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Reform and oversight mechanisms are not enough: Access to justice for workers and employment standards in Central Eastern European countries

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Karol Muszyński

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etui.

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Abstract

From a strictly formal point of view, employment regulation in Czechia, Hungary, Poland and Slovakia (CEECs) provides an acceptable level of protection for employees. However, workers' formal rights are being violated and circumvented on a massive scale. Because the oversight system is non-effective, employees lack sufficient access to justice; furthermore, the courts and administrative bodies approach regulation in a highly formalised way so that the violations and circumventions become 'normalised' over time, rendering formal regulation ineffective. In many situations, like the use of non-standard forms of employment, adverse interpretations when legal ambiguities arise have been reproduced across CEECs even when formal and targeted regulatory changes have been adopted. The paper argues that, in order to prevent the normalisation of such violations and circumventions, it is necessary to expand access to justice for workers. The paper also puts forward an argument that this could be facilitated where trade unions foster pro-worker legal interpretations by engaging in strategic litigation.

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1. Introduction

Statutory regulation has always been a principal tool regulating labour markets across Central Eastern European countries – Czechia, Hungary, Poland and Slovakia (CEECs). Its role has been especially aggravated now that collective bargaining is in decline. Formally established standards are, however, not enough. In order for formal regulation to function, it must be adjusted to reflect changing social reality as well as supervised to ensure that standards are being observed.

Employment standards in Czechia, Hungary, Poland and Slovakia remain a problematic issue. All four countries are experiencing lively debates on how to translate a relatively successful economic transition and economic growth into an improvement in working conditions. It is widely recognised that the existing economic model was built largely upon low labour costs and poor standards (Bohle and Greskovits 2007; Nolke and Vliegenthart 2009; Drahokoupil 2009; Drahokoupil and Piasna 2018).

At the same time, formal employment rules in CEECs are not – as a whole – particularly unfavourable to workers nor do they appear to promote labour flexibility: they provide an acceptable level of protection (OECD 2019). A standard explanation is given by industrial relations experts who treat bargaining power as the most important factor influencing employment standards. Since workers' bargaining power is low, employers can simply exploit their position and impose poorer working conditions than those formally prescribed in law. Thus, the most important question is how to improve bargaining power; and, in particular, how to organise labour, foster trade union renewal and resuscitate or otherwise establish new, more effective forms for the collective representation of workers.

This paper does not intend to question this approach. My intention is to add another, frequently overlooked, layer to the political and legal agenda. I argue that, in order to contribute to the improvement of working standards and the functioning of statutory regulation, one has also to improve workers' access to justice. Here, I comprehend access to justice in a broad manner – the ability to seek and obtain a remedy for violations of formal rights through institutions of justice. Even though formal regulation grants rights to individuals, their actual ability to exercise those rights varies greatly. The barriers that people face in the process of seeking help with their grievances are not limited to the organisation of the legal system itself (such as the high costs of bringing claims to courts), but may stem from other factors (such as a lack of knowledge about one's rights, culturally influenced attitudes that prevent people consulting lawyers or bringing a case to court, etc.). It therefore covers access to courts in a broad sense (the cost

of bringing cases to courts, the length of proceedings, procedural requirements, availability, etc.); access to legal help and legal representation (costs, availability); legal consciousness (knowledge about rights and access to expertise); and attitudes towards the law.

The interpretation that some regulation is beneficial for employers and unfavourable for employees describes only partially the reality of working conditions in CEECs. Very often, employees are put in disadvantageous positions not as a result of formal regulation that explicitly limits their rights but due to the non-enforcement of existing regulation, non-compliance with it or labour law circumventions that are facilitated by adverse interpretations of the formal regulation.

I argue that increasing individual access to justice may play a vital role in improving working standards on two levels:

1. On a micro level, the expansion of access to justice (e.g. in the form of a broader and more comprehensive system of legal aid, better channels of access to justice and better legal knowledge) helps workers execute their rights. This issue is crucial since data suggests that workers could use the legal system more efficiently in claiming rights in places where legal exclusion is at its height (e.g. for workers in enterprises where trade unions are not present and collective bargaining does not take place). CEECs are characterised by a statist system of the regulation of employment standards while labour inspectorates are largely inefficient, so access to lawyers and courts is an alternative solution that can contribute to the raising of employment standards. This might also help many self-employed people who are not necessarily bogus self-employed but are, in fact, in a position where those who contract them are abusing their economic power.

2. On a macro level, better access to justice may improve the position of workers in situations where there are grey areas – where employers' actions are of questionable legality. Historically, some very important developments in CEEC labour markets from the point of view of working standards have occurred as a result of the normalisation of actions that, at the beginning, were highly controversial from a legal perspective. This process of normalisation happened via actual instances that were either accepted by the courts or which simply became widespread on the market in the process of the strategic search for legal loopholes (a form of regulatory entrepreneurship). Due to the highly formalised and hierarchical approach adopted by courts in CEECs, a few judgments that are unfavourable for workers can simply expand and legalise actions that are within the grey area of legality.

Consequently, this paper argues that trade unions in CEECs should be more focused not only on improving formal legislation and its application, but also on how this formal legislation is being interpreted by the courts. This is, of course, very difficult to control (including by trade unions) given the dispersed and

complex organisation of the legal system. However, due to the predominantly statist system of employment regulation in CEE, it is necessary for trade unions not only to influence the formal content of the rules but also to keep trying to influence how those formal rules are interpreted. This paper therefore argues that trade unions should engage in strategic litigation with the aim of fostering a pro-worker understanding of legal interpretations in a more comprehensive manner.

The paper is organised as follows. First, I describe the manner in which CEECs tend to regulate the labour market – by statutory regulation, with collective bargaining having only residual importance. Then I try to explain theoretically why, even though statutory regulation across CEECs does not particularly lend itself to flexibility or be non-protective as regards employees, this does not translate into good working standards. I also show how labour law violations and circumventions may become normalised over time where detrimental interpretations of the law are uncontested by workers, further translating into unfavourable case law and jurisprudence which *de facto* legalises such circumventive behaviour.

I then describe a situation regarding labour law compliance and access to justice in CEECs that promotes this turn of events. To illustrate how this has in fact happened, I present two cases of such developments across all four countries. Taking the example of the use of non-standard forms of employment and the way that employment regulation is being used in temporary work agencies, I describe how circumventive actions by employers, aiming to bypass or violate labour law, become normalised and spread across CEEC labour markets. In the conclusion, I argue that trade unions could engage more proactively in strategic litigation as a means of fostering pro-worker interpretations of the law in situations of high legal ambiguity.

1.1 Statutory character of employment regulations in CEECs

In order to understand employment relations in CEECs, we must first describe the regulatory framework. From a strictly formal point of view (i.e. as described by the existing statutory provisions), regulations across CEECs do not particularly promote flexibility but provide relatively good protections for workers (in terms, for example, of the OECD indices on employment protection legislation).

Trade union density and collective bargaining coverage are much lower than in Western Europe, especially in the private sector. Before the economic transition around 1990, state socialist governments utilised trade unions as a 'transmission belt'. As a result, trade unions were neither autonomous nor oriented towards defending workers' rights in relations with the state as the principal employer. After the economic transition, two interrelated processes happened: the rising importance of plant-level workers' participation in the place of that at any other level (sectoral and national) (Myant 2010); and the rapid decline in trade union membership. Trade union density has fallen from almost universal levels in the 1980s to current figures of 8-12 per cent across all four countries (Visser 2019).

Multiple factors have facilitated the decline of trade unions. First, many workers still express distrust towards trade unions and treat them as a relic of the past. Second, some trade unions in the region openly supported and defended deep and problematic economic reforms, thus alienating themselves from many workers suffering the negative consequences of rapid transition (Ost and Crowley 2001). Third, the privatisation of enterprises and the influx of FDI disrupted organisational chains between many enterprises, thus hindering the self-organisation of workers. Fourth, in the post-transition period trade unions have faced many regulatory challenges that have made their development difficult. Those include, in particular, bureaucratic formalities, restrictions on the right to organise and restrictions on the right to strike, as well as very patchy and fragmented systems of workers' representation (trade unions, work councils, workers' representatives, etc.).

Consequently, trade unions have focused on two dimensions: statutory regulation (defending existing rights and lobbying for formal changes); and plant-level operations (plant-level collective bargaining and oversight of labour standards in companies). Trade unions have been able to remain relatively strong in the public sector and in bigger enterprises, even if those had been subject to privatisation. However, privatisation and rather drastic market transformations have undermined trade unions in particular in smaller enterprises and in the private sector.

