer to inform the employee about the risky jobs, etc.

[26] LRL, art 5, para 1, point 2.

commencement of the work/beginning of the factual employment relationship, will impose an inspection measure that will oblige the employer not only to conclude an employment contract with the undeclared worker, but also to retroactively pay him/her social security contributions for the entire period of the factual employment relationship.

## 2. Notion of self-employment and determination of the employment status of self-employed persons in the Macedonian legal context

Defining the term 'self-employment' and identifying persons who can fall into this category is a complex legal, economic and statistical operation. From a legal point of view, additional difficulties are caused by the regulatory context in which the term is defined (social security, tax law, company law and labour law). A positive definition of the term 'self-employed person' can be found in the context of social security legislation. Thus, the Law on Mandatory Social Insurance Contributions provides that a 'self-employed person' is a *natural person* performing an *autonomous economic activity* or *professional or other intellectual services* to earn an *income*, for his or her *own account*, under conditions laid down in law.[27] Identical definitions are also stipulated by: the Law on Pension and Disability Insurance[28] and the Law on Employment and Insurance against Unemployment.[29] Several elements can be drawn from the definition of the term 'self-employed persons' and used to determine the employment status of these persons that distinguish them from workers, i.e. employees. The self-employed person is always a *natural person who performs particular work personally or mostly personally*. This person, *independently* (without receiving any instructions from and working under the supervision, control and disciplinary authority of the employer) pursues an economic activity or provides professional or other intellectual services to earn an income, *for his or her own account* (and not on behalf and for the account of an employer). The self-employed person performs the *economic activity* or *the professional and other intellectual services* professionally, i.e. as an occupation. The business of the self-employed person is carried out with the aim of *generating income* (rather than earning a salary).

Despite the solid definition base, in North Macedonia there is not a common understanding of the term self-employed persons and the term self-employment causes many quandaries. The term self-employment is not explicitly mentioned either in the context of the Law on Trade Companies (hereinafter LTC) or the Law on Personal Income Tax (hereinafter LPIT).[30] Yet, two categories of persons that are commonly considered self-employed persons are: *sole proprietors* and *independent performers of activities*. Pursuant to the LTC, a *sole proprietor*, shall be a natural person, who as a profession performs some of the trade activities determined by the Law[31], while being personally and unlimitedly liable for his/her liabilities with his/her entire assets.[32] The

[27] Law on Mandatory Social Insurance Contributions, (Official Gazette of RM, no.142/08), art 4, para 1, point 10.
[28] Law on Pension and Disability Insurance, (Official Gazette of RM, no.98/2012), art 7, para 1, point 7.
[29] Law on Employment and Insurance against Unemployment, (Official Gazette of RM, no.37/97), art 2, para 1, point 2.
[30] Official Gazette, no.241/18.
[31] LTC, art 12, para 1.
[32] LTC, art 12, para 2.

