



NEW EMPLOYMENT FORMS AND CHALLENGES TO INDUSTRIAL RELATIONS – NEWEFIN

Policy brief Portugal

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1. Main legislative developments and social dialogue

From 2008, labour and social protection laws went through significant changes in Portugal in conjunction with the dramatic impact of the international crisis, the erosion of labour and social protection resulting from austerity policies and the new labour market and social challenges arising from increasing competition and new technological developments. The emergence of new business models in the country added to those challenges, namely via platform-linked economics.

The policies of internal devaluation implemented in the period 2011-2014, within the framework of the Memorandum of Understanding (MoU) with Troika – European Commission (EC)/European Central Bank (ECB) and/or International Monetary Fund (IMF) – had an extremely negative impact, partly in terms of labour and social protection, the legislation easing dismissals and temporary forms of labour contracts.

The ILO report 2018 concluded: *Further ease of the use of temporary contracts was accompanied by a decrease of employment protection for permanent workers without leading to a change in the share of temporary workers among employees. Thus, adjustment reforms reduced protections without benefit to employment or the labour market* (ILO, 2018: 4).

In the new political cycle, initiated in November 2015, the parliamentary left has focussed on combating precariousness of work, among other important issues, which were paramount conditions for the unprecedented support given by left-wing parties – Left Block (BE), the Portuguese Communist Party (PCP), and the Ecologist Green Party (PEV) – to the formation of a Socialist Party (PS) government.

In these unprecedented political conditions, the measures implemented during the PS mandate and the process of decision-making in the period 2015-2019 reflected the complex and challenging exercise of combining left-wing commitments and social dialogue, namely at a tripartite level. In addition, the social dialogue included new actors, associations of precarious workers – born out of the social movements against austerity and precarious work – which articulated institutional participation with social mobilisation. Therefore measures were defined and implemented combining different forms of social dialogue and different constellations of actors.

1.1. Modifying the regulations of temporary forms of labour contracts

The tripartite agreement 2018 - *Tripartite agreement on combating precarious work and labour market segmentation and promoting greater dynamism in collective bargaining* - integrated the measures comprised in the left-wing deals which *restricted the grounds for use of and reduced the*

duration and renewals of temporary forms of labour contracts, such as fixed term contracts and temporary agency work.

However, the tripartite agreement included measures, not envisaged in the left-wing deals, such as *increasing the duration of very short term contracts, of extending their use beyond tourism and agricultural seasonal activities* and the *increase of the trial period for first-time job seekers and for the long-term unemployed.*

Also, the tripartite agreement introduced an innovative proposal for an *Additional Contribution for Excessive Turnover* – to be applied to business activities that in the same year have an annual share of fixed-term contracts higher than the relevant sector average.

All the employer confederations supported the tripartite agreement, while the trade union confederations had mixed reactions: opposition from the CGTP (General Confederation of Portuguese Workers) and support from the UGT (General Workers' Union). CGTP, the largest trade union confederation, did not sign the agreement, among other reasons arguing that the two measures about very short-term contracts and trial periods were contrary to the aim of combating precarious work, and that the formula of calculating excessive turnover based on sector averages risked retaining the *status quo*.

The amendment to the Labour Code set up by Law 93/2019 reflected the tripartite agreement trade-off. This amendment passed with the favourable vote of PS and the abstention of centre right parties. In the end, the left-wing parties BE, PCP and PEV voted against it. They disagreed with most of the measures added by the tripartite agreement to the original left-wing commitments, in particular also the two related to very short-term contracts and trial periods, which they then sent to the Constitutional Court to be examined.

1.2. Regulating employer responsibilities to prevent the use of modern forms of forced labour

This amendment (Law 28/2016) to the Labour Code established new rules to combat *modern forms of forced labour*, and dealt not only the *criminal responsibility of subcontractors and temporary staffing agencies, but also the responsibility of company users*. This measure did not result from tripartite negotiations, although social partners were consulted. It was approved with the favourable votes of all left-wing parties.

1.3. Improving the battle against 'bogus self-employment' and extending the scope of recognition of employment contracts

The legislation that came into force in 2013 (Law 63/2013) to combat 'bogus' self-employment – reclassifying 'bogus self-employment' as a labour contract – reflected to a large extent an unprecedented Citizens' Legislative Initiative, strongly influenced by social movements against precarious work. In the new political cycle initiated in 2015, measures set by Law 55/2017 with the left-wing votes improved this regime, *extending the procedural mechanisms to combat 'bogus self-employment' to all forms of undeclared work, including false internships and false volunteer work*. It also introduced a protection mechanism that prevents employers' attempts to dismiss the employee

as soon as the Labour Inspection authority (ACT) starts the process. Several other amendments reinforce the role of the ACT and the Public Prosecutor's Office. This measure was not part of a tripartite agreement but social partners were consulted.

1.4. Extending social protection rights of *economically dependent self-employed* and self-employed

The Decree Law 2/2018 redefined the conditions of *economically dependent self-employed* – extending the scope to those who *perform 50% of their yearly activity for the same entity* (previously 80%); it lowered workers' contributions to social security from 29.6% to 21.4% and increased employers' contributions, varying from 7% to 10% (previously 5%). In addition, the Decree Law 53/2018 established that the record of contributions of *economically dependent self-employed* to access unemployment benefits will be equal to those of workers under labour contracts. It became less attractive for employers to replace labour contracts by service contracts. Still these workers do not have the same rights as those under labour contracts, in particular as regards collective bargaining.