As a result of the weakness of trade unions and employer organisations, as well as collective bargaining becoming more or less residual, CEECs are characterised by a statist system of employment protection. Trade unions face hostility or simply a lack of partners on the employer side; bargaining is largely or completely decentralised and takes place (except for Slovakia) largely at company level; and collective bargaining coverage has rapidly fallen and extension mechanisms are rarely used (Müller *et al.* 2019). Moreover, even when collective agreements are signed, they often repeat provisions set down in statutory legislation (Kahancová *et al.* 2019; Myant 2019). The regulation of employment relations therefore relies more heavily on statutory regulation than in Western Europe. Regulation provides individual workers with minimum standards while, for trade unions, it acts as a point of reference in ensuring that labour standards at workplace level are maintained and – at national level – as an object of lobbying to increase the level of protection. We should also observe that statutory regulation tends to be relatively detailed and complex: the Polish labour law scholar, Jakub Stelina, noted that collective bargaining is difficult since 'The [Polish] Labour Code itself looks like a detailed collective agreement' (Stelina 2009: 103).

If the statutory rules are relatively protective, this would suggest that employment protection in CEECs is relatively good. This is, however, not the case. In order to understand why, we must first theoretically explore the socially dynamic nature of the legal rules.

1.2 The dynamic dimension of law in the context of employment regulation

Law is usually seen as a cornerstone of social stability. However, the social embeddedness of legal rules makes them very dynamic. Actors may act fully compliant with the regulation, but they may also try to adapt, circumvent or even violate it. Since the legal rules are formulated as text, they are also subject to conflicts regarding interpretation and the 'real' content of the rules.

Legal regulation establishes a playing ground for enterprises but, from a strictly economic point of view, it also constitutes a cost since it puts limits on firms' behaviour. It is, therefore, almost self-explanatory to say that a creative approach to regulation, especially as regards avoiding it, might give companies an advantage over others (Pollman and Barry 2016). There are different ways of interacting with the regulation to gain leverage.

First, companies may utilise different national jurisdictions to take advantage of more convenient standards, such as lower taxation or more flexible regulation (Berntsen and Lillie 2015). Transferring operations to countries with formally lower levels of social protection is a form of social dumping. Second, interacting with the regulation may take the form of a creative approach to using and adapting it. Effectively, this might circumvent the regulation, i.e. be against the purpose of the regulation but not its letter (Streeck 2004). Tax law may contain loopholes that can allow the optimisation of operating costs; while labour law may contain certain provisions that allow the achievement of greater flexibility. For instance, if fixed-term contracts are cheaper, but there are statutory limits that prevent a legal entity from concluding more than a few fixed-term contracts with the same worker, a firm may utilise a subsidiary to hire the same employee again on a fixed-term contract. The action is not illegal, but it constitutes a creative way of circumventing the regulation. The third manner in which companies might interact with the rules are simple violations aimed at lowering costs or achieving some other form of competitive advantage (Kubick *et al.* 2015; Rochlitz 2017). Firms may simply choose not to pay taxes (by operating in the shadow market), hire workers informally or pay them 'envelope' (non-declared) wages. Such actions are explicitly against the letter of the law.

What is especially important with regard to employment regulation is the possibilities granted by interacting with the regulation. Such interactions, as shown by these examples of adaptation/circumvention and violation, stem primarily from two factors.

The first is ambiguity in the formal legal texts. Even when a law is specifically detailed, what is actually 'allowed' by the law is never fully precise and stems not only from the formal content of the rules (d'Amato 1983; Betlem 2002). The 'actual' meaning of the legal rules is established in the dynamic process of using, interpreting and enforcing the regulation (Mahoney and Thelen 2010; Katsoulacos and Ulph 2016). Legal scholars, administration and the courts play a role here. Of course, there might be discrepancies in the way that rules are understood. For instance: is it allowed to utilise certain forms of non-standard contracts to

structure a specific form for the performance of work? Here, interpretations might be divergent. The legal system usually contains institutional mechanisms that allow the coordination of discrepancies in interpretation, most importantly by means of judicial review and appeals procedures. However, the understanding of the legal rules is influenced by the actions undertaken by each member of society who comes into contact with those rules (Luhmann 2004). Furthermore, the interpretation of ambiguous rules tend to stabilise over time. Usually, this happens because of the way regulation is used, enforced and, especially, interpreted by the courts. However, in contrast, the way that rules are understood might change even without formal reform or modification. Societal challenges and completely new situations may require the reinterpretation of previously 'obvious' rules. Judicial activism and precedent-setting judgments can, sometimes, completely subvert how certain institutions are understood (Müller 2000). I will show later that Central European employment regulation is particularly riddled with ambiguities due to a combination of a statist approach to regulation and a highly-formalised stance regarding interpretation.

The second factor allowing for interplay with the rules is the actual implementation and execution of the rules, as well as the oversight mechanisms that apply. However, formal legal hierarchies do not fully represent socially binding power. Even though formally they are the same, some rules are more 'binding' in a social sense than others, even when their theoretical formal binding force is equal. Many factors contribute to this. Some formally established rules do not have social support or are unknown to members of society (Cohn *et al.* 2010; Cohn *et al.* 2012). Some rules might be violated because actors are able to exploit their power advantage while those whose rights are being violated are in no position to demand that the rules are implemented. Additionally, actors might violate the rules by exploiting defects in oversight mechanisms or a lack of possibilities in terms of the implementation or execution of the rules (Van Brederode 2014; Besley *et al.* 2019). I will show below that both oversight of the rules and access to procedures allowing influence over their implementation are very limited for workers in CEECs.

The dynamic dimension of the law is directly linked to the problem of access to justice. Both interpretation/adaptation and execution are severely riddled with power struggles. People and organisations have different capacities for influencing both the way that the 'binding' meaning of law is established and the actual implementation of the rules (Kennedy 1976; Leiter 1995). The imbalance here is propelled by many factors.

First, actors have different expertise, awareness and understanding of the rules. Knowledge of the legal rules creates a substantial barrier in terms of access to justice – people might simply be unaware of their rights or how to proceed when violations happen. Access to justice studies show us that procedural requirements and a lack of knowledge on how to deal with problems have a fundamental impact on whether and how legal problems are resolved (Pleasence *et al.* 2013).

Second, due to the logic of the legal system, the more proactive side has the edge. When an employer engages in the creative use/adaptation of labour standards, or in their violation, his/her action is assumed to be legal unless and until it is established otherwise via some form of legal or administrative proceedings. In order to establish this, the worker needs to enjoy access to justice.

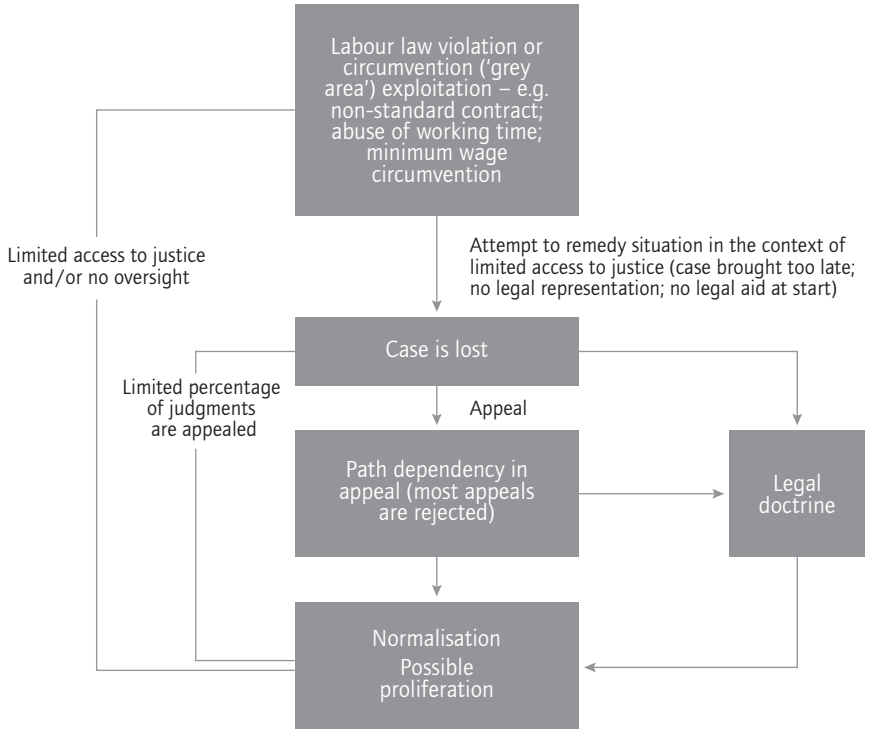
Third, fighting for one's rights may be burdensome and financially draining. Bringing a claim to court is costly. Hiring a lawyer to deal with more complex legal situations might be too expensive (Reimann 2012). The aspect of economy of scale plays an important role as well: bigger companies are more prone to search for 'beneficial' legal interpretations with the use of highly-skilled lawyers. Workers facing barriers in accessing justice will have problems in this regard.

Fourth, proliferation leads to acceptance and normalisation. When practice becomes omnipresent, it often stops being questionable or, sooner or later, becomes formally or informally legalised. Trying to prevent widespread illegal actions might backfire for both political and judicial actors, a factor which is well described by the notion of regulatory entrepreneurship (Pollman and Barry 2016). The best example is provided by the use of self-employment – if subcontracting becomes simply a norm in certain domains of activity (e.g. in the case of professionals), it stops being questioned by oversight agencies, courts and jurisprudence, and might even be accepted by policy-makers due to the political and economic interests that emerge (Giraud and Lechevalier 2018).