category *independent performer of activity*, is not explicitly defined in either the LTC or the LPIT, but it is determined by exclusion or deduction. Thus, according to the LTC, the independent performers of activity can be determined as natural persons who are not considered as commercial entities. These include: natural persons performing an agricultural or forestry activity (individual farmers); craftsmen and natural persons performing services; natural persons performing hospitality services by renting rooms in their place of residence and natural persons engaged in freelance professions (attorneys at law, notary publics, medical doctors and others).[33] On the other hand, the term independent performer of activity, according to LPIT, has a slightly broader scope, including both natural persons engaged in economic activities (sole proprietors), as well as other groups of independent performers of activities, such as: natural persons performing agricultural activity (*individual farmers*), natural persons performing craft activity (*craftsmen*) and *natural persons performing professional and other intellectual services* (health, dental, veterinary, lawyer, notary, consulting, accounting, auditing, appraiser, engineering, architectural, journalistic, sports, cultural and other intellectual activity). [34] Although the legal regimes of company and tax law provide a relatively broad framework for the coverage of self-employed persons, this framework usually includes the 'traditional' forms of 'regulated' self-employment (sole proprietors, individual farmers, craftsmen and independent performers of activities) which presupposes mandatory registration in the Central Register of the Republic of North Macedonia, and where necessary prior mandatory registration in an appropriate special register in accordance with the rules governing the respective activity, i.e. profession. The options of *other 'self-employed' persons (freelancers*) who independently perform an activity or profession, which can be treated as 'new' or 'modern', or which is not regulated (e.g. translators, tourist guides, freelancers in the IT sector, graphic design and multimedia, entertainment, consultants, etc.), are usually limited to registering an 'unincorporated' (e.g. sole proprietor) or 'incorporated' enterprise (e.g. a single-member limited liability company). According to the existing regulations, freelancers do not have the possibility to register in the form that corresponds to their preferences to be regarded as persons who are closer to the concept of 'self-employment' than 'entrepreneurship'[35] Hence, the self-employed 'freelancers' most often operate in the domain of the informal economy. In our view, the regulatory framework of social insurance, should *de lege ferenda*, provide space for the introduction of an adequate category of payers of social security contributions, i.e insured persons, which will include self-employed freelancers. However, it is worth noting that with the amendments to several laws in the field of labour relations and social security that were in force in the period from early January to late July 2015 (the so-called Laws on Freelancers), an attempt was made to regulate the status and position of *persons earning income from the performance of physical and/or intellectual work, on the basis of one or more contracts for services, copyright*

[33] LTC, art 8.

[34] LPIT, arts 19 and 20.

[35] In theory, it is considered that a main criterion for distinguishing between an entrepreneurial activity from self-employment, is the way in which work and the means of production are organized. If the economic activity is carried out without an organizational base, then it is considered self-employment. Otherwise, it is usually considered that the performance of the activity, i.e. profession is organized in the form of an 'enterprise'. However, it is worth mentioning that in practice, entrepreneurial activities can often be very small (i.e. they are referred to as micro-enterprises), where the organisational factor is of minor importance compared to the personal efforts put in by the person running the enterprise. See Perulli.A, *Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* (Committee on Employment and Social Affairs and the European Commission, DG Employment and Social Affairs, 2003), 10.

*contracts or other contracts which set a compensation for the performed work.*[36] The basic goal of the legislator was to subsume the so called 'freelance workers' under the payment of social security contributions regime, while also determining their legal position and social security status. Still, the unclear legal provisions that shaped the legal regime of freelance work, the unpreparedness of the state institutions (primarily the Pension and Disability Insurance Fund of Macedonia) as well as the inadequate financial burden on persons who had generated incomes performing certain physical and intellectual work resulted with repealing of the regulations on freelance work, after only seven months since their introduction.

### 3. Disguised employment relationship

Traditionally, the Macedonian labour law theory, under the influence of the labour law theory from the period of socialism, considered the disguised employment relationship/bogus self-employment as a subspecies of the so-called 'factual employment relationship'.[37] The 'factual employment relationship' theory, emphasized the illegal character of the *de facto* employment, at the expense of introducing legal mechanisms for its requalification into 'legal' employment relationship. [38] More recent theoretical approaches in North Macedonia, inspired by the ILO classification, define disguised employment relationship as a non-standard form of work, emphasizing the need to introduce appropriate legal mechanisms to combat such a form and the precariousness it causes in relation to the position and rights of workers from employment and social security.[39] Forms of disguised employment in North Macedonia can be found in various activities of the private sector, both in the 'more traditional' (transport, construction, catering) and in modern activities and professions (marketing, information and communication technologies, consulting services, media, etc.). Surprisingly, the disguised employment relationship is particularly present in the public sector (education, health care, social protection, state administration bodies, etc. [40]). Disguised employment relationship is concluded under the 'veil' of various designated or undesignated contracts which only by their title, legal qualification or content (that usually doesn't reflect the genuine relationship between the parties) constitute civil law contracts, i.e. contracts which are not treated as employment contracts (e.g. contracts for

[36] See Kalamatiev.T and A.Ristovski, *Factual employment relationship and freelance work in the Macedonian legal system*, (Радно и Социјално Право, 2015), 19.