These two laws also redefined general rules of social protection *for all self-employed* workers, establishing they all pay a fixed contribution of EUR 20 per month to maintain the continuity of their integration in social security and benefit from all corresponding provisions. The period of absence for awarding sickness benefits to self-employed workers was reduced from 30 to 10 days (closer to the regime for contractual work); and maternity and paternity cash benefits for child assistance were extended to them. Furthermore, taxes will be based in real income, and the amount payable in each month is directly derived from the average income obtained in the previous quarter.

These measures were not negotiated at a tripartite level, but social partners were consulted. The dialogue between left-wing parties and associations of precarious workers played an important role in terms of the design of the measures.

1.5. The *Extraordinary Programme of Regularisation of Precarious Employment Relationships in Public Administration* (PREVPAP)

This programme (Law 42/2016 and Law 112/2017), targeted workers in the public sector who perform functions corresponding to permanent needs, and subjected to hierarchical authority, discipline or direction, without a 'proper legal employment relationship'. Sector trade unions participated in different phases of the programme, namely in examining workers' requests and decisions by Bipartite Evaluation Committees (CABs), and integrating workers in respective services (Campos Lima, 2018). Challenges to the full implementation were observed in some critical areas, such as education and research, namely concerning the integration of researchers who perform permanent functions in adequate employment relationships. In addition to the dialogue with trade unions, the dialogue with associations of precarious workers, in particular with the association *Precários do Estado* (*Precarious of the State*), assembling precarious workers in the public sector has been very important in the developments of this process.

1.6. Regulating *platform-linked individual transportation business*

While *platform-linked individual transportation business* was subject to regulation (Law 45/2018 published on 10 August 2018), which generated controversy, other platform-linked activities did not receive the same attention from the legislature. Trade unions organising workers in services, tourism, hotels and restaurants became increasingly concerned about the deregulation induced by the wide proliferation of the *food delivery platform-linked business*.

The *TVDE operators* and the *drivers* (registered by an electronic platform) have to conclude a written contract signed by both parties, which can be classed as an employment contract, in terms of article 12 of the Labour Code. In line with this presumption, the law defines that the equipment and instruments of work are all those belonging to the beneficiary (TVDE operators) or exploited by the beneficiary or any other type of lease. The working time regime for the drivers in TVDE transport activity follow the same regulations that apply to employees engaged in mobile transport activities or to the working time regime for independent drivers, depending on the type of contract in force between the parties. The law does not define any responsibilities of platforms regarding the drivers.

Furthermore, the *Legal regime for individual and paid passenger transport in de-characterised vehicles based on an electronic platform (TVDE)*, set by Law 45/2018, was not discussed with social partners or with sector unions. To start with, the problem was framed initially as a competition problem with taxi businesses and a problem of social dumping (detrimental to the taxis businesses). The consultations that took place in the parliamentary *Committee on Economy, Innovation and Public Works*, instead of the parliamentary *Committee on Labour and Social Security*, set the scene and to a certain extent selected the actors to be involved in the consultations.

2. Labour market effects of the reforms

The widespread use of the ‘atypical’ forms of employment or ‘new forms of employment’ was not entirely triggered by the economic crisis of 2008. Considering, for instance, the share of temporary jobs, it was between 1995 and 2001 that it escalated by 10 percentage points, reaching around 20% at the turn of the century, a proportion that would continue with slight variations during that decade. Following the crisis, a slight decrease was observed as these jobs were the easiest to cut down, but in 2015, 2016, 2017 and 2018 the pre-crisis levels were reached with a share around 22%. In fact, there is a concern that the recent economic and employment recovery has been mainly based on precarious and low wage jobs and on sectors where they are widespread (Observatório sobre Crises e Alternativas, 2018; Caldas and Almeida, 2018).

On the other hand, the crisis seems to have had the effect on decreasing the level of temporary agency work, but from 2012 it started to increase again, already reaching levels above those observed before the crisis by 2016.

The trends regarding self-employment are interesting. While in 2008, the share of self-employed in Portugal was well above the average in the EU 28, at respectively 13.5% and 9.8%, a decrease was observed in the earliest phase of the crisis that accelerated significantly after 2013-2014 – coinciding with the first measures to combat ‘bogus self-employment’ – reaching since then lower levels than the EU average, at 8.6% and 9.7% respectively in 2018. It has been argued (e.g. by some of our respondents, as mentioned in 3.2.2) that this downward trend may somehow reflect a reconfiguration of precariousness and false employment status, i.e. the conversion of (bogus) independent workers into (bogus) self-employed without employees or (bogus) sole proprietors.

The magnitude of particular forms of employment such as the economically dependent self-employed or the platform workers remain largely unknown, or at least uncertain, which proves particularly challenging for the purposes of this study. Statistical data is not yet available to assess the possible impact of the widespread proliferation of platform-linked work observed during 2019 in individual transport (TVDE) and also in food delivery platform-linked work.

3. Recommendations

- i) To re-evaluate recent amendments to the Labour Code set up by Law 93/2019, in particular the legal ramifications of very short-term contracts and trial periods, which were sent to the Constitutional Court to be examined, given the risks encompassed by those.
- ii) To re-evaluate the legislation regarding the platform-linked individual transportation businesses, going beyond framing this form of employment as a competition problem with taxi businesses and a problem of social dumping, and bearing in mind the responsibilities of the platforms in terms of labour rights and the social protection of the drivers.
- iii) To call for the legislature's attention to the need to regulate other forms of platform work, namely food delivery platform-linked businesses.
- iv) To contemplate the adoption of new methodologies in terms of statistical data collection in order to allow the assessment of the magnitude of wide-spreading new forms of employment, in particular platform-linked work.
- v) To ensure the strengthening of resources of the labour inspection authority, especially to combat economically dependent (bogus) self-employment and all forms of undeclared work.
- vi) To foster the role of social partners in the debate about labour law and social protection reforms.
- vii) To foster new forms of social dialogue including different constellations of actors.