
The concept of 'worker' in EU law

Status quo and potential for change

—
Martin Risak and Thomas Dullinger

Report 140



The concept of 'worker' in EU law

Status quo and potential for change

—

Martin Risak and Thomas Dullinger

Report 140

european trade union institute

Study carried out for the Austrian Chamber of Labour, with the support of the ETUC, ETUI and Austrian Trade Union Federation (OGB).

Martin Risak is an Associate Professor and Thomas Dullinger a lecturer and researcher at the Department of Labour Law and Law of Social Security, University of Vienna, Austria. Contact: martin.risak@univie.ac.at and thomas.dullinger@univie.ac.at.

ETUI publications are published to elicit comment and to encourage debate.
The views expressed are those of the author(s) alone and do not necessarily represent the views of the ETUI nor those of the members of its general assembly.

Brussels, 2018
© Publisher: ETUI aisbl, Brussels
All rights reserved
Print: ETUI printshop, Brussels

D/2018/10.574/08
ISBN: 978-2-87452-474-5 (print version)
ISBN: 978-2-87452-475-2 (electronic version)



The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.

Contents

Foreword	5
Executive summary	7
Introduction	9
1. A new impetus from the European Pillar of Social Rights.....	9
2. Who is protected and why?	10
3. New framework, new concepts?	13
1. The concept of ‘worker’ in primary and secondary EU law.....	17
1.1. Primary law	17
1.1.1. Article 45 TFEU	17
1.1.2. Other references to the concept of ‘worker’	19
1.1.3. The unwritten exemption of collective bargaining in Article 101 TFEU ...	20
1.2. Secondary law.....	23
2. Review of the case law of the European Court of Justice	26
2.1. Methodology	26
2.2. Introduction	27
2.3. Before <i>Lawrie-Blum</i>	27
2.4. The departing point: <i>Lawrie-Blum</i>	28
2.5. Economic activity	30
2.6. Real and genuine activities	31
2.7. Services for and under the direction of another person	35
2.8. Remuneration	37
2.9. Subject of the activity	39
2.10. Nature of the relationship between the parties	39
3. Conclusions of the review of the case law of the European Court of Justice.....	40
3.1. General trend: autonomous concept of ‘worker’ in EU law.....	40
3.2. Limited relevance of economic factors	42
3.2.1. Sharing of the commercial risks of the business	42
3.2.2. Freedom to engage his/her own staff.....	42
3.2.3. Conditions relating to work and pay are governed by collective labour agreements.....	43
3.2.4. Being incorporated into the undertaking of the service recipient and forming an economic unit with it.....	43
3.2.5. Conclusion	44

4. Outlook: Is there any potential for change?	45
4.1. A purposive approach to defining the concept of 'worker'	45
4.2. Going beyond the received concept of 'worker'	46
4.3. Relevance of the regulatory level	47
References	49
Annex I: List of cases included in the review of the case law of the European Court of Justice	51
Annex II: Overview of the facts and the main findings of selected important ECJ decisions	54

Foreword

In the changing world of work, with the emergence of new forms of employment that often lie in the grey zone between traditional employment and self-employment, the scope of protection offered by labour and employment law has once again become an urgent issue.

Defining the concept of 'worker' is thus of the utmost (and growing) importance, and although it is not (yet) legally defined at EU level, it has been shaped by numerous decisions of the Court of Justice of the European Union (CJEU, formerly the European Court of Justice (ECJ)). It is therefore necessary to analyse this jurisprudence and to explore how and whether the underlying concept of 'worker' can adapt to changes in the world of work and still be fit for purpose for those who are in need of protection.

This study develops a European concept of 'worker' based on the jurisprudence of the CJEU and explores the possibilities of further adapting it to new forms of employment, namely to those workers in the self-employed category who are in need of a similar level of protection as traditional employees.

This is a very topical research subject, as on 21 December 2017 the Commission presented its proposal of a Directive on Transparent and Predictable Working Conditions¹. A key initiative launched under the European Pillar of Social Rights, the aim of the proposed Directive is to revise the so-called 'Written Statement Directive' (Directive 91/533/EEC on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship²). The main objective of the proposal, beyond improving workers' access to information concerning their working conditions, is to improve conditions for all workers, and most notably those in new and non-standard forms of employment. The Commission proposes to clarify the personal scope of the Directive by defining a notion of 'worker' which is based on established CJEU case law.³ This is a sensitive issue, as shown by the opposing reactions of the European cross-industry social partners: the European Trade Union Confederation (ETUC), BusinessEurope, the

1. European Commission (2017c) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final, Brussels, 21.12.2017.

2. OJ L 288, 18.10.1991, p. 32–35.

3. Article 2 on 'Definitions' states that 'For the purposes of this Directive, the following definitions shall apply: (a) "worker" means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration; (...).'

European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Employers and Enterprises providing Public Services and Services of General Interest (CEEP). While the ETUC broadly welcomes the proposal, the employers' side completely opposes the introduction of such an EU definition, arguing that it will only lead to further legal uncertainty (also on Member State level) and that it does not respect the principle of subsidiarity.⁴

This research was carried out by Professor Martin Risak and Thomas Dullinger (Department of Labour Law and Law of Social Security at the University of Vienna) for the Austrian Chamber of Labour (Arbeiterkammer, AK). Taking great interest in the project, the European Trade Union Institute (ETUI), together with the ETUC and the Austrian Trade Union Federation (OGB), decided to offer logistical support.

The ETUI hopes that the results of this research will provide the European institutions, European and national social partners, and Member States a better insight into this issue of the definition of 'worker', and prove useful in the ongoing legislative process on the proposed Directive, as well as in other future European (legislative) debates.

Stefan Clauwaert
(ETUI senior researcher)

Maria Jepsen
(ETUI Director Research Department)

4. See, amongst others: BusinessEurope (2018) Commission proposal for a Directive on transparent and predictable working conditions – BusinessEurope's views, Brussels, 26.02.2018 (<https://www.businessseurope.eu/publications/commission-proposal-directive-transparent-and-predictable-working-conditions>); ETUC (2018) ETUC Position on the draft Transparent and Predictable Working Conditions Directive, adopted at the Executive Committee Meeting of 7-8 March 2018 (https://www.etuc.org/sites/default/files/document/files/etuc_position_on_the_draft_transparent_and_predictable_working_conditions_directive_updated.pdf); and UEAPME (2018) UEAPME position on a proposal for a directive on transparent and predictable working conditions in the European Union COM(2017) 797, Brussels, 26.02.2018.

Executive summary

Technological and organizational changes in the world of work demonstrate the increasing need to extend the protective scope of labour law either in whole or, at the very least, in part so that it may fulfil its purpose to protect those who are not able to negotiate individually for fair working conditions. This concerns situations where persons, despite not having a contract of employment as such, are economically dependent on a single or a small number of principals or clients/employers for their source of income. This often results in inequality of bargaining power, putting the persons concerned in a similar situation to that of workers.

The emerging regulatory challenges can be addressed at different levels: the first option is to redefine the concept of 'worker' or to introduce specific legislative initiatives aimed at giving the vulnerable self-employed access to a range of employment rights. Another approach would be to reinterpret the concept of 'worker' in the case law by building on existing elements that go beyond the received approach, one that sets great store by the organisational aspect of personal subordination or personal dependency. To that end, we have undertaken an extensive review of the decisions of the European Court of Justice (ECJ) that concern the concept of 'employee'.

In short, the ECJ has a tendency to unify the concept of 'worker' not only with regard to primary law but also in the field of secondary law. This is also the case with those directives that refer explicitly to a national understanding.

As a general conclusion, it can be stated that the ECJ has so far discussed economic aspects mostly in the context of potentially excluding persons working in a relationship of personal subordination from the scope of application of provisions covering workers. On the other hand, the Court has not used economic factors to extend the scope of application beyond those persons working not in a relationship of personal subordination but in one based on some form of economic dependency since they are not really performing on the market but are working in person for only one or a very small number of contractual partners. In only a few cases, most of which concerned not social policy but competition law, have such elements been taken into account.

It is important to point out that the concept of 'worker' has been developed in the context of the fundamental freedom of movement for workers (Article 45 TFEU). It is therefore doubtful that this is a suitable starting point for the development of an autonomous European concept of 'worker' to be applied to more typical fields of labour law – not those providing freedoms but those protecting workers.

That is to say that, when defining the concept of ‘worker’, the different aims of the various acts of EU legislation must be taken into account. The review of the case law shows that this line of argument has not been used to distinguish between the different purposes of the various legislative acts, and that it has potential to push the boundaries of the concept of ‘worker’. It should therefore be pursued in future cases at the outer boundaries of the traditional concept of ‘worker’.

We feel that it would be most appropriate to use and to develop this purposive approach further in the field of competition law (Article 101 TFEU). It should be taken into account that the ban on cartels that serves to safeguard a functioning market is applicable neither to collective bargaining for workers nor to those processes for the vulnerable self-employed, as they are confronted with similar problems associated with market failures. Given that the exemption from Article 101 TFEU is an unwritten one, progress in extending the scope of protection beyond those working in a relationship of subordination is, in our view, most likely to be made in this field.