[37] Under the term 'factual employment relationship', in addition to 'disguised employment' (concluding a contract for service in order to conceal the true employment status of the employee under an employment contract), the following situations could also be included: 1) practices of entering into an employment relationship with an employee who does not meet the stipulated or prescribed conditions for employment; without publicly a job vacancy or without adhering to the form of the contract; 2) undeclared, i.e. unregistered employment; 3) situations in which the employment relationship continued to exist despite the absence of a legal basis (for example, the employee continued to work for the employer after the expiration of the fixed-term employment contract or after the termination of the employment with the employer). See Baltič.A i M.Despotovič, *Foundations of labour law in Yugoslavia – labour relations system*, (Savremena Administracija, Beograd, 1971), 41.

[38] See Kalamatiev.T and A.Ristovski, (n 36), 7-10.

[39] See Ristovski.A, *Fixed-term contracts and disguised employment relationships in North Macedonia*, (ILO, 2021).

[40] According to relevant data from 2016, there were a total of 4,684 persons engaged in the public sector with volunteer contracts, service contracts, authors' contracts or other contracts. The majority of these persons worked in public health institutions, universities, schools and kindergartens. See Ministry of Information Society and Administration, Annual Report on the Register of Public Administration Employees (2016), 29.

services, copyright contracts, but also, temporary and occasional work contracts, volunteer contracts, etc.). Despite such practice, North Macedonia lacks a systematic approach to identifying, regulating and combating disguised employment. The single, more significant 'normative response' stipulated by the LRL, aimed against the abuse of contracts for services as a substitution of employment contracts, was the introduction of the indicator 'performance of the work within or outside the registered activity or profession of the employer'[41], the purpose of which was to differentiate contracts of employment from so-called 'special contract', i.e. contracts for services. However, in the contemporary forms of organisation of business and production activities, there is often a loose and blurred border between 'core' and 'other' activities of employers. Moreover, when inscribing in the trade register, employers usually apply the so-called 'general business clause', which is an indication that the commercial entity can perform all activities according to the National Classification of Activities.[42] On the other hand, as a measure to combat disguised employment in the public sector, in 2015, the Assembly of the Republic of Macedonia adopted the so-called Law on Transformation into Permanent Employment Relationship.[43] This Law provides the scope of persons who shall be entitled to transformation of their working relationship into permanent employment relationship (those are the persons who had been working on the basis of a contract that lasted at least three months up to 30 November 2014 and who had valid contracts at the time the Law was introduced), the dynamics and the manner of the transformation, restrictions on future hiring of workers under volunteering contracts and service contracts, etc. [44] Anyway the aim of the law has been only partially achieved, since the Ministry of Finance has preserved its discretionary power to approve prior consent for hiring a person on a civil-law contract without any specific criteria and precondition. That's why there are still many other public sector workers who continuously work under contracts different than employment contracts and are in disguised employment relationship.

In the forthcoming period one should expect that the legislator would take into account the solutions incorporated in ILO Employment Relationship Recommendation (no. 198), in particular those relating to the introduction of the principles of 'primacy of facts' and 'legal presumption for the existence of an employment relationship'. The legal presumption for the existence of employment relationship should serve as legal ground to reclassify false service contracts (disguised employment relationship) into contracts of employment (genuine employment relationship) with a possibility for claiming retroactive exercise of labour and social security rights. This should apply provided the contractual relationship between the employer and the worker meets the requirements for the existence of employment relationship and the employer fails to prove otherwise.