Finally, the previous arguments tend to create a self-propelling dynamic in which the lack of enforcement and barriers in terms of access to justice actually 'push' the 'grey zone' towards a more unfavourable position and might fully normalise actions whose legality was controversial at the beginning (Bureau and Dieuaide 2018). In this way, limited access to justice is a precondition for slow 'displacement' in such grey areas. When case law is created, it self-reproduces in further case law due to the legal system's organisational logic of operation in which courts tend to refer to judgments previously issued in similar cases and to block appeals. Case law influences legal doctrines that reciprocally influence both future case law and law-making.

Graph 1 presents a model showing how circumventions and violations might lead to the normalisation of legal grey areas in the context of limited access to justice. If not prevented, labour law violations and circumventions simply normalise and proliferate. If prevented in a situation of limited access to justice, adverse case law might further stabilise over time by legalising actions within grey areas. Case law influences legal doctrine that is also a factor contributing to the self-propelling logic of grey area normalisations.

Graph 1 **Limited access to justice and the possibility of the proliferation of labour law violations or circumventions**



Source: own elaboration

In order to show the functioning of the model in practice, I will first present the piecemeal quantitative data which underpins such dynamics and then present specific cases in which such developments have taken place.

1.3 Methodological limitations

This paper uses various indirect sources to analyse access to justice in the context of labour law violations and circumventions. An analysis of indirect data is required since obtaining precise and robust data on labour law violations is impossible. Some information is more reliable and some options for quantitatively assessing certain types of labour law violations are present. However, for many reasons, this process is, in its entirety, inherently impossible to measure quantitatively and in a reliable way.

The first reason for this is related to the dynamic process of the functioning of the law. The ultimate assessment of the legality of actions which are questionable from a legal point of view actually happens only sporadically. When we download files via torrent, our action is probably illegal but it is not seen by the formal institutions of the legal system. Therefore, an assessment is not being made. Do we therefore commit a crime? This is not determined unless we are brought to a court and convicted. The same applies to employment regulations: a worker's

rights might have been violated, but if s/he does not know about it, or knows about it but, for whatever reason (such as fear), does not bring a case to a court or the labour inspectorate, a legal assessment will never be made.

An even more problematic situation arises when the assessment is unclear. This problem refers to the nature of the violation or circumvention itself and its relation to the market economy. Competitive advantage in a market economy can be gained by utilising different resources more effectively than the competition. The exploitation of loopholes, or simply avoiding regulation, can give one company an advantage over the competition ('outlaw innovation' or regulatory entrepreneurship) (Söderberg 2017; Flowers 2008; Pollman and Barry 2016). Labour law violation/circumvention can, in some cases, be treated as a form of innovative activity while whole business models can be built on the exploitation of this grey area. For instance, in many countries, Uber utilised the ambiguous relationship between cab services and other transportation services simply to carry out some tasks cheaper. While being on the face of it simply a platform linking providers with clients, Uber was able to operate as a cab company without being subject to the many regulations with which standard cab companies are forced to comply. Two factors are important here: first, it was not obvious whether Uber's actions constituted any type of violation at all, although it certainly did exploit under-regulation/legal loopholes. Secondly, its operations were, to some extent, not visible due to oversight issues. Exploring the grey areas provides enterprises with opportunities and is particularly common in the area of employment relations in CEECs.

What is especially noteworthy is that those actions are beneficial precisely because it is difficult to assess their legality and because they are hidden. In such situations, the question whether formal action will be undertaken is crucial and determined by the legal capacity of the actors that are involved.

In this paper, I primarily draw on data from labour inspectorates and court statistics. Labour inspectors are legally trained and tasked with performing inspections and assessing the legality of actions. Such data has some quantitative use and may be used at least to assess the extent of the phenomenon.[1] Court statistics allow us to compare the number of potential cases in the domain of employment regulation and to understand the limited access to justice that workers have in CEECs.

Additionally, I use some hard data available on certain types of negative labour market developments. Most importantly, this refers to data on the use of non-standard contracts (although, again, assessing with certainty whether that is legal is impossible) and the extent of minimum wage violations. The latter is with the reservation that available data on apparent minimum wage violations may not correspond to such actions being illegal, since Eurostat's Structure of Earnings

1. Data from labour inspectorates is not, however, representative as it comes from inspections undertaken within scheduled plans as well as in response to emergencies and *ad hoc* political necessities.

Survey does not provide details on type of contract versus wage. This means that data on minimum wage violations are not violations of wage regulations per se, as some forms of contract might lie outside the minimum wage provisions.

It is possible to gain some insights into the area on the basis of access to justice studies. The problem is that access to justice studies rely on survey information and are usually difficult to perform. They are, however, useful in terms of assessing the most important and serious infringements, i.e. those cases that have been brought to court and formalised in legal proceedings. The problem is that access to justice surveys require relatively large samples and are difficult to conduct. We have reliable and relatively new sources only for Poland (Winczorek 2019; Winczorek and Muszyński 2019).

Finally, it is possible to learn from quantitative studies (ethnographic studies and interviews with experts, workers and unionists), especially with regard to the strategies used in violation or circumvention infringements as well as the processes involved in the normalisation of violations.

2. Labour law compliance and access to justice

2.1 Labour law violations and oversight mechanisms

Violations and the circumvention of labour law are common across CEECs. The Czech Labour Inspectorate detected some 46,500 instances in 28,000 companies in 2019 (SUIP 2020); the Slovakian Labour Inspectorate found 47,000 infringements in around 30,000 companies in 2018 (NIP 2019: 3); the Polish body detected 258,300 irregularities regarding occupational health and safety (OHS) on top of 60,800 violations of employees' rights in 63,300 companies also in 2018 (PIP 2019b: 297); while the Hungarian authority found that 72 per cent of all 15,500 enterprises inspected had violated employment standards in 2019, with more than two-thirds of all those employed in these enterprises being subject to labour law violations (NGM 2020: 1).

The violations and circumventions detected by oversight agencies can be grouped into five main categories: the use of non-standard forms of employment where standard contracts should be used; the violations and circumvention of regulations by temporary work agencies; violations regarding wages; violations regarding working time; and infringements of OHS.

Concerning the first of these categories, employers in all CEECs tend to use non-standard forms of employment to optimise their tax position and make working conditions more flexible. The specific types and uses of non-standard forms of employment do, however, vary between CEECs depending on institutional history. This will be discussed further in detail in a later part of this paper.[2]

In the second instance, there are multiple violations and circumventions of employment regulation affecting temporary work agencies. Again, this will be analysed in detail in a later part of this paper.[3]

Regarding the third category, wage violations are also common across CEECs. The most frequent across all four countries were not paying the wage at all or not observing the level of salary stipulated in the contract; not paying the wage on time; depriving workers of due premiums (overtime or nightshift premia); paying 'envelope' wages; and violating minimum wage provisions (SUIP 2019 and 2020: 16-20; PIP 2019b: 97-102; NGM 2020: 9-10; Goraus-Tańska and Lewandowski 2019).

2. See below: Case 1. Use of non-standard forms of employment and the question of the employment relationship.
3. See below: Case 2. The uses and abuses of labour law in temporary work agencies.

In the fourth case, violations regarding working time are also very common. The situation is similar across all countries, with the most common infringements being not keeping proper working time records; forcing workers to work hours that are too long or granting them rest periods that are too short; not offering sufficient annual leave for workers; and violations regarding settlement periods (SUIP 2020: 23-27; NIP 2019: 14; PIP 2019b: 97-102; NGM 2020: 7-9).

Finally, OHS infringements are, unsurprisingly, particularly common across all CEECS (24,000 cases in Czechia in 2019; 258,000 in Poland in 2018; 35,500 in Slovakia; and 72.8 per cent of c. 14,000 enterprises infringing OHS in Hungary affecting two-thirds of all employed workers). The most common of these are: improper conditions in the workplace; a lack of training, medical check-ups or proper clothing and equipment; and improper reactions following accidents (SUIP 2020: 57-58; PIP 2019b: 318; NIP 2019: 4; PMF 2019: 1-3).

An overwhelming majority of infringements do not result in fines – from over 75 per cent in Poland to around 90 per cent in Czechia, Hungary and Slovakia; while the fines for infringements are low in comparison to the potential gains that employers might enjoy from violating the rules (Muszyński 2018). Although increasing the effectiveness of labour oversight is also crucial, the ability of labour inspectorates to intervene is, in many situations, limited due to the legal ambiguities being exploited to the detriment of workers – which I will demonstrate in the examples that follow.

2.2 Access to justice and courts in CEECs

Even though violations of labour law are widespread, with only a fraction being remedied by labour inspectorates, they are translated into legal action only sporadically. Why do workers in CEECs not litigate to assert their rights? A characteristic feature of problems with access to justice in CEECs is a low level of trust regarding legal institutions (CEPEJ 2017; European Commission 2019) and low legal awareness. The CEEC population at large – not only workers – have little knowledge of their rights and are not particularly eager to engage in legal proceedings in their defence (Kurczewski and Fuszara 2017; Jakab and Gajduschek 2019; Gajduschek 2017). Informal solutions such as negotiations are preferable.