In our opinion, the group of persons in a comparable position to workers are those who do not work in a relationship of subordination (or of personal dependency) but who are economically dependent on their contractual partners, as they do not perform fully on the market. The following criteria may serve as indicators of this economic dependency:

- The services are provided in person; the right to use substitutes is limited or does not make sense economically.
- The work is provided for only one or a very small number of contracting parties. The person concerned therefore does not perform fully on the market but depends on a limited number of contractual partners.
- Lack of own operating resources and/or employees;
- Restrictions to work for other parties;
- Dependence on the earnings for the living of the person concerned.

A statutory definition of the concept of ‘worker’ at European level has its advantages and pitfalls. On the one hand, it secures uniform application of EU legislation by providing transparent guidelines and prevents Member States from sidestepping the European concept by means of exemptions and loopholes. On the other hand, an excessively narrow definition hampers the application of labour regulations to persons who are in a similar situation and, therefore, are in need of protection but do not fall under the definition.

Introduction

1. A new impetus from the European Pillar of Social Rights

In the framework of the European Pillar of Social Rights⁵, the European Commission has proposed, *inter alia*, a revision of the 'Written Statement Directive' (Directive 91/533/EEC). This revision is part of a set of measures regarding labour relations aimed at ensuring that the EU *acquis* maintains its relevance and effect in 21st century labour markets, where globalisation and digitalisation are changing existing forms of employment and bring in new work arrangements. In particular, the European Pillar of Social Rights seeks to promote secure and adaptable employment relationships that are protected from precariousness and abuses, not only among new and atypical forms of work but also within established employment types, while not stifling job creation and innovation on the labour market.⁶

Following the finally failed consultation of the social partners⁷ under Article 154 TFEU⁸ concerning the revision of the Written Statement Directive (Directive 91/533/EEC), the European Commission presented a proposal for a Directive on Transparent and Predictable Working Conditions in the EU.⁹ The explanatory memorandum points out that the extensive public consultation¹⁰ has revealed a growing challenge to define and apply appropriate rights for many workers in new and non-standard forms of employment relationships.¹¹ One of the problems identified is the scope of application of labour law, in particular that of the Written Statement Directive, whose Article 1 currently affords some discretion to Member States in terms of applying their own definition of what is an employee. Thus Member States' discretion¹² can lead to certain provisions of the Written Statement Directive being applied in the Member States in a different way to same categories of workers. Furthermore, it can also cause a lack of consistency in the coverage

5. SWD(2016) 51 final.

6. COM(2017) 6121 final, p. 2.

7. COM(2017) 6121 final.

8. COM(2017) 2611 final.

9. COM(2017) 797 final.

10. SWD(2017) 205 final.

11. COM(2017) 797 final, p.1.

12. However, Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness; e.g. judgment of the European Court of Justice (ECJ) of 17 November 2016, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, C-216/15, EU:C:2016:883.

for the growing category of non-standard forms of employment.¹³ Therefore, the European Commission suggests clarifying the personal scope of the revised Written Statement Directive in line with the parameters set out by the CJEU¹⁴ to identify an employment relationship by including criteria which would help achieve more consistency in the personal scope of application of this Directive. It proposes a definition in Article 2 (1) (a) of the proposed Directive as follows:

“worker” means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.’

In recital 7 of the proposed Directive it is made clear that, provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could come within scope of this Directive.

This proposal of the European Commission for a Directive on Transparent and Predictable Working Conditions including for the first time a statutory definition of the notion of ‘worker’ demonstrates that it is not only worthwhile but also timely to examine this concept in EU law and to discuss whether it is still fit for purpose, i.e. whether the existing one is still able to include in the scope of labour law those individuals who are actually in need of protection. In an initial step, we therefore need to ask who is protected by labour law and why (see Introduction, section 2). In a subsequent step, we will explore whether changes in the world of work require a redefinition of existing concepts and notions (see Introduction, section 3). If it is necessary to move beyond the current approach, then strategies will need to be developed outlining how this will be achieved. This study will focus on the potential of the case law of the European Court of Justice (ECJ) to allow the concept of the employee to adapt to the changing world of work (see Chapter 2) that has been acknowledged not only by academics and national policymakers but also by the European Commission in its documents discussing the establishment of a European Pillar of Social Rights.¹⁵

2. Who is protected and why?

The two core questions underlying labour law relate to the scope and justification of employment protection: i.e. who is protected, and why? The scope of labour law should extend to those who are in need of protection because of their unique situation. This leads us to the second question, namely what makes the employment relationship so special and the employee in need of special protection. One of the most frequently cited underlying rationales of labour law is the twofold economic dependence of the employee. This refers, first, to the fact that resources (e.g. materials, machines or an organisation) are typically needed

13. COM(2017) 797 final, p. 11.

14. See the leading judgment of the ECJ of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, 66/85, ECLI:EU:C:1986:284.

15. SWD(2016) 51 final, p. 32.

to perform the work and that employees have, at least historically, depended on the employer to provide them. Secondly, it implies dependence of the employee on 'selling' his or her labour in exchange for remuneration from the employment relationship to sustain his or her living. Most legal orders, however, do not refer to these economic arguments, focusing instead on the way the work is actually performed.¹⁶ Especially the second aspect (dependence on the salary to earn a living) is considered impractical, as employers often have no means to ascertain whether their contractual partners actually have other sources of income or their reasons for working more generally.

For decades, therefore, many jurisdictions have followed an organisational approach focusing on the notion of restricted self-determination when working, as this, on the one hand, delivered satisfactory results and, on the other, was practical and relatively easy to apply. This was based on the fact that only those having enough resources were able to become self-employed and that they were able to negotiate for pay that satisfied their needs. On the other hand, those working under the close supervision of another person often did not have enough bargaining power when negotiating pay and conditions of work.¹⁷ In those circumstances, it was rather unproblematic to equal organisational and economic dependency in the past.

Without ever being open about the underlying rationale, the European Court of Justice (ECJ) applies a similar approach that very much focuses on organisational aspects. According to settled case law¹⁸ – under the 'Lawrie-Blum formula'¹⁹ – the essential feature of the employment relationship is that, for a certain period of time, one person performs services for and under the direction of another person in return for which he or she receives remuneration. It is of major importance that a person act under the direction of his or her employer as regards, in particular, their freedom to choose the time, place and content of their work.²⁰ In only a few cases (that will be outlined below – see Chapter 3), economic aspects are referred to such as the fact that the employee does not share in the employer's commercial risks²¹, or that, for the duration of that relationship, he or she forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking²². These aspects, although not featuring very prominently, are important and will be addressed below, as they hold some potential for interpreting the concept of the worker in a way that may adapt it to a changing world of work.

16. For Austria, see Risak M. (2010) *Labour law in Austria*, The Hague, Kluwer Law International, p. 36; and Brodil W. *et al.* (2016) *Arbeitsrecht in Grundzügen*, Vienna, LexisNexis, p. 14; for Germany, see Weiss M. and Schmidt M. (2008) *Labour law and industrial relations in Germany*, The Hague, Kluwer Law International, p. 45.
17. Davies P. and Freedland M. (1983) *Kahn-Freund's labour and the law*, London, Stevens, pp. 14 and 69.
18. An in-depth analysis of the relevant case law is undertaken in Chapter 2.
19. See Chapter 2.4.
20. Judgment of the ECJ of 13 January 2004, *Debra Allonby v Accrington & Rossendale College and Others*, C-256/01, EU:C:2004:18, paragraph 72.
21. Judgment of the ECJ of 14 December 1987, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.*, C-3/87, EU:C:1989:650, paragraph 36.
22. Judgment of the ECJ of 16 September 1999, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, C-22/98, EU:C:1999:419, paragraph 26.

One of the key features of the early 21st century is not only the flexibilisation of the employment relationship but also the **emergence of a growing number of self-employed**. This can be attributed to a number of different factors: advances in digital technologies, the widespread availability of handheld devices and ever-increasing high-speed connectivity combined with the realities presented by several cycles of economic downturn, shifts in lifestyle and generational preferences have all led to this increase in the number of self-employed workers.²³ However, these new ‘solo-entrepreneurs’ and freelancers are very different from those of the past, where ‘liberal professions’ such as lawyers, architects and other high-skilled professionals had the power to bargain for high remuneration and controlled their own working conditions. The ‘new’ self-employed, especially those active in the virtual realms of the gig economy today (known as ‘crowdworkers’), resemble more the workers of the early 20th century who did not have any other alternatives than to sell their labour in a highly competitive market. They compete with a large reserve army of labour unlike those self-employed in liberal professions. They are also similar to traditional employees, as they carry out the work in person and, in so doing, sell their labour and not an end product. Finally, they are also vulnerable, as they earn their livelihood by doing this for only one or a very limited number of immediate contractual partners. The only difference between them and traditional employees is the fact that they are formally free to work doing whatever they choose whenever they choose – however, it may often be the case that this freedom is in name only owing to an economic situation which leaves them few alternatives to selling their labour in a certain way to a limited number of contractual partners.