[41] LRL, art 252, para 1.
[42] See Law on the One-Stop-Shop System and Keeping a Trade Register and a Register of Other Legal Entities, Official Gazette of RM, no. 84/2005), art 7.
[43] Law on Transformation into Permanent Employment Relationship, (Official Gazette of RM, no.20/2015).
[44] Law on Transformation into Permanent Employment Relationship, art 2 – art 7.

## 4. Casual work

Casual work can be defined as work that is executed for a very short period, or occasionally and intermittently, often for a specific number of hours, days or weeks. [45] Its constituent elements are the 'short duration' and the 'intermittent' character of the work. [46] A casual worker, can be defined as a worker who carries out temporary and occasional work for an employer, either on a one-off basis (for a very short period of time, even if it is full-time) or occasionally (on an ad-hoc basis), 'if' and 'when' the employer requests from the worker to perform such work. [47] Although casual work in different variants (as temporary and occasional; weekly, daily or hourly work) is primarily associated with the labour law systems and practices of developing countries, it is increasingly regulated in developed countries as well. In developed countries there are other, similar non-standard forms of work, the main features of which are the uncertain quantity and distribution of delegated work (as in on-call work, or zero-hour contracts), rather than the 'duration' of the engagement itself (as in casual work). However, unlike casual work, where there is usually a lack of so-called 'mutuality of obligations' (as a test for determining an individual's employment status applicable in common law) [48] or 'continuity' (as an indicator applicable in continental law), in on-call/zero-hours work, mutuality of obligations/continuity is commonly considered to be existent, thus, leading to a qualification of this form of working relationship as an employment relationship.

In North Macedonia, casual work is not separately regulated in the labour, nor the social security legislation. It is explicitly mentioned only in the context of tax law, through the *contracts for temporary and occasional performance of services*, [49] provided by the Law on Personal Income Tax, without, however, the Law to provide a definition that will more substantially define these contracts. As a consequence, contracts for temporary and occasional performance of services are considered civil contracts, which are usually expected to be concluded through a 'copyright agency' where a personal income tax will be paid. In practice, temporary and occasional work is often performed informally, without concluding any written contract, while payment is often made 'cash-in-hand'. Contractual arrangements that correspond to the characteristics of the temporary and occasional work (short duration and discontinuity), are found in the performance of: low-skilled, agricultural, construction jobs, crafts, catering, tourism, cultural activities, IT services, sales agent jobs, etc. Non-standard forms of employment in the Macedonian labour legislation, which by their characteristics, perhaps, are closest to temporary and occasional work, are fixed-term and seasonal employment. Yet, it seems that the key difference between these forms of employment on the one hand and temporary and occasional work on the other, is that, in fixed-

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[45] ILO, *Non-Standard Employment Around the World-understanding challenges, shaping prospects*, (International Labour Organization, 2016), 22.

[46] De Stefano.V. *Casual Work beyond Casual Work in the EU: The Underground Casualization of the European Workforce - and What to Do about it*, (European Labour Law Journal, 2016), 424.

[47] Macdonald.L, *Managing Fixed-Term and Part-Time Workers*, (Lexis Nexis UK, 2009), 215-216.

[48] The emergence of 'mutuality of obligations' doctrine, i.e. test is associated with the seminal work by Mark Freedland (The Contract of Employment of 1976) and the 1980s cases of '*O'Kelly*' and '*Nethermere*'. See Countouris.N, *Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law* (Hart Publishing, 2015), 174. A 'mutuality of obligations' can be understood as a presence of mutual commitments to maintain the employment relationship in being over a period of time, i.e. to make work available in the future (on the part of the employer) and to be available for work (on the part of the worker). See Deakin.S and G.S.Morris, (n 51) 138.