For instance, in a representative study on access to justice concerning a population of respondents across Poland (Winczorek 2019), around 18 per cent said they had experienced a problem related to labour law in the five years prior to the study, which was the second largest category after consumer law problems. The study was conducted in the tradition of access to justice, in which respondents were asked questions about the general problems they had experienced. These were then classified by experts as belonging to a particular category in order to avoid a situation in which respondents did not know that their problem could have had a legal solution. However, only 20 per cent of people suffering legal problems related to labour law consulted a lawyer, while eight per cent went to court to litigate and three per cent took other legal measures. A substantial majority of respondents consulted family members (75 per cent) and/or tried to talk to the

other party involved in the conflict (64 per cent), but a large share (11 per cent) did nothing about a problem that they themselves had classified as serious.[4] Moreover, when respondents' conflict was related to an issue with the employer (labour law problems might stem from factors other than the actions of an employer), only six per cent of respondents decided finally to litigate while the share of 'informal steps', such as consultation with family members and inaction, increased further. This is especially important since respondents who work on non-standard contracts tend to report more legal problems than others (Winczorek 2019).

That employees do not litigate their rights is also shown by another study, conducted by Winczorek and Muszyński (2019) on small and medium enterprises. Among SMEs, only ten per cent of entrepreneurs reported legal problems with employees. The reported problems did not concern workers' litigating their rights but were related rather to the improper performance of duties or problems with leave. We should also note that employers tend to use legal assistance more frequently.

The most pressing issue in CEECs in terms of the intersection between employment regulation and access to justice is the functioning of the courts. This takes multiple shapes – from the length of the procedure, which severely limits the ability to exercise rights, to the lack of specialist courts dealing with labour law issues, which limits the specialisation of judges and, furthermore, lowers the quality of the procedure.

In Czechia, there are no separate labour law courts or departments within courts, and all litigation related to employment issues falls by default into the hands of the civil law courts. No special procedure exists for labour law cases which is, comparatively speaking, an exceptional situation (Schömann 2014: 36). Statistics therefore also cover labour law litigation within the broad category of civil law cases. Proceedings in civil law cases are very lengthy. In the first instance, courts need on average 276 days to issue a verdict, with a median of 176 days. We see a pattern of substantial path dependency in case law, with only 8.3 per cent of cases going to appeal and less than one-half (42 per cent) of appeals being successful (Ministerstvo spravedlnosti 2019).

Hungary is a notorious example of extremely limited access for workers to litigation concerning their workplace rights. Historically speaking, the number of cases related to labour law in Hungary is relatively low – from 2000-2011, between 22,000 and 32,000 cases were brought each year (Igazságügyi Minisztérium 2000-2011). After the new Labour Code was passed in 2012, this number decreased rapidly. In 2016, there were only 13,000 cases going to court, which is attributed to the liberalisation of the new Labour Code limiting workers' rights. Furthermore, a new Civil Code Procedure was adopted in 2018. Although its impact is yet to be assessed, it did put new requirements on claimants, further decreasing the number of labour law cases brought to litigation (Schmidt 2019).

4. The numbers do not add up to 100 per cent as respondents were able to choose multiple answers.

Further, the same problems apply as in other countries – proceedings are very long (only general data across all cases is available, showing that first instance cases last around two years). Experts assess that employment cases last on average 1-2 years, with 6-12 months for second instance judgments and six months for those going to the Supreme Court (Curia) (Rátkai 2020). Again, we see path dependency in appeals, with only 12 per cent of first instance rulings being appealed and a majority being rejected.

A characteristic feature in Hungarian access to justice is also the physical limitations which prevent claimants accessing courts. Until the end of March 2020, there was a very limited number of courts dealing with first instance labour law cases – only 20 courts for a country with a population of 9.8 million people. Furthermore, at the end of March 2020, all administrative and labour courts were abolished and, henceforth, employment litigation will be handled by regional courts. It is hard to assess how this will affect access to courts and the length of procedures.

In Poland, there are special departments that deal with labour law litigation and social security cases. In the first instance, labour law cases may be dealt with by district or regional courts, depending on the severity of the case. However, in the last ten years the number of labour law and social security departments has significantly decreased – before 2011, these departments were present in one-half of the c. 300 district courts. In 2011, however, labour law departments were abolished in 74 of the 159 courts in which they existed, while in 2019 labour law departments disappeared from a further 12 courts. This has substantially increased the physical distance of litigants from courts and has also had a negative impact on the length of legal proceedings.

In 2016, the average time to obtain a first instance judgment in labour and social security cases in district courts was 9.1 months, the single most lengthy category of cases classified in the statistics and double the average of 4.6 months. In regional courts, the average time to receive a first instance judgment in labour law/social security cases was 9.7 months and, again, that was the single longest category among cases classified in the statistics, with an average of 8.2 months for all cases.

In only around 20 per cent of labour law cases are there appeal proceedings, of which 70 per cent are unsuccessful, highlighting the need for effective access to legal aid at a very early stage.

Problems in litigating in the domain of employment are clearly seen in the annual number of labour law cases. In 2016, there was a total of almost 15 million cases brought to court. Among those, however, only 82,000 were brought in the field of labour law (Ministerstwo Sprawiedliwości 2017). In practice, this means that labour law litigation is extremely limited even though Poles do litigate substantially on other issues.

In Slovakia, labour law cases are also put in the broad category of civil law cases; therefore, no detailed information on the number of cases can be deduced. This also means that no simplified procedure for labour law cases exists in Slovakia – cases are litigated according to a standard procedure, as in Czechia. Proceedings

in the domain of labour law are extremely long and take on average almost three years (35.3 months) from the moment the case is brought to the final decision being made (Ministerstvo spravodlivosti Slovenskej republiky 2018). The length of proceedings has almost doubled in the last few years.

The problem of physical access to courts and the length of the procedures in labour law cases are major obstacles across CEECs in terms of access to justice. Even when workers do go to court, which is itself troublesome, the judgments they obtain will be issued only after a lengthy procedure. If a court forces an employer to reinstate a worker as a result of a dismissal held to be unfair, such a judgment does not make sense where it is issued after a year or two. This situation makes it questionable as to whether workers can, in fact, exercise their rights at all.

Legal scepticism intertwined with the structural problems pertaining to the functioning of the courts means, however, that the standard way of improving access to justice – which revolves around increasing the availability of legal aid at individual level – might not be effective in CEECs. This relates to the following issue. One important dimension of the limited access to justice is that, across all CEEC countries, there are multiple solutions providing for unpaid legal aid. Even though in some cases it is not easy to obtain free legal aid (for instance, in Slovakia in only 0.2 per cent of cases does the court grant free legal representation – GSLA 2013), the existing solutions enable a variety of different options for accessing lawyers and legal aid, both at the level of pre-judicial procedures as well as at the level of court-based procedures. Access to lawyers and legal aid is, therefore, not a determining factor in the case of CEECs.

2.3 Overlapping issue in limited access to justice – legal culture

Stressing the 'statist' character of employment regulation tells only one part of the story. This would indicate that the will of the law-makers, expressed in norms, more or less determines the principles which regulate the labour market. However, this is not the case because law-makers have little power over the way regulation is interpreted and applied. This is the role of actors on the market, oversight agencies and – most importantly – the courts.

One peculiarity of Central Eastern European legal systems is not only their reliance on statutory regulation but also their (hyper-)positivist approach to the interpretation and application of the law (Varga 2012). Legal positivism is a legal tradition that stresses the autonomous position of the legal system within society: it treats the law as a closed, logical system of rights and obligations that do not necessarily have any connection to other societal norms (such as moral or economic ones). At the level of legal interpretation and application, positivism stresses that legal decisions can be deduced from the existing legal rules without reference to societal considerations (Hart 1958). To issue a legal decision, one must simply apply the rules of interpretation to the legal text.

There is a vast literature on the emergence of the (hyper-)positivist approach to the legal interpretation in Central Eastern Europe (e.g. Mańko 2013; Milej 2008; Kühn 2004; Schönfelder 2016; Varga 2012). This tradition can be tracked back to XIX century considerations of the role of judges as mouthpieces of the law. This tradition was strengthened especially during 'actually existing socialism' as a result of the assumed understanding of the law as an instrument of power and as a shelter for judges that wanted to separate themselves from political involvement. Legal positivism has also become deeply embedded within the system of legal education (Stambulski and Zomerski 2019). This has important consequences for the functioning of employment regulation.