These changes and their concomitant challenges have also been observed at EU level. In its Green Paper ‘Modernising labour law to meet the challenges of the 21st century’²⁴, the European Commission already noted in 2006 that:

“The emergence of diverse forms of non-standard work has made the boundaries between labour law and commercial law less clear. The traditional binary distinction between “employees” and the independent “self-employed” is no longer an adequate depiction of the economic and social reality of work. Disputes concerning the legal nature of the employment relationship can arise where that relationship has either been disguised or where a genuine difficulty arises in seeking to fit new and dynamic work arrangements within the traditional framework of the employment relationship.”²⁵

In addition to the issue of disguised employment that will not be discussed in this paper, the Commission went on to address the issue of the vulnerable self-employed already outlined above:

-
23. Lobel O. (2016) The gig economy & the future of employment and labor law, Research Paper Series 16-223, San Diego, University of San Diego School of Law Legal Studies, p. 2.
 24. COM(2006) 708 final. See Temming F. (2016) Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven, *Soziales Recht*, 6 (4), pp. 158-168 (p. 165).
 25. COM(2006) 708 final, p. 10.

“The concept of “economically dependent work” covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment. They may not be covered by labour law since they occupy a “grey area” between labour law and commercial law. Although formally “self-employed”, they remain economically dependent on a single principal or client/employer for their source of income. This phenomenon should be clearly distinguished from the deliberate misclassification of self-employment. Already some Member States have introduced legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers.”²⁶

3. New framework, new concepts?

These changes in the world of work described by the European Commission are now being accelerated by the digital transformation, making it very timely to consider again the fundamental question of labour law: who is protected and why? Or, as the European Commission has asked in the 2006 Green Paper: ‘Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract?’²⁷ The recent Commission Staff Working Document accompanying the consultation on a European Pillar of Social Rights likewise emphasises that the distinction between ‘worker’ and ‘self-employed’, and that between ‘self-employed’ and ‘entrepreneur’ are sometimes blurred. The case of the collaborative economy is considered particularly illustrative, as it is based on a business model which allows individuals to capitalise on their own assets such as cars or houses, while these companies provide tasks rather than fully-fledged services, making it hard to account for work and workers under current standards.²⁸

If such a need to extend the protective scope of labour law, or at least that of certain parts of it, is found to exist, there are two options to consider: either redefine the concept of ‘employee’ or introduce specific legislative initiatives aimed at giving the vulnerable self-employed access to a range of employment rights.

Redefining the concept of ‘employee’, or specifically including the self-employed within the scope of certain employment law norms, would widen the scope of application of the rights to organize, to bargain collectively and to take collective action to this group of vulnerable self-employed. It would also extend the application of individual labour law, i.e. the set of rules granting individual rights and entitlements and therefore protecting employees from unfair and unhealthy working conditions. This body of laws usually encompasses, *inter alia*, minimum wages²⁹, working time restrictions, the right to paid sick leave and holidays as well

26. COM(2006) 708 final, p. 11.

27. COM(2006) 708 final, p. 12.

28. SWD(2016) 51 final, p. 32.

29. Wage regulation, however, does not fall within the competence of the EU (Article 153(5) TFEU).

as protection against dismissal. If the economic situation of the employee is the reason why these rights and entitlements have been developed in the first place, it is difficult to argue why the scope of their application should not be extended to persons in the same situation based merely on the premise that they are not formally integrated enough into the business of their contractual partners.

This redefinition of the concept of the employee could be achieved in one of two ways: either by **way of law**, i.e. explicitly including definitions that go beyond the perceived notion of the worker, or by way of the ECJ's wider interpretation of the concept of the worker. The latter would appear to be the more viable option, as changes to primary and secondary EU law can be very difficult to achieve and because the responses to the Green Paper concerning a unified concept of the worker were mostly negative.³⁰ Moreover, in the Communication launching a consultation on a European Pillar of Social Rights, the European Commission again uses the traditional concept of 'worker' with its focus on personal subordination:

‘Provisionally, for the purpose of this consultation, the term “worker” designates any person who, for a certain period of time, performs services for another person in return for which she or he receives remuneration, and acts under the direction of that person as regards, in particular, the determination of the time, place and content of her or his work.’³¹

It therefore seems highly unlikely that the concept of 'worker' will be redefined in a significantly different way in primary and secondary law. This is also evident in the recent proposal of the European Commission for a Directive on Transparent and Predictable Working Conditions that for the first time includes a statutory definition of the concept of 'worker' in EU law.³²

Another option would be the **introduction of an intermediary category** so that at least some of the legislation protecting workers could be extended to this group of vulnerable self-employed. In the light of the growing number of persons undertaking platform-based work (known as 'crowdworkers'), especially in the US, it has been suggested that the law might recognise such an intermediate category.³³ In this way, so the argument runs, the level of protection may be graded, and the fact that the personal integration of some of the crowdworkers is less intense and that they enjoy a certain level of flexibility and freedom can actually be used to their advantage.

However, even before this comes about, a number of Member States have introduced legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers. For example, in Germany

30. COM(2007) 627 final, p. 7.

31. COM(2016) 127 final, Annex I, p. 2.

32. COM(2017) 797 final.

33. Lobel O. (2016) *The gig Economy & the future of employment and labor law*, Research Paper Series 16-223, San Diego, University of San Diego School of Law Legal Studies, p. 10; Harris S.D. and Krueger A.B. (2015) *A proposal for modernizing labor laws for twenty-first-century work: the 'independent worker'*, Discussion Paper 2015-10, Washington, DC, The Hamilton Project.

and Austria, some employment regulations are also applicable to 'employee-like persons' (*arbeitnehmerähnliche Personen*). In Austria, these individuals are defined as persons who perform work/services by order of and on account of another person without being in an employment relationship, but who may be considered employee-like owing to their economic dependence. Only some provisions of labour law apply to these employee-like persons, e.g. those on the competence of the labour courts,³⁴ agency work,³⁵ employee liability³⁶ and anti-discrimination.³⁷ In Germany, this intermediate category is similarly defined and is also covered by the Collective Agreements Act (*Tarifvertragsgesetz*); persons belonging to this category may therefore conclude collective agreements with normative effect. In the 2006 Green Paper, the European Commission also cites as examples the notion of 'para-subordinate' in Italy³⁸ and the Self-Employed Workers' Statute in Spain on the rights and benefits of the self-employed, including economically dependent workers.³⁹

In the United Kingdom, the extension of employee rights beyond the employment contract seems to be the most developed. The 'targeted approach' to establishing differing rights and responsibilities in employment law for 'employees' and 'workers' is another example of how categories of vulnerable workers involved in complex employment relationships have been given minimum rights without an extension of the full range of labour law entitlements associated with standard work contracts. In its decision of 28 October 2016, the Central London Employment Tribunal used this concept of the 'worker' when qualifying drivers using the platform *Uber*, entitling them to the minimum wage and paid annual leave.⁴⁰

At European level, however, the question in the 2006 Green Paper as to whether there is a need for a 'floor of rights' dealing with the working conditions of all workers regardless of the form of their work contract was answered in the negative. Most Member States and social partners are opposed to the introduction of any third intermediary category, such as the so-called 'economically dependent worker', alongside those of dependent workers and independent self-employed workers. Even in Member States where such a concept already exists in national law, such as Italy, there were **reservations about whether an unequivocal definition could be devised at European level**.⁴¹ The recent Communication of the European Commission launching a consultation on a European Pillar of

34. The Labour and Social Courts Act, p. 51 (3) 2.

35. The Act on Agency Work, p. 3.

36. The Employees' Liability Act, p. 1 (2).

37. The Equal Treatment Act, pp. 1 (3) 2 and 16 (3) 2.

38. See De Stefano V. (2016) The rise of the 'just-in-time workforce': on-demand work, crowd-work and labour protection in the 'gig-economy', Geneva, International Labour Office, p. 20.

39. COM(2006) 708 final, p. 12.

40. Employment Tribunals 28.10.2016, 2202551/2015 & Others, Aslam, Farrar & Others v Uber B.V., Uber London Ltd. & Uber Britannia Ltd, <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>; upheld by Employment Appeal Tribunal 10.11.2017, Appeal No. UKEAT/0056/17/DA, Uber B.V., Uber London Ltd. & Uber Britannia Ltd v Aslam, Farrar, Dawson & Others, https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf

41. COM(2007) 627 final, p. 7.

Social Rights⁴² refers to the increasing existence of ‘grey zones’, such as ‘dependent’ and ‘bogus’ self-employment, leading to unclear legal situations and barriers to access social protection. It therefore remains to be seen whether this option will be followed up at a later stage in the process of establishing a European Pillar of Social Rights, although it seems unlikely that the Member States will be more amenable to this option than they were a decade ago.

Legislative changes that either redefine the concept of the worker or introduce a third, intermediary category between workers and self-employed do not appear to be a terribly realistic possibility in the near future. Consequently, our attention is turned towards the possible activities of the ECJ that is called upon to interpret the concept of ‘worker’ in EU primary and secondary legislation. The subsequent focus of this paper will therefore be on the potential of the case law of the ECJ to go beyond the perceived approach when interpreting the concept of ‘worker’ in EU law. It will seek to deduce arguments from existing case law that corroborate a concept of ‘worker’ that also takes into account economic factors. In a certain respect, we are looking for ‘cracks’, inspired by Leonard Cohen in his song *Anthem*: ‘There is a crack, a crack in everything, that’s how the light gets in.’ Our intention is to find those cracks and develop arguments for widening them so as to let in more ‘light’.