[49] See LPIT, art 14, para 1.

term and seasonal employment, there is, or at least, is expected to be, some 'continuity' and relative 'stability' in the performance of the work, while the whole system of administering these forms of employment (registration/deregistration in mandatory social insurance and payment of wages and social insurance contributions) is adapted to such a nature of the employment contracts. [50] So, the unsuitability of the legal framework regulating current non-standard forms of work and the system through which they are administered to the needs of employers for employing and paying seasonal or other casual workers, discourages those employers to formally employ the workers, and as a consequence, many of the employees performing casual work are engaged informally and payed cash-in-hand. If the Macedonian legislator, decides to regulate temporary and occasional work in the context of labour law, it could be expected to qualify it as work 'outside' the employment relationship, or work performed on the basis of a 'mixed contract' (between employment contract and contract for services) by extending certain, selected employment rights (e.g. occupational health and safety, limited working hours, daily and weekly rest, minimum hourly or daily wage, collective labour rights, dismissal protection, etc.) to temporary and occasional work, and of course, by adding an adequate social security protection. The reasons for 'legalization' of temporary and occasional work in North Macedonia should be sought in the need to fight informal employment, as well as to reduce precariousness of 'de facto' temporary and occasional workers. Macedonian legislation, *de lege ferenda*, could apply some of the regulatory techniques familiar to comparable labour law systems. Those are, in particular: limiting the maximum duration of temporary and occasional work (on a weekly, monthly and/or annual basis) and transformation of this 'very' atypical form into a 'less' atypical form (such as fixed-term work) if the worker works longer or contrary to the maximum duration; restricting its application only to work/services outside the employer's main activity; determining the scope of persons who could be engaged in temporary and occasional work (for example, unemployed, students, part-time employees, pensioners, etc.); extension of eligibility qualifications, primarily for acquiring social security entitlements (for example, allowance during maternity and parental leave, during temporary incapacity for work due to sickness and injury or unemployment benefits) in order to cover the periods of 'interruption' in the total qualification period for exercising the specific entitlements, etc. A good basis for modeling the temporary and occasional work in the Macedonian labour legislation can be the legal frameworks of several EU countries, such as: Romania (which has regulated day labour for the performance of 'unskilled working activities of an occasional nature'); Hungary (regulating so-called 'simplified employment' which can be entered into to carry out seasonal work in agriculture and tourism or causal work in other sectors); Slovakia (where three different schemes of 'agreements of work performed outside the employment relationship' exist, such as: work performance agreements, with the aim of regulating work that is limited in its results; agreements on work activities, with the aim of regulating occasional activities limited by the type of work and agreements on temporary work for students); Netherlands (where three types of intermittent work arrangements exist, such are: on-call, or stand-by work; zero-hours contracts and minimum-maximum contracts); Italy (where two types of contracts for intermittent work exist, namely: the first, in which, the worker is not bound to accept calls and the employer to offer a

[50] E.g. seasonal work is defined as a work carried out during particular periods – seasons, which does not last *more than eight months in a period of 12 consecutive months* (LRL, art 47, para 1). The new LRL is expected to introduce the so-called '*employment contract for permanent seasonal work'*, which would serve as a legal ground for renewable seasonal employment, that would oblige the contracting parties to continue the employment relationship in the next season, after the expiration of the employment contract due to the end of the work in the previous season.

minimum amount of work, and the second, in which, the worker undertakes to accept the calls), etc. [51]

Currently, there is an ongoing reform in North Macedonia for the purpose of establishing a new system of so-called 'Simplified Work Engagement'. The main goal of the reform is to tackle informal employment in the sectors with high incidence of undeclared work (agriculture, tourism and hospitality, construction) by the regulation of casual/temporary and occasional work in the said sectors. The main features of the system should be the following:

- a new easy to use electronic platform to be designed for registration and deregistration of workers on a daily or other temporary or occasional basis;

- taxes and social insurance contributions (for pension and insurance against occupational accidents) shall be calculated on a daily basis for each engaged worker while the thirtieth part of a minimum monthly salary is expected to be used as the basis for their calculation. This means that employers will pay taxes and contributions only for those days when workers are actually engaged;