First, the question of legal interpretation. The way Central Eastern European lawyers tend to interpret the rules is limited to a logical decoding of the literal meaning of the legal text and not of its purpose (Schönfelder 2016; Mańko 2013). Legal education puts an emphasis on the literal interpretation of statute over any other form of interpretation (such as functional, economic, etc.). Acts applying the law are seen as stemming solely from the technical process of interpretation that ascertains the 'state of the law'. The social role of the law, such as in terms of balancing the interests of the parties, societal development, etc., is in principle out of the question. Administration and the courts engage in 'mechanical jurisprudence: applying the law according to its letter' (Varga 2014: 92). Only when literal interpretation leads to paradoxical or irreconcilable contradictions may other approaches be used. The domination of this literal interpretation in the application of the law presupposes that the legal system is rationally and logically constructed. For instance, if different notions are used in statute, it is assumed that they must necessarily mean different things. On the contrary, the same notions indicate the same 'objects'. This has consequences for the actual functioning of legal norms, creating a sphere in which regulatory entrepreneurship and the adverse interpretation of legal rules may act to benefit stronger parties.

The history of granting the right to organise to those engaged under Polish civil law contracts and the self-employed provides a good example of the problems that might be caused by such an approach. Until 2018, the Polish Act on Trade Unions used the same legal notion to describe people granted the right to organise as the notion used in the Labour Code for people performing work (i.e. employee – *pracownik*). Because the Labour Code defined employees as those performing work on the basis of Labour Code contracts, it was assumed in the legal doctrine and jurisprudence that only those people had the right to organise – even though the Labour Code limits the scope of application of its definition of 'employee' to the Code itself (Art. 2). As a result, workers hired on civil law terms or the self-employed, even where they were performing dependent work, were denied the right to organise and join trade unions. These decisions were substantiated by the will to maintain a consistency of interpretation between the same legal notion in the Act on Trade Unions and the Labour Code.

To change this interpretation, trade unions tried to act firstly via the International Labour Organization (in 2012) and – when this proved ineffective – filed (in 2013) a motion to the Constitutional Tribunal questioning the restriction of the right to organise and join trade unions on the basis of non-conformity with the

Constitution and the ILO Convention on Freedom of Association and Protection of the Right to Organise. The Constitutional Tribunal verdict was issued in 2015, rendering this interpretation of the provision unconstitutional. However, it took parliament another three years finally to adopt formal changes to the legal provisions, specifying explicitly that the right to organise also encompasses those with civil law contracts and the self-employed performing dependent work.

Second, this example shows that legal positivism influences the process of the adaptation of the law. In general, it is assumed that the law needs to be formally adapted for changes to take place.[5] Courts and administrations are not eager to react to developments in the market and change established ways of interpretation. If a certain way of understanding the law is established, formal reforms need to be implemented on a top-down basis to change the regulation.

Third, this domination by a mechanical understanding of the law makes it difficult to influence regulations by taking account of the power relations that exist between the parties in the application of norms. A good example is the manner in which the 'staggering' of collective redundancies is common across CEECs (Countouris *et al.* 2016: 53; Gadomska 2011). Some companies, especially when entering the market by purchasing another company and restructuring it into a subsidiary, undertake collective redundancies but intentionally 'stagger' them to avoid the limitations and obligations that apply in such cases, including the obligation to consult trade unions (Countouris *et al.* 2016). 'Staggering' collective redundancies constitutes a circumvention of employment regulations as redundancies are being intentionally scheduled in a manner that circumvents the regulation (as the requirement to consult trade unions is intended to establish alternative solutions). Such 'staggered' redundancies have been challenged as circumventions of regulation in European courts in some countries, such as in Italy and the UK (TUC 2012: 20; Countouris *et al.* 2016: 53). However, because statutory law provides for specific periods and quantitative measurements that indicate when the procedure is required, they remain legally unchallenged in CEECs. Another example – which I will discuss later in the paper – is how legislative changes to the definition of the employment relationship and dependent work across CEECs have tried, but unsuccessfully, to introduce more purposive-oriented criteria into assessments of the employment relationship.

Further, there are question marks over the possibilities that legal positivism actually gives to the parties. On the one hand, it can be argued that mechanical jurisprudence may potentially increase legal certainty among the parties – the parties can more or less 'predict' what judgments will be issued if a careful analysis of the situation and existing case law is made (which, again, requires resources). On the other hand, the dominance of literal interpretations opens the door for a strategic search for legal loopholes. Because courts and administrations are approaching the law non-creatively, this opens up possibilities for cunning employers to benefit from it. For instance, the use of bogus self-employment,

5. As I will show later, adopting formal changes to the law is also not always an option where path dependent interpretations continue to remain unchallenged in case law.

bogus posted work and hidden temporary agency work has been enabled across CEECs because employers have used relatively complex organisational chains (many different enterprises and long chains of subcontractors) as a means of dispersing responsibility and hiding the actual benefactors of such structures. Labour inspectorates and the courts have not been eager to fine these employers because they have assumed a very rigid, non-creative and defensive approach to the legal texts (Čaněk 2018; Hofmannová and Čaněk 2018). For instance, when numerous reports indicating that drivers working on UberEats are violating OHS provisions and that there might be some problems pertaining to the legality of their migration status, the Polish Labour Inspectorate decided to inspect Uber – only to find out that Uber's subsidiary in Poland employs no more than a few administrative workers who enjoy relatively good conditions in the office (PIP 2019a).

3. Case 1. Use of non-standard forms of employment and the question of the employment relationship

3.1 Normalisation of detrimental interpretations regarding the use of non-standard forms of employment in CEECs

Over some period of time, all CEECs have seen a substantial rise in the use of non-standard forms of employment, either with severely limited employment protection (such as so-called simplified employment in Hungary) or even being regulated outside the protection of the labour code – in particular, civil law contracts and self-employment regulated by civil and/or commercial law. Such contracts are associated with lower levels of employment protection and are damaging to working standards and job stability. The use of such forms of employment began as a business practice in the shadow employment sector and was successfully normalised as a result of its expansion across the market before being further legalised by administrative practices and court judgments to the extent that some uses were even formally allowed. Drahokoupil and Myant (2015) argue that the extent of the use of non-standard solutions across CEECs allows us to speak even of the 'increasing irrelevance of labour law' in terms of regulating labour markets and employment conditions.

What is especially striking about such developments is that, even though multiple changes have been made to the way in which the employment relationship is legally structured in national legal systems, this has had little to no impact on market practices and – more importantly – the actual admissibility of such actions as defined by labour oversight bodies and courts.

All four countries assume the 'primacy of facts' method in terms of distinguishing the employment relationship and dependent worker status. This means that there are particular criteria stipulated in law that need to be verified in order to assess that a contractual relationship in fact constitutes an employment relationship. Since the criteria are always partially vague so as to extend the scope of application, the courts have struggled with their interpretation. The 'primacy of facts' method is common among European countries (ILO 2013), but the most interesting peculiarity is the way in which CEEC courts have approached the assessment of whether a certain relationship constitutes an employment relationship as a question of the will of the parties entering into the contract. On the one hand, because labour law contains general references to the civil law, the courts have assumed that, in order for an employment relationship to be established, there must be a common mutual agreement between the two contracting parties. On the

other, the law provides for certain criteria that indicate whether an employment relationship exists from a legal point of view. As a result, the criteria implemented by policy-makers, in order to broaden the scope of the employment relationship, has either not effectively influenced the way in which this assessment is made or has even narrowed it because the criteria have been treated as additional conditions supplementary to the mutual agreement of the parties. All in all, the changes intended to introduce a more purposive analysis of the relationship between the parties have either been rejected or otherwise deflected by oversight agencies' and court practice. This is not expected to change unless the detrimental interpretations are effectively challenged during litigation – which requires improvements in access to justice.

Czechia

In Czechia, changes in the definition of the employment relationship are related primarily to the (in)famous Svarc system, which was designed in 1990 by Miroslav Svarc, an entrepreneur in the construction industry, to optimise the tax position. Again, precise data on the use of the Svarc system is unknown, with only some estimates available, but it is believed that the system was extremely popular in the 1990s. The crucial element in the mechanism was based upon the exploitation of the uncertainties in concluding non-labour forms of contract in a context similar to an employment relationship. To prevent the use of the system, a 1992 reform prohibited the outsourcing of activities necessary to carry out tasks within enterprises. The regulation was very rigid, although it is believed that the Svarc system continued to exist, with the strictness of the regulation even causing controversies over whether outsourcing was at all possible under it. These were ended by a 2005 reform that allowed outsourcing if such activities had a commercial character and did not aim to circumvent the labour law.

The subsequent adaptation of the employment relationship introduced in 2006 was vague and ambiguous as it provided at least nine indicators for the existence of an employment relationship. It is, however, uncertain whether all of these needed to have been met in order to establish the existence of an employment relationship, whether these are simply examples or whether some form of hierarchy among the indicators needed to be introduced pursuant to case law. This issue was also subject to severe controversy between labour law scholars in Czechia and it did not, in fact, influence the way in which the courts operated in this domain (Stránský 2012; Šubrt and Triezová 2012; Šedivá 2014). The courts have historically – in a (hyper-)positivist spirit – treated the additional indicators as requirements and not as guidelines in terms of assessing the existence of an employment relationship (Myant 2010: 56).