42. COM(2016) 127 final, Annex I, pp. 4 et seq.

1. The concept of 'worker' in primary and secondary EU law

Before attempting to define the concept of the worker in EU law as it is interpreted by the ECJ, it is necessary to establish a few basic facts about EU labour law that are relevant to this study. It is an undisputed fact that EU law does not include a comprehensive body of labour law but rather consists of bits and pieces of legislation that regulate different aspects of the employment relationship and – more broadly speaking – the field of social policy. As the TFEU has laid down only substantive rights in the field of equal pay (Article 157) and the free movement of workers (Article 45), the main body of EU labour law is enacted through secondary legislation, primarily in the form of directives.⁴³

The ECJ regularly points out that there is no single definition of worker in EU law.⁴⁴ In particular, the definition of worker used in connection with the free movement of workers (Article 45 TFEU) does not necessarily coincide with the definition applied in relation to Article 48 TFEU (coordination of social security systems) and Regulation No 1408/71.⁴⁵ The object of this study is the definition of worker in primary and secondary EU law in the field of labour and employment law; social security law issues will therefore not be addressed in this paper.

1.1. Primary law

1.1.1. Article 45 TFEU

Any discussion of the concept of 'worker' in EU law usually takes as its basis the fundamental freedom of the free movement of workers enshrined in Article 45 TFEU, given that the founding purpose of the EU was the creation of a common market in which barriers to trade between Member States were progressively removed.⁴⁶ Although the term 'worker' is the 'lynchpin'⁴⁷ to Article 45 TFEU, the Treaties provide no definition of the underlying concept.⁴⁸ As will be discussed in

43. Barnard C. (2012) EU employment law, 4th ed., Oxford, Oxford University Press, p. 47.

44. Judgment of the ECJ of 12 May 1998, *María Martínez Sala v Freistaat Bayern*, C-85/96, EU:C:1998:217, paragraph 31; judgment of the ECJ of 7 June 2005, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, C-543/03, EU:C:2005:364, paragraph 27; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 63.

45. Judgment of the ECJ in *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 31.

46. Davies A.C.L. (2012) EU labour law, Cheltenham, Edward Elgar Publishing, p. 69.

47. Barnard C. (2012) EU employment law, 4th ed., Oxford, Oxford University Press, p. 144.

48. This also has an effect on the coordination of social security under Article 48 TFEU, which provides that, in this field of policy, the European Parliament and the European Council are to adopt such measures as are necessary to provide freedom of movement for workers;

greater detail in Chapter 2 on a review of the case law of the ECJ, the Court has developed its understanding of the concept of ‘worker’ most extensively in the area of free movement of workers. It uses the definition of ‘worker’ as developed in line with Article 45 TFEU, especially as first laid down in the landmark case of *Lawrie-Blum*⁴⁹, as a point of reference in determining the meaning of the same or similar terms in employment-related Directives.⁵⁰

Although the ECJ does not – at least not explicitly – follow a purposive approach, it is doubtful that the concept of ‘worker’ as embodied under Article 45 TFEU is a suitable starting point for the development of an autonomous European concept of ‘worker’ to be applied to more typical fields of labour law. Article 45 TFEU establishes a fundamental freedom to be made use of by workers and employers with a view to their deriving greater benefit from the European single market. This market-creating function is very much concerned with granting access to the labour markets of other Member States, and this entails, as Article 45(2) explicitly states, the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. This market-creating and, therefore, efficiency-oriented purpose is very different from those pursued by provisions usually included in the body of labour laws such as minimum wages, paid sickness leave, annual leave, working time regulation, collective bargaining and dismissal protection. These provisions are more concerned with safeguarding equity and voice⁵¹ or, as Davidov recently put it, countering democratic deficits and dependency⁵².

These observations on the purpose of the provisions referring to the concept of ‘worker’ are especially important in terms of going beyond the perceived scope of application of labour law associated with the employment contract as a relationship of personal subordination. In the context of the free movement of workers, many decisions involve issues of transitional periods with new Member States limiting the free movement of workers but not the freedom to provide services as a self-employed person. It is here that the difference between the two freedoms becomes readily apparent, but it will become less so after the transitional period has expired and the freedoms are fully established. As for issues concerning the core of labour law, the object is altogether different, and a teleological interpretation based on the purpose (the *telos*) can lead to different results. Caution is therefore advised when transferring the concept of the employee as developed in the context of the fundamental freedoms to other fields of labour law based on other considerations.⁵³ For a purposive approach can lead to a different understanding of the concept of ‘worker’ in secondary law.

to this end, they are to make arrangements for the payment of benefits for employed and self-employed migrant workers and their dependants.

49. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284.

50. Barnard C. (2012) *EU employment law*, 4th ed., Oxford, Oxford University Press, p. 144.

51. See Beford S.F. and Budd J.W. (2009) *Invisible hands, invisible objectives: bringing workplace law and public policy into focus*, Stanford, Stanford University Press, p. 5.

52. Davidov G. (2016) *A purposive approach to labour law*, Oxford, Oxford University Press, p. 119.

53. This is also pointed out by Rebhahn R. and Reiner M. (2012) Article 153, paragraph 6, in Schwarze J. (ed.) *EU-Kommentar*, 3rd ed., Baden-Baden, Nomos Verlag.

1.1.2. Other references to the concept of 'worker'

The foundation for secondary legislation in the field of employment can be found in the Treaties, more specifically in Article 153 TFEU in its reference to the concept of 'worker'. The ECJ has not yet interpreted the concept of 'worker' in this connection.⁵⁴ In the literature, it has been argued that the extensive interpretation by the ECJ of the autonomous concept of 'worker' in secondary legislation that will be discussed below must logically also result in an extensive interpretation of the notion of 'worker' in Article 153 TFEU.⁵⁵ Otherwise, the case law would be applying an understanding that went beyond the competence of the European lawmaker. Some commentators, especially Rebhahn⁵⁶, argue for a broader understanding of the concept of 'worker' in Article 153 TFEU. Some emphasis should also be placed on the argument of economic dependency, and this would also enable the EU to enact secondary legislation to include 'economically dependent' persons who do not appear to be covered by the perceived concept of 'worker'.

A further reference to the concept of 'worker' can be found in the provision of equal pay for men and women in Article 157 TFEU. Each Member State is required to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. In this connection, the ECJ also employs an autonomous understanding of the notion and explicitly refers to the *Lawrie-Blum* formula⁵⁷, developed in the context of the free movement of workers.⁵⁸ The following aspect is of interest for this study:

‘It is clear from that definition that the authors of the Treaty did not intend that the term “worker”, within the meaning of Article 141(1) EC [now Article 157 TFEU] should include independent providers of services who are not in a relationship of subordination with the person who receives the services.’⁵⁹

54. Rebhahn R. and Reiner M. (2012) Article 153, paragraph 6, in Schwarze J. (ed.) EU-Kommentar, 3rd ed., Baden-Baden, Nomos Verlag; Rebhahn R. (2016) Neue Formen der Arbeit – Unionsrechtliche Aspekte, in Risak M. and Tomandl T. (eds.) Wie bewältigt das Recht Moderne Formen der Arbeit?, Vienna, New Academic Press, p. 26.

55. Temming F. (2016) Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven, Soziales Recht, 6 (4), p. 165 et seq.

56. Rebhahn R. and Reiner M. (2012) Article 153, paragraph 6, in Schwarze J. (ed.) EU-Kommentar, 3rd ed., Baden-Baden, Nomos Verlag; Rebhahn R. (2016) Neue Formen der Arbeit – Unionsrechtliche Aspekte, in Risak M. and Tomandl T. (eds.) Wie bewältigt das Recht Moderne Formen der Arbeit?, Vienna, New Academic Press., p. 30.

57. ‘For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.’

58. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 67. No justification is given for also applying the concept of 'worker' developed in this context to the equal treatment of men and women; this is surprising, as the ECJ has pointed out in paragraph 64 that, in order to determine the meaning of the term 'worker', it is necessary to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty. In what respect the objectives of free movement and equal treatment are similar is not specified, however.

59. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 68.

The ECJ then goes on to state that the formal classification of a self-employed person under national law does not, however, exclude the possibility that a person must be classified as a worker within the meaning of Article 157 TFEU⁶⁰ if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.⁶¹ When referring to the aspects to be taken into account, it becomes clear that the Court does not go beyond the received concept of subordination: in the case of teachers who are, vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work.⁶²

In **conclusion**, the ECJ clearly employs a **unified concept of ‘worker’ when dealing with primary EU law** as developed in the context of the free movement of workers laid down in Article 45 TFEU. However, the Court does not refer to the different aims and purposes or adapt the concept of ‘worker’ to them.

1.1.3. The unwritten exemption of collective bargaining in Article 101 TFEU

Article 101 TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Collective bargaining, especially any agreement on wages, has such a restrictive effect on competition between workers that it becomes even more restrictive if such an agreement also has an *erga omnes* effect. In the case of *Albany*⁶³, however, the ECJ pointed out that the activities of the Community are to include not only a ‘system ensuring that competition in the internal market is not distorted’ but also ‘a policy in the social sphere’. It then cites a number of provisions that relate to a cooperative approach to social policy and to the role of the social partners⁶⁴ before concluding the following:

‘59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. Then Article 141(1) EC.

61. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 71.

62. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72, again referring to a case in connection with the free movement of workers; judgment of the ECJ of 26 February 1992, *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen*, C-357/89, EU:C:1992:87, paragraph 9 et seq.

63. Judgment of the ECJ of 21 September 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraph 54 et seqq.

64. Judgment of the ECJ in *Albany*, C-67/96, EU:C:1999:430, paragraphs 55 to 58.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty [now Article 101(1) TFEU].⁶⁵

Therefore, this unwritten exemption of collective agreements, understood as agreements between organisations of employers and workers that include measures to improve conditions of work and employment, as ruled in the *Albany* decision and other later judgments⁶⁶, also refers to the concept of 'worker'. However, in these decisions, the Court does not go on to specify who does and who does not qualify as a worker for the purpose of this exception.

This was also the case in the 2014 judgment in *FNV Kunsten*⁶⁷, which concerned collective bargaining covering substitute musicians considered self-employed under national (Dutch) laws. The ECJ held that, although the substitute musicians perform the same activities as employees, they are, in principle, 'undertakings' within the meaning of Article 101(1) TFEU, for they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal.⁶⁸ In so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings.⁶⁹ An agreement concluded by such an organisation does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.⁷⁰ This appears to be a very straightforward response to the perceived concept of 'worker', but the ruling then takes an interesting turn when the ECJ states that that finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees.⁷¹ The judgment then elaborates on the concept of 'undertaking' set out in Article 101(1) TFEU that clearly focuses on economic aspects and market performance. It states that, in today's economy, it is not always easy to establish the status of some self-employed contractors as

65. See Barnard C. (2012) EU employment law, 4th ed., Oxford, Oxford University Press, p. 193.

66. Judgment of the ECJ of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, paragraph 49; judgment of the ECJ of 9 July 2009, *3F v Commission of the European Communities*, C-319/07 P, EU:C:2009:435, paragraph 50.

67. Judgment of the ECJ of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, EU:C:2014:2411.

68. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 27.

69. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 28.

70. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 30.

71. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 31.

‘undertakings’.⁷² According to settled case law, on the one hand, a service provider can lose his status of an independent trader, and hence of an undertaking, if he **does not determine independently his own conduct on the market**, but is **entirely dependent on his principal**, because he **does not bear any of the financial or commercial risks arising out of the latter’s activity** and **operates as an auxiliary** within the principal’s undertaking.⁷³ The ECJ then juxtaposes the concept of ‘undertaking’ with that of ‘employee’ and states that the term ‘employee’, for the purpose of EU law, must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case law that the essential feature of that relationship is that, for a certain period of time, one person performs services for and under the direction of another person in return for which he receives remuneration.⁷⁴ Once again, the ECJ refers to its case law developed in the context of the free movement of workers.⁷⁵ From that point of view, the Court has previously held that the classification of a ‘self-employed person’ under national law does not preclude that person from being classified as an employee within the meaning of EU law if his **independence is merely notional**, thereby **disguising an employment relationship**.⁷⁶

It follows that the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work⁷⁷, does not share in the employer’s commercial risks⁷⁸, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.^{79, 80}

In **conclusion**, the ECJ held that it is only when self-employed service providers who are members of one of the contracting employees’ organisations and perform for an employer, under a works or service contract, the same activity as that employer’s employed workers, are ‘false self-employed’, in other words, service providers in a situation comparable to that of those workers, that a provision of a

-
- 72. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 32.
 - 73. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 33 with reference to the judgment of the ECJ of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, paragraphs 43 et seq. concerning service-station operators.
 - 74. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34.
 - 75. Interestingly, there is no direct reference to the Court’s landmark decision in *Lawrie-Blum* but only to *N.*, C-46/12, EU:C:2013:97, paragraph 40 and ‘the case-law cited’ – which, of course, refers to the *Lawrie-Blum* judgment.
 - 76. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34; referring to the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 71.
 - 77. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72; cf. judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36.
 - 78. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36; judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34.
 - 79. Judgment of the ECJ in *Becu*, C-22/98, EU:C:1999:419, paragraph 26; judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34.
 - 80. Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34.

collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is unclear from this well discussed judgment whether the ECJ has – at least in the context of competition law – introduced a new category that falls between ‘workers’ and ‘undertakings’, namely the ‘false self-employed’ – service providers in a situation comparable to that of an employer’s employed workers, or if this group actually consists of ‘workers’ within the meaning of EU legislation who are misclassified. Based on the outcome of the 2006 Green Paper consultation referred to above, it is very unlikely that this intermediary category, if it even exists, extends beyond the unwritten exemption from Article 101 TFEU for collective agreements.

1.2. Secondary law

The only autonomous legal definition of the notion of worker is found in the Occupational Safety and Health (OSH) Framework Directive 89/391/EEC⁸¹ that itself is not very specific, thus leading to no other conclusion than that the scope of application is very broadly defined.⁸² Other directives do not include an explicit definition, and the terminology used is heterogeneous, with some using the term ‘worker’ and others ‘employee’. Most, but by no means all, refer to the nationally accepted definition of the concept of the worker/employee. Therefore, the terminology used in secondary law is inconsistent, and the heterogeneity is further exacerbated by the reference to a national understanding in only some, while others include no such reference.

The various directives can be differentiated into groups. The Posted Workers Directive (96/71/EC) affords protection not only to posted workers but also to the labour markets and social systems of the Member States to which workers are posted. Directive 96/71/EC refers to the term ‘worker’. As its substance is closely related to the fundamental freedom to deliver cross-border services set out in Article 56 TFEU, it is conceivable that it refers to the notions used in connection with the free movement of workers in Article 45 TFEU.

Other directives based on social partner framework agreements also use the term ‘worker’, for instance the Part-Time Work Directive (97/81/EC), the Fixed-Term Work Directive (1999/70/EC) and the Parental Leave Directive (2010/18/EU). However, they refer to the nationally accepted definition by stating that they cover those ‘who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State’. With regard to the Parental Leave Directive, however, the ECJ has ruled that Member

81. Article 3(a) defines ‘worker’ as ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’, while Article 3(b) defines ‘employer’ as ‘any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment’.

82. See Temming F. (2016) *Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven*, *Soziales Recht*, 6 (4), p. 159; in the Austrian context, Risak M. (1999) *Verwirrungen um den Arbeitnehmer-Begriff des Arbeitnehmerschutzgesetzes*, Vienna, Manz Verlag, p. 43.

States are not allowed to make any exceptions or exclusions to the Directive's scope of application encompassing all workers.⁸³

Other directives such as the Maternity Protection Directive (92/85/EEC), the Collective Redundancy Directive (98/59/EC) and the Temporary Agency Work Directive (2008/104/EC) also use the term 'worker' but do not explicitly refer to the nationally accepted definition. As will be discussed in detail below, the Maternity Protection Directive is the starting point for the introduction of an autonomous definition of the concept of the worker in secondary law.⁸⁴

Other Directives such as the Written Statement Directive (91/533/EEC), the Transfer of Undertakings Directive (2001/23/EC) and the Employer Insolvency Directive (2008/95/EC) use the term 'employee'. Most refer to the nationally accepted definition of the concept, stating that they cover employees 'having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'.⁸⁵ Directive 2008/95/EC, on the other hand, does not do so⁸⁶, and it is also one of the directives in relation to which the ECJ has interpreted the concept of the employee autonomously.⁸⁷

Yet others use neither the term 'worker' nor 'employee', such as the Young People at Work Directive (94/33/EC), referring instead to the prerequisite of an 'employment contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'. Finally, some directives contain no explicit provisions on the personal scope of application, such as the Working Time Directive (2003/88/EC), although it is clear that it applies only to workers.⁸⁸ With regard to the latter, the ECJ has noted that, for the purpose of applying the Directive, the notion of 'worker' may not be interpreted differently according to the law of the Member States but has an autonomous meaning specific to EU law.⁸⁹

83. Judgment of the ECJ of 16 September 2010, *Zoi Chatzi v Ypourgos Oikonomikon*, C-149/10, EU:C:2010:534, paragraph 29.

84. Judgment of the ECJ of 20 September 2007, *Sari Kiiski v Tampereen kaupunki*, C-116/06, EU:C:2007:536 paragraph 24; judgment of the ECJ of 11 November 2010, *Dita Danosa v LKB Lizings SIA*, C-232/09, EU:C:2010:674, paragraph 51.

85. Article 1 of Directive 91/533/EEC; Article 2(1)(d) of Directive 2001/23/EC refers to a person, who, in the Member State concerned, is protected as an employee under national employment law.

86. In Schlachter M. (ed.) (2015) EU labour law: a commentary, The Hague, Kluwer Law International, p. 459, Davulis advocates a national approach.

87. Judgment of the ECJ of 9 July 2015, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, C-229/14, EU:C:2015:455, paragraph 33.

88. Davies A.C.L. (2012) EU labour law, Cheltenham, Edward Elgar Publishing, pp. 199 and 202; Risak M. (2015) 2003/88/EC: working time, in Schlachter M. (ed.) EU labour law: a commentary, The Hague, Kluwer Law International, p. 387.