- the system is expected to be opened for a broad group of workers (not only the unemployed, but also employed, self-employed, pensioners, students);

- It is expected that the legal nature of the work engagement in the new system of simplified work engagement will be characterized as a work outside of an employment relationship. However, such status should not deprive the engaged persons/workers from acquiring certain employment rights enjoyed by regular workers/employees. In the selective extension of rights, it will be crucial to take into account the international labour standards (particularly the fundamental principal and rights at work as well as the basic working conditions - adequate living wage, limits on hours of work and safe and healthy workplaces) and the EU Directives (particularly Directive (EU) 2019/1152 on predictable and transparent working conditions);

- the contract for engagement is expected to be concluded orally; the employer to be obliged to inform the worker on the essential terms and conditions of his/her engagement prior the worker commences the work; the worker to have access to the terms and conditions of the engagement in an electronic form on the platform, and if requests, the employer to be obliged to provide him/her a printed confirmation from the electronic form in which the working conditions are provided;

- Measures to prevent abusive practices aligned with Directive 2019/1152 should be introduced, particularly concerning limitations to the use and duration of the working engagement.

[51] De Stefano.V. (n 46), 438.

## Conclusion

The gray areas between employment and self-employment and the emergence of specific non-standard forms of work aimed at filling such areas, do not occur incidentally and by accident. They are a consequence of tectonic changes in the world of work. Labour law (as a regulatory framework, but also as a scientific discipline) faces the challenge of finding an appropriate way to address such changes, in order to maintain its basic and essential function - regulating the position and rights of workers in need of protection. The theory identifies various approaches to achieving the mentioned goal of labour law, ranging from maintaining the 'status quo' and leaving a flexible boundary between labour and civil law, to redefinition (enlargement) of the notion of subordinate work, to creating an intermediate category (i.e an employment status) between subordinate work and self-employment and to setting forth a 'hard core' of social rights which shall be applicable to all workers irrespective of their contractual arrangement.[52] The latter is most in line with the ILO approach in determining the personal and material scope of worker protection at the universal level. A genuine confirmation for this, is the establishment of the Universal Labour Guarantee, which guarantees *to all workers* (regardless of their contractual arrangement or employment status) the enjoyment of *fundamental principles and rights of work* and *basic working conditions* (adequate living wage, limits on hours of work and safe and healthy workplaces).

In North Macedonia, for a longer period of time now, there is an ongoing process of adopting a new Labour Relations Law. Hence, the great expectations from the new Law to offer normative responses to the contemporary challenges faced by the Macedonian 'worker' and the labour market. In this context, it is expected that appropriate legal mechanisms will be introduced to address undeclared (informal) work and disguised employment in order to protect 'de facto' employees and 'bogus self-employed persons' who are excluded from the protective framework of labour legislation and social security.

The gray areas covering the space between subordinated work (employment) and independent work (self-employment) require appropriate regulatory measures, but the Macedonian legislation still has difficulties in recognizing and properly regulating self-employment. Attempts to regulate the so-called 'freelance work' in 2015 ended in failure and the issue of the status and rights (primarily of social security) of freelancers (as de facto self-employed persons concluding civil law contracts), still remains unresolved.

A comprehensive regulation of 'casual' (temporary and occasional work or similar non-standard forms of intermittent work) is necessary for the sake of the interests of all three sides of the social dialogue: the state (with the aim of formalizing informal employment), the employers (with the purpose of having predictable forms and means of engagement of workers with lower administrative and financial costs) and the workers (as a means to ensure decent work, that will include fundamental rights from employment and social insurance). A significant step in this direction is the initiation of the labour market reform related to the establishment of a so-called 'simplified work engagement' system, the aim of which is to adequately regulate casual work in certain sectors and activities with a high incidence of informal employment.

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[52] See Rosioru.F, *Legal Acknowledgement of the Category of Economically Dependent Workers*, (European Labour Law Journal, 2014), 304.