In 2012, a change was introduced to relax the definition of the employment relationship, providing that dependent work is performed in the context of a superior-subordinate relationship, in person, by an employee for a wage at the expense and responsibility of an employer, within working hours at a place established by the employer. The reform also provided for higher sanctions for employees and employers, a centralisation of the competences of the oversight

authority and sanctions for employers hiring foreigners illegally in the form of exclusion from public funding.

Multiple solutions have been tested throughout the years as a means of combating the Svarc system and practically all have remained inefficient in this regard. An assessment of the nature of the employment relationship is still primarily being made subsequent to an assessment of whether the parties are in mutual agreement (Hůrka 2017; see Czech Supreme Court decision 21 Cdo 920/2010, issued on 16 June 2011).

The number of contractual relationships deemed to be circumventing the regulation remains very small (a few hundred per year) and inspectors find it especially difficult to assess those situations in which a worker has non-standard working hours (Strielkowski 2013). The new definition has also not had a fundamental impact on case law (Šedivá 2014).

Hungary

In Hungary, the problem regarding employee status is related to the use of bogus self-employment (Gyurlavári 2019). The 1992 Labour Code did not contain the definition of 'employee' and the definition of an employment relationship consisted of many dispersed elements. A specification as to whether relations between the parties constituted an employment relationship has been made by the courts on the presumption that establishing a contract under the Labour Code may take place only where the parties have entered into an agreement with the intention of concluding such a contract but concluded some other contract to disguise that fact.

In 2003, Article 75/A of the Hungarian Labour Code on the prohibition of false self-employment entered into force. This was supplemented by an administrative recommendation by the Ministry of Labour and the Ministry of Finance specifying criteria indicating the existence of an employment relationship. These included (primarily): the obligation of the employee to perform the work in person, the obligation of the employer to offer employment, integration in the business organisation, work being arranged by the employer and the existence of a subordinate relationship; and (secondarily): the right to direct, a determination of the duration of work and the working time schedule, a determination of the place of employment/work, payment, performance of work within the employer's infrastructure, ensuring the conditions for occupational health and safety and the conclusion of a written contract. Concurrently, the courts developed a judicial line on how to assess whether an employment relationship has been established, by differentiating these criteria into primary and secondary (as set out above), with a rather casuist and formalised methodology on how to approach the problem (Gyulavári 2016: 85-86). At the same time, the role of civil law contracts in the economy reportedly grew (Kun 2019: 43-44; Albert and Gal 2017).

In 2012, a new Labour Code was adopted that does not contain a definition of the employment relationship but does define 'employee' (Section 34). However,

not a lot has actually changed in the way that employment relationship/employee notions are understood, while both the old administrative recommendation and historic rulings based on the concept of the will of the parties are still being referred to by the oversight agencies and the courts (ILO 2013; Gyurlavari 2014 and 2016; Kun 2019).

Poland

Numerous changes in the definition of the employment relationship have been made in Poland in the last 25 years. These adaptations and debates have been specifically linked to the relatively broad use of civil law definitions of employment and self-employment in the economy. Such reforms have had little to no impact on the way the employment relationship is understood due to the path dependency of interpretations in the context of limited access to justice. This obviously had an impact on the employment standards, since civil law contracts and self-employed are partially outside OHS provisions, do not offer paid holidays, lie completely outside working time regulations, have limited access to social security and are only partially covered by minimum wage laws (since 2017).

In 1990, Poland noted a significant rise in self-employment. It is estimated that a substantial part of this self-employment was bogus, even though no detailed data is available on this point (Wisniewski 2004). To prevent the spread of bogus self-employment, the Labour Code article on the employment relationship, which had been unchanged since 1974, was supplemented in 1996 with a criterion based on supervision of work. A provision was also added that an employment relationship exists regardless of the name of the contract (Art 22.1 of the Polish Labour Code). There is consensus between legal experts that the introduction of this criterion did not change much in terms of how the courts and the oversight agencies understood it (Gersdorf 2013). After an initial drop in self-employment of around ten per cent, the level of self-employment quickly 'recovered' and even surpassed the previous figures (Wisniewski 2004).

From a legal point of view, especially since the law expressly stated that the name under which the contract proceeded should not influence an assessment of the relationship between the parties, the courts were still using the name of the contract as a criterion in the identification of the existence of a 'mutual agreement between the contracting parties'. The general consideration was that an employment relationship is established when the parties express a statement of consent by mutually entering such a relationship. If, therefore, the parties wanted to use self-employment as cover for an employment relationship, then the court could rule that such an action circumvented Article 22.1 of the Labour Code which would indicate that an employment relationship had been established that required a contract under the Labour Code. However, it was difficult for workers to claim that they did want to enter into an employment relationship if they had agreed to conclude a contract that was named otherwise (Gersdorf 2013).

The issue remained highly problematic and a 1996 reform did not change the way the courts ascertained the existence of an employment relationship and

the necessity of concluding Labour Code contracts. In 2002, therefore, two new criteria were introduced, i.e. performing work in a place specified by the employer; and at the times specified by the employer. Even though these changes were meant to facilitate and expand those situations in which a court would assess that an employment relationship had been established, it resulted in the opposite scenario. The courts – acting in a (hyper-)positivist spirit – treated the additional criteria (that were meant as auxiliary indicators) as the actual conditions that had to be met before being able to rule that an employment relationship did exist. For instance, if a worker had flexible working time and worked outside a workplace, the courts ruled that, in such a scenario, an employment relationship did not exist and thus a civil law contract or self-employment could apply (Gersdorf 2013).

This 2002 change in the definition of an employment relationship resulted in employers beginning to abuse self-employment, and especially civil law contracts, even more. With limited possibilities to challenge that in the court, and the subsequent case law developments that did arise being adverse, civil law contracts and self-employment began to be used on a massive scale. There are piecemeal data showing the almost complete crowding out of Labour Code contracts by civil law contracts and self-employment in certain sectors such as the arts (Zawadzki 2016), the videogame industry (Ozimek 2019) and in cleaning and security (Duda 2016). Civil law contracts also began to be used as substitutes for probationary contracts under the Labour Code and in relations with temporary work agencies, and were absolutely dominant in employment for students and young workers.

Courts and legal jurisprudence have struggled for many years with the identification of an employment relationship and when civil law contracts or self-employment can be used. As of 2020, it is impossible to predict in general what the courts will do in such cases. This problem is controversial even in a Supreme Court that issues casuistic and even self-contradictory rulings based not on functionalist interpretations but on (hyper-)positivist attempts to decode the 'real' meaning of textual norms in view of the inherently ambiguous legal provisions (Grzebyk 2015).

Moreover, as a result of a divergence in case law, the approach of the Labour Inspectorate in this regard has been very passive and defensive. The Labour Inspectorate does not have the administrative competence to judge that a particular relationship is an employment relationship, but it can put a case to a court which is equipped to make such a judgment. Labour Inspectors tend, however, first to consult workers and only when workers demand it do they bring a case to court.

Slovakia

Similar to Poland, self-employment and civil law employment are used in Slovakia to circumvent the labour law.

In comparison to Poland and Czechia, the rise of self-employment in Slovakia was relatively slower in the 1990s, with self-employment starting to grow substantially only in the XXI century. The number of the self-employed expanded from 161,000

in 2001 to 370,000 in 2018 (around 15 per cent of all employees; LFS 2001-2018), although there is no data on how many of these could be classified as bogus. Self-employment is popular especially in the construction sector.

Qualitative data suggests the same problems as those suffered by solo self-employed people in other countries: in general, employers use complex chains of subcontractors to limit their responsibility and reduce wages. Employers abuse their position and assure themselves of the commitment of the self-employed by conditionality in the payment of invoices – e.g. by not paying the whole sum or by extending payment periods. A self-employment situation of course influences the right to holidays (which is dependent on individual agreement with contractors) and working time (the absence of working time regulations or the notion of overtime working incentivises long hours, working at weekends, etc.), and also leads to infringements of OHS standards (since responsibility for observing OHS standards, workplace accidents, etc. is unclear). The self-employed also have no access to trade unions (Eichhorst *et al.* 2013: 82-83).

In order to prevent the rise of bogus self-employment, a definition of dependent work was introduced to the Labour Code in 2007, stipulating ten criteria allowing for the identification of dependent work. This provision was deemed ineffective and too casuist since it was unknown whether the criteria were, in fact, conditions or simply indicators. In 2012, a change was made in the definition of dependent work, making it highly similar to that applying to employment relationships in Czechia and Poland. In 2013, another change was adopted, again modifying the criteria. These changes did, however, somewhat reduce the use of self-employment although the very slight decrease after 2009 is believed to reflect the economic crisis rather than the legal changes (Kahancová and Martisková 2015: 8).

During the economic crisis, employment relationships based on civil law (so called 'work agreements' – *dohody o pracach wvykonyvanych mimo pracovneho pomeru*) began to play a bigger role. Such contracts offer limited protection, with shorter dismissal notice periods, limited working time protection and no severance pay. Before 2013, these contracts were extremely popular, with as many as one in four workers employed under them. In 2013, social and health contributions were equalised with contracts signed under the Labour Code and the use of work agreements dropped by around one-third. Although no robust data exists, the Slovak Labour Inspectorate claims that work agreements are used primarily in conditions similar to a standard contract to circumvent more restrictive labour law employment and to lower labour costs (NIP 2017: 13).