89. Judgment of the ECJ of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, EU:C:2010:612, paragraph 10; judgment of the ECJ of 7 April 2011, *Dieter May v AOK Rheinland/Hamburg*, C-519/09, EU:C:2011:221, paragraph 22, where the Court explicitly stated that '[t]his information, given by the Court as regards the concept of "worker" within the meaning of Article 45 TFEU, applies in respect of the same concept used in the legislative measures referred to in Article 288 TFEU (annotation by the author: acts of secondary law) too'.

First, it can be **concluded** that the **terminology** of the EU secondary legislation when defining the ambit of the various directives is not **homogenous**. In their English language versions, some directives use the term 'worker', while others use the term 'employee'⁹⁰ – to date, this variation in terminology has not had any effect on the interpretation: the wording is used interchangeably.⁹¹ This is an important point to make, as UK employment law, on the other hand, does distinguish between the notion of the employee and the worker, and there are significant differences in the application of legislation as a result. This is not the case, however, in EU labour law.

What is far more significant is that some directives refer to the **national understanding** while others do not and so leave the way open for the argument that an **autonomous European interpretation** has to be applied. In fact, it appears that the ECJ has increasingly moved towards a Union-wide concept of 'worker' in secondary law. This has been achieved not only through its interpretation of the directives but also by also applying the argument of 'effet utile' (practical effectiveness of EU law) to those directives such as the Temporary Agency Work Directive (2008/104/EC) that explicitly refer to the national understanding of the concept of 'worker'. In its judgment in *Ruhrlandklinik*⁹², the ECJ states that:

“To restrict the concept of “worker” as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law [...] is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.

Indeed, such a restriction would permit the Member States or temporary-work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that directive [...]

This development will be discussed below as one of the 'cracks' that propagate beyond the national understanding of the concept of 'worker'.⁹³ However, before delving into an investigation into the cracks, it is necessary to conduct an analysis of the perceived elements of the European concept of 'worker'.

90. This is different in the French and German language versions that uniformly speak of *travailleur* and *Arbeitnehmer*; see Riesenhuber K. (2012) *European employment law*, Cambridge, Intersentia, § 1 paragraph 2.

91. Riesenhuber K. (2012) *European employment law*, Cambridge, Intersentia, § 1 paragraph 2.

92. Judgment of the ECJ in *Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraphs 36 et seq.

93. Especially critical of this development is Junker A. (2016) *Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes - Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs*, *Europäische Zeitschrift für Arbeitsrecht*, 2, pp. 184-206.

2. Review of the case law of the European Court of Justice

2.1. Methodology

Three different methods were used to determine which cases are relevant to the concept of ‘worker’ in EU law so as to ensure that all such cases were included in this review of the case law of the ECJ.

First, we analysed all relevant cases frequently cited in publications regarding the concept of ‘worker’ in EU law (especially Ziegler (2011); Schneider and Wunderlich (2012)⁹⁴). We then looked at all cases cited in these ‘leading cases’ as well as all cases cited in these cases.

In a second step, we reviewed all cases handed down in the past four years containing the word ‘worker’ or referring to Article 45 TFEU. We used the website of the ECJ and the search function provided there to filter the relevant cases (<https://curia.europa.eu/>). This method failed to produce any significant results, as very few of these cases concerned the concept of ‘worker’. Nevertheless, this was a necessary step, as we otherwise might have overlooked some important new decisions, given that they have not yet been published or cited in older judgments.

The third approach was to use the search function of the website of the ECJ (<https://curia.europa.eu/>) to search for decisions citing the leading case *Lawrie-Blum*⁹⁵ or elements of the *Lawrie-Blum* formula.

We also undertook another approach, namely to search for all decisions containing the word ‘worker’. However, this approach was abandoned because of the high number of search results. Analysis of such a large number of decisions was outside the scope of this study.

In a subsequent step, we excluded any cases from the initial search results in which the ECJ did not elaborate on the concept of ‘worker’ at all, e.g. because the qualification of worker was not in dispute between the parties or because the national court had already confirmed the qualification of worker. All other cases were analyzed in detail and examined, whether they contained anything new,

94. Ziegler K. (2011) *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht*, Baden-Baden, Nomos Verlag, 530 pp.; Schneider H. and Wunderlich N. (2012) Article 45 TFEU, in Schwarze J. (ed.) *EU-Kommentar*, 3rd ed., Baden-Baden, Nomos Verlag.

95. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284; see Chapter 2.4.

different or more detailed than preceding cases. In the course of this selection process we found many cases, in which the ECJ mentioned the concept of worker in the sense of the landmark case *Lawrie-Blum* but did neither apply it on the actual situation nor did elaborate on it. These cases were also excluded.

The analysis of the jurisprudence regarding the concept of worker undertaken in this study is therefore based on all the decisions that remained after these filtering processes. However not every single one of them is mentioned in the study, because there have been many decisions so similar to each other, that it in our view was not necessary to mention all of them. The table in Annex I provides an overview of the cases referred to in this study.

For the table of the most important cases regarding the concept of worker in Annex II we chose decisions in which the ECJ developed or refined the core elements of the concept of worker or in which the ECJ elaborated in relative depth on the scope of application of this concept.

2.2. Introduction

The ECJ regularly points out that there is no single definition of 'worker' in Community law.⁹⁶ Especially the definition of worker used in the context of free movement of workers (Art 45 TFEU) does not necessarily coincide with the definition applied in relation to Article 48 TFEU (coordination of social security systems) and Regulation No 1408/71.⁹⁷ Object of the following study of the case law of the ECJ is the definition of 'worker' in the context of Article 45 TFEU and related labour and employment law standards. This is particularly significant, as the ECJ has ruled that the definition of 'worker' in relation to Regulation 1612/68 and Article 157 TFEU is identical to that in relation to Article 45 TFEU.⁹⁸ In a more recent case⁹⁹, the ECJ even stipulated that its definition of the term 'worker' was applicable to all legal acts of the EU in connection with Article 288 TFEU, i.e. all secondary legislation, that use the same concept.

2.3. Before *Lawrie-Blum*

The point of departure for a European concept of 'worker' is the 1986 landmark decision *Lawrie-Blum*¹⁰⁰ in which the ECJ interpreted the term 'worker' within the meaning of Article 45 TFEU for the first time. Before this case, the ECJ merely

96. Judgment of the ECJ in *Martinez Sala*, C-85/96, EU:C:1998:217, paragraph 31; judgment of the ECJ in *Dodl und Oberhollenzer*, C-543/03, EU:C:2005:364, paragraph 27; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 63.

97. Judgment of the ECJ in *Martinez Sala*, C-85/96, EU:C:1998:217, paragraph 31.

98. For Article 157 TFEU: judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 67. For the Regulation 1612/68: judgment of the ECJ of 31 May 1989, *I. Bettray v Staatssecretaris van Justitie*, 344/87, EU:C:1989:226.

99. Judgment of the ECJ in *May*, C-519/09, EU:C:2011:221, paragraph 22.

100. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284.

ruled on specific aspects of the concept of ‘worker’¹⁰¹ or did not need to provide a definition of the notion at all¹⁰².

Of major importance in the preceding case law is the judgment in *Levin* in which the ECJ stated that the term ‘worker’ – at least in the context of the free movement of workers – has a Community meaning and may not be defined by reference to the national laws of the Member States.¹⁰³ Because this concept defines the field of application of one of the fundamental freedoms guaranteed by the Treaty, it may not be interpreted restrictively.¹⁰⁴ The ECJ went on to state that the term ‘worker’ also covers persons who pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact, obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration.¹⁰⁵ Although these findings were important in defining the scope of the free movement of workers, the ECJ neither needed nor chose to present a concept of ‘worker’ in this case. In the case *Walrave*, the ECJ was not required to decide whether the pacemaker in a cycle race is a worker or not, because the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services.¹⁰⁶ In many other judgments prior to the case *Lawrie-Blum*, the national judges sought no guidance in interpreting the notion of ‘worker’ but took it upon themselves to decide whether the person concerned had to be classified as a worker or not. In such cases, the ECJ assumed that the persons concerned were workers without challenging that assertion.¹⁰⁷

2.4. The departing point: *Lawrie-Blum*

As mentioned above, *Lawrie-Blum* was the first case in which the ECJ was required to develop a definition of the term ‘worker’. *Deborah Lawrie-Blum*, a British national, was refused admission, on the ground of her nationality, by the *Oberschulamt Stuttgart* (Secondary Education Office, Stuttgart, Germany) to the *Vorbereitungsdienst*, a period of preparatory service leading to the Second State Examination, which qualifies successful candidates for appointment as teachers in a German *Gymnasium*.¹⁰⁸ The ECJ had to examine whether the tasks involved

¹⁰¹. As in the judgment of the ECJ of 23 March 1982, *D.M. Levin v Staatssecretaris van Justitie*, 53/81, EU:C:1982:105.

¹⁰². As in the judgment of the ECJ of 12 December 1974, *Walrave and Koch v Association Union Cycliste Internationale and Others*, 36/74, EU:C:1974:140 and the judgment of the ECJ of 14 July 1976, *Gaetano Donà v Mario Mantero*, 13/76, EU:C:1976:115.