There is almost no case law in Slovakia regarding the establishment of dependent work status in the case of self-employment or civil law employment. In fact, case law is so scarce that Slovak labour law scholars primarily refer to judgments from other countries (mostly Czechia and the European Court of Justice) in doctrinal discussions. It is believed that the limited number of labour courts and the extremely lengthy and costly proceedings are responsible for workers not trying to assert their rights. This issue is visible in that the few cases where such a situation has actually reached court have been widely covered in the media and are as a result considered important from the point of view of the Slovak legal system.

For instance, in April 2018 the former public broadcaster (RTVS) did not extend contracts with its subcontractors allegedly due to their criticism of the company's management. In turn, they sued the company on the basis that their subcontractor status was, in fact, hidden employment that had not been properly terminated (Slovak Spectator 2018).

Of course, the absence of case law creates an obstacle to the Labour Inspectorate in its performance of its tasks (Mészáros 2018).

4. Case 2. The uses and abuses of labour law in temporary work agencies

The second case of how labour law violations and circumventions can become normalised over time without proper access to justice is provided by the use of temporary work agencies in CEE. It is important to note that temporary work as a legal institution appeared in the region only in the process of convergence with the European Union. It is primarily subject to Directive 2008/104/EC implemented in 2008 but a few other directives, issued earlier in the 1990s, have also sought to regulate it (Schömann and Guedes 2012). As a result, temporary agency work can be seen as a legal 'transplant' developed in slightly different institutional frameworks and then copied into central east European legal systems. There is an extensive literature on how legal transplants can generate unintended consequences within the legal system of the 'recipient' (Snyder 2000: 7-11 and the literature therein).

In the region, temporary work is often used to structure relationships that would normally require contracts under the labour code. It is especially important because the temporary work agency sector is itself precarious due to the transitory and interim character of work, lower wages, the obstacles to self-organisation and the triangular relationship between employee, employer-agency and employer-client. Again, we see a dynamic in which a 'bending' of the rules regarding temporary work agencies becomes normalised and spreads across the market. I start with the Polish case as it is the best example of such a process in the temporary work agency sector, followed by a similar Hungarian example and then the Czech and Slovak cases.

Poland

In general, temporary work agencies in Poland are particularly prone to engage in labour law violations and circumventions. In 2018, the Labour Inspectorate carried out 768 inspections with regard to the functioning of temporary agency work (PIP 2019b: 131). Irregularities and violations were detected in 83 per cent of cases, the most common being irregularities pertaining to the lack of proper paperwork; the conclusion of non-standard forms of employment; the violation of the non-discrimination rule; and violations regarding wages.

In the sector, around one-half of all temporary agency workers are hired on civil law contracts that provide – as already explained – much lower level of protection.

However, allowing temporary work agencies to conclude civil law contracts was not initially the intention of the policy-makers. Temporary agency work in Poland

is subject to a separate Act on Temporary Workers, which was adopted during the process of integration with the EU in 2003, just prior to accession. When the Act proceeded through parliament, law-makers intended all temporary agency workers to be hired on Labour Code contracts. The only planned exception was for workers aged between 16 and 18 who were to be exempted due to specificities in the social security system (Council of Ministers 2003: 19). The idea that temporary agency workers should be hired on Labour Code contracts was reflected in Article 7 of the Act which stated that: 'The temporary work agency hires temporary workers on the basis of a Labour Code contract for a definite duration or a Labour Code contract for the duration of the time required to perform specific work.' Meanwhile, Article 26 of the Act, in its initial drafting, stated that:

'1. For individuals aged between 16 and 18 years who are students, who are assigned to temporary work on the basis of a civil law contract, shall apply mutatis mutandis the provisions of the Labour Code concerning the employment of young persons for reasons other than professional training.
2. For individuals that are assigned temporary work on the basis of a civil law contract, the provisions of Articles 8, 9 paragraph 1 and Article 23 shall apply mutatis mutandis.'

As has been indicated by a prominent Polish labour law scholar, the 'Article was deeply flawed from a legislative point of view' (Sobczyk 2009: 112). Because Article 26.2 of the Act did not refer directly to workers aged 16-18, it could have been argued from the point of view of a purely literal interpretation that it was possible to hire all workers, regardless of age, on civil law contracts.

Ultimately, the interpretation allowing the employment of all workers on civil law contracts has become the dominant one, a result also of the following interrelated developments:

1. Employers engaged in a *fait accompli* strategy, i.e. they acted as if the provision allowed them to hire all workers on civil law contracts, even around 2005-2006 which was the period when this was being heavily debated. This is visible in Table 1, which shows that temporary work agencies utilised civil law contracts right from the start;
2. In 2003, the Department of Labour Law within the Ministry for Labour of the Social Democratic government issued a pro-employer interpretation of the Act which argued that the wording allowed all workers to be hired on civil law contracts. This happened even though it was the same ministry that had prepared the justification for the Act which stated precisely the opposite. However, Polish law does not comprehend a 'legally binding' interpretation being issued by an administrative body and, consequently, such an interpretation did not have binding force.
3. In a scholarly debate on temporary work agencies, some labour law scholars argued for a 'pro-employer' interpretation.

An expansive interpretation rooted in a pro-employer spirit became mainstream and was eventually upheld by the Supreme Court (Resolution of Supreme Court I UZP 6/11 from 12 December 2011), thus establishing a binding interpretation.

The upshot has been that, since the introduction of the Act in 2003, the number of temporary agency workers in Poland has increased rapidly. Around one-half of all temporary work agency workers are now hired on civil law contracts.

Table 1 **Civil law contracts in temporary work agencies in Poland**

Year	Number of workers in temporary work agencies			Percentage of temporary agency workers on civil law contracts
	Performing work under Labour Code contracts	Performing work under civil law contracts	Total	
2003	30 751	877	31 628	2.8%
2004	59 580	108 064	167 644	64.5%
2005	78 959	127 706	206 665	61.8%
2006	140 106	148 334	288 440	51.4%
2007	256 541	230 050	486 591	47.3%
2008	259 997	214 750	474 747	45.2%
2009	219 709	159 394	379 103	42.0%
2010	239 347	193 755	433 102	44.7%
2011	286 741	212 283	499 024	42.5%
2012	293 190	216 157	509 347	42.4%
2013	319 927	239 538	559 465	42.8%
2014	389 454	309 824	699 278	44.3%
2015	415 804	383 923	799 727	48.0%
2016	396 910	398 869	795 779	50.1%
2017	459 897	403 928	863 825	46.8%

Source: Ministry of Labour and Social Policy/Ministry of Family, Labour and Social Policy 2004-2018; own calculations

In April 2017, while reforming the length of time under which temporary workers could have been assigned to a single employer-client, a reform was introduced that, finally, fully legalised the use of civil law contracts in relation to temporary work agencies. The new provision removed Article 26 and modified Article 7, expressly formalising that all temporary workers could be hired under civil law contracts. The rationale behind the change was that some civil law contracts were encompassed by hourly minimum wage provisions.

The dynamics behind the normalisation of civil contracts in temporary agency work in Poland show how an adverse interpretation of the law, where mildly or insufficiently contested, might expand across the economy and produce severe and adverse results. The interpretation could have gone either way, i.e. in the direction that finally 'won', allowing all workers to be hired on civil law contracts, or in the direction limiting civil law contracts to workers aged 16-18, which would have been much more beneficial for workers. Widespread market developments,

coupled with unfavourable judgments, slowly paved the way for these negative developments. It must be said that even a few adverse judgments might, ultimately, become normalised over time. One might argue that, with greater access to justice (better access to lawyers, better information on the law), this process could have been slowed or even completely prevented.

Hungary

The Hungarian history regarding temporary work agencies resembles the Polish story, although the precise dynamics are slightly different. Temporary agency work was introduced in 2001 and the number of temporary agency workers stabilised at around 2-3 per cent of the workforce in 2007, with an exceptional drop in 2009 as a result of post-crisis adjustments. Temporary workers are hired predominantly in the manufacturing sector (Meszmann 2016). In the 2000s, temporary work agencies were known to be violating employment regulations (Jobline 2013) in particular as regards concluding non-standard contracts (simplified employment) with workers (Meszmann 2016; Kiss 2013), as well as using such contracts as a proxy for contracts for a probationary period (Jablonczay 2018) even though the law required them to conclude Labour Code contracts (Chapter XI of the 1992 Labour Code). In 2012, the use of simplified employment and occasional work relationships in temporary work agencies was fully legalised by the new Labour Code. Such contracts excluded some forms of protection (especially regarding working time, leave and holidays). As in the case of Poland, the proliferation of circumventions eventually led to full legalisation.

In general, the 2012 Labour Code and its subsequent amendment, especially in 2018, aimed to improve working standards in temporary work agencies. Those changes have remained, however, largely ineffective on the ground floor. Meszmann notes that: 'While there were also positive changes in regulation, some issues remain troubling at the level of implementation. The most precarious feature of temp agency work stems from its misuse and the lack of collective interest representation of temp workers' (Meszmann 2016: 76).

Czechia

In Czechia, the temporary agency work sector is deemed to be the one where labour law violations and circumventions feature most strongly. In 2019, the Czech Labour Inspectorate conducted 469 planned inspections in temporary work agencies, 37 per cent of which detected labour law violations with the most common being the violation of laws preventing discrimination against temporary agency workers; and procedural infringements aiming to circumvent protective regulation.

Temporary work is used on a large scale in manufacturing, with some examples of regulatory entrepreneurship in the sector aimed at taking advantage of the ambiguity contained in the existing regulation. In utilising temporary work agencies, employers have been able to engage in various grey area practices – not

necessarily illegal, but of questionable legality (Electronics Watch 2017; Haidinger 2016). This includes: the use of non-standard forms of employment; the renewal of short-term contracts on a monthly basis; the introduction of very long and flexible working time with abrupt changes in shifts, creating ambiguity over whether overtime premiums should be paid; and rigid control over work and private life (Andrijasevic and Sacchetto 2014). Most importantly, the use of temporary work has become an alternative to the hire of workers on a permanent basis. This has served multiple purposes: increasing numerical flexibility; fragmenting the workforce; hindering the work of labour oversight agencies; and, at least to some extent, enabling employers to benefit from the circumvention of statutory regulations.

No large scale analysis of this phenomenon exists, but there are case studies on how the manufacturing sector (Haidinger 2016), and especially Foxconn factories, have utilised temporary work to circumvent labour laws (Electronics Watch 2017; Andrijasevic and Sacchetto 2014) by using the institution of temporary agency work to hire *de facto* core workers (Andrijasevic and Sacchetto 2017). By switching temporary workers between subsidiaries, Foxconn was able to create a fragmented structure of employment which has obviously created problems regarding the enforcement of standards while making workers' self-organisation more difficult (Electronics Watch 2017). For instance, it has made it very difficult to determine whether or not non-discrimination standards regarding indirect workers have been met, due to the very patchy way that workers are assigned tasks and perform work. Andrijasevic and Sacchetto (2017: 67) describe it in the following manner: 'Employment irregularities concerning agency workers become institutionally invisible and "disappear". This "disappearance" is best illustrated by the fact that the local Labour Inspectorate considered subcontracting and its potential irregularities as falling beyond the scope of its activity despite agency workers' structural indispensability for Foxconn's production process.'

Labour Inspectorate reports show how difficult it is for agencies charged with oversight to supervise the labour market where legal ambiguities go unchallenged in the courts.

Slovakia

The situation regarding temporary work agencies in Slovakia is similar to that in Czechia. Temporary workers are hired predominantly in the manufacturing sector, which raises concerns as to whether they should be hired on a permanent basis especially since temporary work can be used to make working conditions more flexible and to reduce wages. There is no official data on the number of workers working via temporary work agencies, although it is thought that this number has increased in the last ten years (Kahancová and Martisková 2011; Fabo and Sedláková 2017).

Temporary work agencies in Slovakia, like in Poland, have also utilised the notion of civil law contracts to structure relations with workers. To prevent this, the Slovakian government undertook a number of reforms in 2011 (introducing equal

wages between temporary and regular workers; requiring agencies to hire only on Labour Code contracts; introducing restrictions on the number of contracts that may be concluded with one employer-client; and limiting travel reimbursements to prevent employers optimising their tax positions). In 2013, further changes were introduced that increased capital requirements for temporary agencies. These formal reforms are, however, believed to have had little to no impact on the actual functioning of temporary work agencies (Kahancová and Martišková 2015). This once more shows that regulatory changes do not necessarily translate into changes in working conditions in the absence of other actions.

As with the case of Czechia, large multinationals in particular have exploited legal ambiguity on the intersection between temporary work agency regulation and other regulations to lower wages and worsen working conditions (Andrijasevic and Novitz 2020). While analysing the violations and circumventions of labour regulations within Samsung's subcontracting chains, Andrijasevic and Novitz (2020: 206) note that 'Unfree labor relations do not occur in the absence of labor market regulations but rather in the context of a complex "overregulated" legal and codified regulatory landscape.'

Enterprises are able to exploit imprecisions and legal ambiguity because of the problems with oversight and the lack of access to justice among those workers whose rights are being violated.

5. Conclusion Statutory approach to regulation and the effectiveness of regulation – access to justice as a supplement

It is usually assumed that the reform of formal regulation and improved labour oversight will suffice to improve working standards across CEECs. However, as shown in the cases above, formal reform is ineffective if detrimental interpretations of the existing rules are allowed to become established over time. Policy-makers have, in good faith, and many times in many different contexts, attempted to tackle certain problems, such as the definition of the employment relationship, without this action being translated into real changes in employment conditions. The Slovak government has been probably the most active among CEECs in terms of trying to regulate and improve working conditions in recent years. As noted by Fabo and Sedláková (2017: 137), however: 'The rapid changes in labour legislation in Slovakia seem to have had little to no effect on unemployment while the effect in tackling precarious work seems to have been limited and, possibly, temporary.'

The improvement of employment standards cannot also be fully guaranteed by the application of better oversight mechanisms. These may detect and prevent violations of labour law and OHS standards in cases where clear rules are established, but they cannot prevent adverse interpretations in case law and jurisprudence.

One of the problematic issues with regard to the extent of the control that can be exercised over legal interpretation is that the legal system is, on the one hand, path dependent but, on the other, highly dispersed. Courts settle cases every day. Not all workers try to contact trade unions when dealing with the problems they face. At the same time, even a few adverse judgments can translate into detrimental developments in working conditions, as shown in the examples above. While there are multiple actions that could be attempted in terms of improving general access to justice, such as enlarging the scope of professional legal aid to the pre-proceedings phase and during court proceedings, decreasing the costs of starting legal proceedings and raising awareness of workers' rights, etc., these of course cannot all fall to trade unions, especially in view of the low legal consciousness and legal scepticism which prevails among the general population.

However, there are other means by which trade unions could influence legal interpretation. Trade unions should – as is done by other social actors – engage more strongly in strategic litigation. Strategic litigation is a type of legal action in which a social actor engages and invests in selected legal proceedings, usually litigation, in order to reach a favourable judgment that can lead to greater change. Trade unions have – on many issues – been active in litigating collective labour law issues and in proceedings before constitutional courts (Tomšej 2018; Pichrt

and Štefko 2018; Gyulavári and Kártyás 2018; Balogh 2017; Wujczyk 2017; Surdykowska 2016). Some of these actions have had a significant impact and have constituted an effective substitute for formal reforms where the trade unions have been unsuccessful in lobbying for legal changes. For instance, Polish trade unions were able to extend the right to organise to non-standard workers (Surdykowska 2016) while Hungarian ones successfully challenged a provision allowing for the termination of civil servants' employment relationships without justification (Gyulavári and Kártyás 2018). The same level of activism could be adopted while engaging in particular individual cases of workers. This is especially important since individual workers face multiple barriers in accessing justice that could be remedied by trade unions engaging more actively in individual cases. The idea of strategic litigation is that the impact of a case should be bigger than resolving the problems of an individual claimant. Such actions could be accompanied by campaigns to promote litigation actions among members and other workers to pave the way for more widespread developments in case law. Cases – if won – could be promoted to contribute to a general switch in how particular situations should be understood.

The never-ending inability of formal reforms to change particular regulations provides a good example of why this is necessary. Without concurrent reforms exercising a significant impact on the way that particular provisions are understood in daily practice, old interpretations will still be binding and reproduced in case law and jurisprudence regardless of the goodwill of law-makers influenced by successfully trade union lobbying. As a result, circumventive strategies will still dominate and spread across the market.

Creating an exhaustive list of issues in which strategic litigation could be used by trade unions to improve working standards goes well beyond the scope of this paper. However, across CEECs there are a number of issues that could benefit from greater involvement by trade unions in terms of lobbying for beneficial legal interpretations. These include issues already explored in this paper, such as the definition of dependent work in Slovakia (Mészáros 2018); the scope of the right to organise and trade unionists' rights in the context of changes regarding those on civil law contracts and the self-employed in Poland (a fundamental change for which the full scope of application is yet to be established in case law and jurisprudence – see Baran 2019); the inclusion in the Hungarian 2012 Labour Code of the need for reasons substantiating the termination of a contract (Gyulavári and Kártyás 2018); and workers' rights in the case of business transfers, especially regarding the termination of contracts, in Czechia (Samec and Cibulková 2016). All of these issues, among others that can be further identified, represent cases in which there is a significant legal ambiguity that could potentially be used for the benefit of workers, or to their detriment. Without proactive reactions from trade unions and the development of strategic actions aimed at influencing courts' interpretations in a more pro-worker spirit, we could again see unfavourable developments contributing to a worsening of employment standards.

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