¹⁰³. Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 11. The ECJ refers to Case 75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (Administration of the Industrial Board for Retail Trades and Businesses) [1964] EU:C:1964:19, for this interpretation. The case Unger concerned Regulation No. 3/58 on social security for migrant workers.

¹⁰⁴. Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 13.

¹⁰⁵. Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 16.

¹⁰⁶. Judgment of the ECJ in *Walrave*, 36/74, EU:C:1974:140, paragraph 7.

¹⁰⁷. Judgment of the ECJ of 12 February 1974, *Giovanni Maria Sotgiu v Deutsche Bundespost*, 152/73, EU:C:1974:13; judgment of the ECJ of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)*, 43/75, EU:C:1976:56.

¹⁰⁸. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 2.

fell under the scope of the free movement of workers.¹⁰⁹ Accordingly, it repeated its finding from the case *Levin* that the term 'worker' has a Community meaning and must be interpreted broadly.¹¹⁰

‘That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’¹¹¹

Because the school determines the services to be performed by the trainee teacher and his working hours and it is the school's instructions that he must carry out and its rules that he must observe, it is clear that during the entire period of preparatory service the trainee teacher is under the direction and supervision of the school to which he is assigned.¹¹² The ECJ then pointed to its finding in the judgment in *Levin* that the expression 'worker' must be understood as including persons who, because they are not employed full-time, receive pay lower than that for full-time employment, provided that the activities performed are effective and genuine. The latter requirement was not called into question in *Laurie-Blum*.¹¹³

Almost all subsequent judgments handed down by the ECJ that concern the notion of 'worker' in the European law context use the definition developed in *Laurie-Blum*, known as the '*Laurie-Blum* formula'. Some of them selected only certain aspects that were relevant to the individual case, while others refined this definition or clarified parts of it. However, there are some judgements by the ECJ that bring other elements to the fore owing to the questions asked by the national courts.

The following is a version of the definition of the term 'worker' that is frequently used in more recent judgments:

‘[A]ccording to consistent case-law of the Court, that concept has a specific independent meaning and must not be interpreted narrowly. Thus, any person who pursues activities that are real and genuine^[114], to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’¹¹⁵

109. Judgment of the ECJ in *Laurie-Blum*, 66/85, EU:C:1986:284, paragraphs 10, 16 et seqq.

110. Judgment of the ECJ in *Laurie-Blum*, 66/85, EU:C:1986:284, paragraph 16.

111. Judgment of the ECJ in *Laurie-Blum*, 66/85, EU:C:1986:284, paragraph 17.

112. Judgment of the ECJ in *Laurie-Blum*, 66/85, EU:C:1986:284, paragraph 18.

113. Judgment of the ECJ in *Laurie-Blum*, 66/85, EU:C:1986:284, paragraph 21.

114. The ECJ also uses the phrase 'effective and genuine' (judgment of the ECJ of 8 June 1999, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, C-337/97, EU:C:1999:284, paragraph 13).

115. Judgment of the ECJ of 1 October 2015, *O v Bio Philippe Auguste SARL*, C-432/14, EU:C:2015:643, paragraph 22; see also judgment of the ECJ of 4 February 2010, *Hava Genc v Land Berlin*, C-14/09, EU:C:2010:57, paragraph 19.

The Court has held that it is for the national court to apply that concept of a ‘worker’ in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case, having regard both to the nature of the activities concerned and the relationship of the parties involved.¹¹⁶

Factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of Article 45 TFEU.¹¹⁷ Moreover, the issue of the abuse of rights can have no bearing on the answer to the question as to whether a person is a worker within the meaning of Article 45 TFEU.¹¹⁸ The motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration.¹¹⁹

2.5. Economic activity

The ECJ regularly states that the practice of activities is subject to EU law only in so far as it constitutes an economic activity.¹²⁰ This is a **requirement not only for the qualification of worker, but also in the definition of self-employed** in the context of Articles 49 et seqq. TFEU, and therefore it is **not a suitable distinguishing** feature. Furthermore, every pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of the Treaty (provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary).¹²¹

There are several types of cases in which this criterion is relevant. The ECJ already stated that the formation of **national teams** is a question of purely sporting interest and as such has nothing to do with economic activity.¹²² However,

116. Judgment of the ECJ of 26 March 2015, *Gérard Fenoll v Centre d'aide par le travail 'La Jouvène' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, C-316/13, EU:C:2015:200, paragraph 29; judgment of the ECJ in *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 29.

117. Judgment of the ECJ of 6 November 2003, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, C-413/01, EU:C:2003:600, paragraph 28; confirmed in the judgment of the ECJ of 21 February 2013, *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, C-46/12, EU:C:2013:97, paragraph 46.

118. Judgment of the ECJ in *Ninni-Orasche*, C-413/01, EU:C:2003:600, paragraph 31.

119. Judgment of the ECJ in *L. N.*, C-46/12, EU:C:2013:97, paragraph 47.

120. Judgment of the ECJ in *Walrave*, 36/74, EU:C:1974:140, paragraph 4; judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 13.

121. Judgment of the ECJ of 14 July 1976, *Gaetano Donà v Mario Mantero*, 13/76, EU:C:1976:115, paragraph 12; judgment of the ECJ of 5 October 1988, *Udo Steymann v Staatssecretaris van Justitie*, 196/87, EU:C:1988:475, paragraph 10; judgment of the ECJ of 13 April 2000, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, C-176/96, EU:C:2000:201, paragraph 43; judgment of the ECJ of 20 November 2001, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, C-268/99, EU:C:2001:616, paragraph 33.

122. Judgment of the ECJ in *Walrave*, 36/74, EU:C:1974:140, paragraph 8; judgment of the ECJ in *Lehtonen*, C-176/96, EU:C:2000:201, paragraph 34.

professional or semi-professional sportsmen who are in gainful employment or provide a remunerated service perform economic activities.¹²³ In its judgment in *Levin*, the Court decided that persons who pursue activities on such a small scale as to be regarded as **purely marginal and ancillary** do not fall under the scope of the free movement of workers because these activities are not economic activities.¹²⁴ Similarly, the qualification of activities as economic activities can also be questionable because of the **subject of the activity** (for example services performed in education¹²⁵ or healthcare¹²⁶) or because of the **nature of the relationship** between the relevant parties (for example a religious tie¹²⁷). None of these types of cases seems relevant for the purpose of this study.

2.6. Real and genuine activities

The criterion which requires that the activities be effective and genuine pre-dates the judgment in the case *Lawrie-Blum*. It finds its origin in the fact that the rules on the free movement of workers guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity.¹²⁸ In the case *Levin*, the ECJ had to decide whether a person who pursues an activity to such a limited extent that in so doing he earns income which is less than that which is considered as the minimum necessary to enable him to support himself can be a worker within the meaning of Article 45 TFEU. Against this background, it is appropriate that the ECJ focused on the extent of the activity by stating that 'those rules cover only the pursuit of effective and genuine activities, **to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary**'.¹²⁹ It falls to the national courts to make the necessary findings of fact in order to establish whether the person concerned can be considered to be a worker within the meaning of the case law.¹³⁰ When establishing whether that condition is satisfied, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue.¹³¹

^{123.} Judgment of the ECJ of 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, paragraph 73; see also judgment of the ECJ in *Lehtonen*, C-176/96, EU:C:2000:201, paragraphs 32 et seqq.

^{124.} Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 17; confirmed in the judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 13 and the judgment of the ECJ in *Steymann*, 196/87, EU:C:1988:475, paragraph 13.

^{125.} Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 20.

^{126.} Judgment of the ECJ in *Ruhrlandklinik*, C-216/15, EU:C:2016:883, 44 et seqq. in context of Article 1(2) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

^{127.} Judgment of the ECJ in *Steymann*, 196/87, EU:C:1988:475, paragraphs 8 et seqq.

^{128.} Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 17; judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 13; judgment of the ECJ in *Lehtonen*, C-176/96, EU:C:2000:201, paragraphs 43 et seq.

^{129.} Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraph 17; see also judgment of the ECJ in *Lehtonen*, C-176/96, EU:C:2000:201, paragraph 44, for an alternative formulation.

^{130.} Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraph 13.

^{131.} Judgment of the ECJ in *Ninni-Orasche*, C-413/01, EU:C:2003:600, paragraph 27.

When assessing the effective and genuine nature of the activity, the national courts may take account of:

- The fact that the person concerned worked only a very limited number of hours in a labour relationship.¹³² This fact would tend to indicate that the activity is on such a small scale as to be regarded as purely marginal and ancillary.
- The number of working hours and the level of remuneration.¹³³
- The irregular nature and limited duration of the services actually performed under a contract for occasional employment.¹³⁴
- If appropriate, the fact that the person must remain available to work if called upon to do so by the employer.¹³⁵
- In the case of internships whether in all the circumstances the person concerned has completed a sufficient number of hours in order to familiarise himself with the work.¹³⁶
- The progressive increase in remuneration for activities carried out in the course of vocational training.¹³⁷
- The right to paid leave¹³⁸ (note that thereby the national qualification has an effect on the qualification of ‘worker’ under EU law).
- The right to the continued payment of wages in the event of sickness (note that thereby the national qualification has an effect on the qualification of ‘worker’ under EU law).¹³⁹
- The right to a contract of employment which is subject to the relevant collective agreement (note that thereby the national qualification has an effect on the qualification of ‘worker’ under EU law).¹⁴⁰
- The fact that the contractual relationship with the same undertaking has lasted for a number of (in the case of *Genc* four) years.¹⁴¹
- All the aspects which characterise an employment relationship.¹⁴²
- The payment of contributions and, if this applies, the nature of those contributions.¹⁴³
- All the circumstances of the case that have to do with the activities and the employment relationship concerned.¹⁴⁴

132. Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraph 14.

133. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27; judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 25.

134. Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraph 14.

135. Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraph 14.

136. Judgment of the ECJ of 26 February 1992, *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*, C-3/90, EU:C:1992:89, paragraph 16.

137. Judgment of the ECJ of 19 November 2002, *Bülent Kurz, né Yüce v Land Baden-Württemberg*, C-188/00, EU:C:2002:694, paragraph 35.

138. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27; judgment of the ECJ of 1 October 2015, *O v Bio Philippe Auguste SARL*, C-432/14, EU:C:2015:643, paragraph 25.

139. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27; judgment of the ECJ in *O*, C-432/14, EU:C:2015:643, paragraph 25.

140. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27; judgment of the ECJ in *O*, C-432/14, EU:C:2015:643, paragraph 25.

141. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27.

142. Judgment of the ECJ in *L. N.*, C-46/12, EU:C:2013:97, paragraph 44.

143. Judgment of the ECJ in *O*, C-432/14, EU:C:2015:643, paragraph 25.

144. Judgment of the ECJ in *L. N.*, C-46/12, EU:C:2013:97, paragraph 43; judgment of the ECJ of 7 September 2004, *Michel Trojani v Centre public d’aide sociale de Bruxelles (CPAS)*, C-456/02, EU:C:2004:488, paragraph 17.

The cases that concern the **extent of the activity** are the most important type of cases for this criterion.¹⁴⁵ According to the case law, the fact that a person works for only a very limited number of hours in the context of an employment relationship may be an indication that the activities performed are marginal and ancillary.¹⁴⁶ However, the fact remains that, regardless of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC (now Article 45 TFEU).¹⁴⁷

The fact that a worker's earnings do not cover all his needs cannot preclude him from being a member of the working population. It appears from the Court's case law that the fact that his employment yields an income lower than the minimum required for subsistence¹⁴⁸ or normally does not exceed 18 hours a week¹⁴⁹ or 12 hours a week¹⁵⁰ or even 10 hours a week¹⁵¹ does not prevent the person in such employment from being regarded as a worker within the meaning of Article 45 TFEU (see the *Levin* and *Kempf* cases) or Article 157 TFEU (see the *Rinner-Kühn* case) or for the purposes of Directive 79/7 (see the *Ruzius-Wilbrink* case).¹⁵² From 3 to 14 hours a week is also deemed sufficient.¹⁵³ In the judgment in *Ninni-Orasche*, the ECJ stated that working for a temporary period of two and a half months can be sufficient to be considered a worker within the meaning of Article 45 TFEU.¹⁵⁴ Moreover, it is possible to be a worker by engaging in a 'brief minor' professional activity which 'did not ensure him a livelihood' or an activity which 'lasted barely more than one month'.¹⁵⁵

145. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 21; judgment of the ECJ of 3 June 1986, *R. H. Kempf v Staatssecretaris van Justitie*, 139/85, EU:C:1986:223, paragraph 14; judgment of the ECJ of 21 June 1988, *Steven Malcolm Brown v The Secretary of State for Scotland*, 197/86, EU:C:1988:323, paragraphs 20 et seqq; judgment of the ECJ of 13 July 1989, *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 171/88, EU:C:1989:328; judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraphs 13 et seqq.; judgment of the ECJ in *Bernini*, C-3/90, EU:C:1992:89; judgment of the ECJ of 18 July 2007, *Wendy Geven v Land Nordrhein-Westfalen*, C-213/05, EU:C:2007:438; judgment of the ECJ of 4 June 2009, *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, C-22/08, EU:C:2009:344; judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraphs 22 et seqq.; judgment of the ECJ in *Ninni-Orasche*, C-413/01, EU:C:2003:600.

146. Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraph 14; judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 26.

147. Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 26; judgment of the ECJ in *O*, C-432/14, EU:C:2015:643, paragraph 24.

148. Judgment of the ECJ in *Levin*, 53/81, EU:C:1982:105, paragraphs 15 et seq.

149. Judgment of the ECJ of 13 December 1989, *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten*, C-102/88, EU:C:1989:639, paragraphs 7 and 17.

150. Judgment of the ECJ in *Kempf*, 139/85, EU:C:1986:223, paragraphs 2 and 16.

151. Judgment of the ECJ in *Rinner-Kühn*, 171/88, EU:C:1989:328, paragraph 16.

152. Judgment of the ECJ of 14 December 1995, *Inge Nolte v Landesversicherungsanstalt Hannover*, C-317/93, EU:C:1995:438, paragraph 19; judgment of the ECJ of 14 December 1995, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz*, C-444/93, EU:C:1995:442, paragraph 18.

153. Judgment of the ECJ in *Geven*, C-213/05, EU:C:2007:438, paragraphs 7 and 27.

154. Judgment of the ECJ in *Ninni-Orasche*, C-413/01, EU:C:2003:600, paragraph 32.

155. Judgment of the ECJ in *Vatsouras/Koupatantze*, C-22/08, EU:C:2009:344, paragraphs 25 and 30.

The second important group of cases where this criterion is relevant consists of cases concerning activities that involve **social considerations**¹⁵⁶ or **traineeships/vocational training**.¹⁵⁷

According to the case law, it is irrelevant that the productivity of a person employed for the purpose of maintaining, restoring or improving his capacity for work because he is unable, for an indefinite period by reason of circumstances related to his situation, to work under normal conditions¹⁵⁸ is low or that, consequently, his remuneration was largely provided by subsidies from public funds. Neither the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker.¹⁵⁹ However, an activity cannot be regarded as an effective and genuine economic activity if it constitutes merely a means for rehabilitation or reintegration and the purpose of the employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.¹⁶⁰

Nevertheless, it is possible that a person, who in return for board and lodging and some pocket money does various jobs for about 30 hours a week as part of a personal socio-occupational reintegration program,¹⁶¹ is a worker within the meaning of Article 45 TFEU. The national court must in particular ascertain whether the services actually performed are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.¹⁶² This type of case does not appear to be relevant for the purpose of this study. Some relevant conclusions will be drawn where appropriate.

According to settled case law, the fact that a person is working as a trainee does not mean that he is not a worker if the training period is completed under the conditions of genuine and effective activity as an employed person.¹⁶³ Neither the

156. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraphs 5, 13 et seqq.; judgment of the ECJ in *Trojani*, C-456/02, EU:C:2004:488, paragraph 9; judgment of the ECJ in *Fenoll*, C-316/13, EU:C:2015:200, paragraph 35;

157. Judgment of the ECJ in *Bernini*, C-3/90, EU:C:1992:89, paragraph 16; judgment of the ECJ of 21 November 1991, *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir SARL*, C-27/91, EU:C:1991:441, paragraphs 7 et seq.; judgment of the ECJ in *Kurz*, C-188/00, EU:C:2002:694; judgment of the ECJ of 17 March 2005, *Karl Robert Kranemann v Land Nordrhein-Westfalen*, C-109/04, EU:C:2005:187, paragraphs 12 et seqq.; judgment of the ECJ of 30 March 2006, *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi*, C-10/05, EU:C:2006:220, paragraphs 19 et seqq.;

158. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 5.

159. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 15.

160. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 17.

161. Judgment of the ECJ in *Trojani*, C-456/02, EU:C:2004:488, paragraph 9.

162. Judgment of the ECJ in *Trojani*, C-456/02, EU:C:2004:488, paragraph 24. See also the judgment of the ECJ in *Fenoll*, C-316/13, EU:C:2015:200 and the judgment of the ECJ of 26 November 1998, *Mehmet Birden v Stadtgemeinde Bremen*, C-1/97, EU:C:1998:568.

163. Judgment of the ECJ in *Kranemann*, C-109/04, EU:C:2005:187, paragraph 13; judgment of the ECJ in *Mattern*, C-10/05, EU:C:2006:220, paragraph 21.

origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law.¹⁶⁴ As this type of case appears to be neither relevant nor beneficial for the purpose of this study, these cases will not be given any further consideration here.

2.7. Services for and under the direction of another person

One of the two core elements characterising an employment relationship is 'that for a certain period of time a person performs services for and under the direction of another person'.¹⁶⁵ Over time, the ECJ has had a number of opportunities to explain what this phrase means and to develop case law indicating which facts are relevant for classification as worker.

According to the case law of the ECJ, the Community concept of 'worker' must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.¹⁶⁶ The answer to the question as to whether a relationship of subordination exists within the meaning of the definition of the concept of 'worker' must, in each particular case, be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties.¹⁶⁷

The following facts are relevant for classification as worker and must be taken into account by the national courts:

- That the person is under the direction and supervision of his contractual partner.¹⁶⁸
- That it is the contractual partner that determines the services to be performed by the person and his working hours.¹⁶⁹
- The freedom for a person to choose his own working hours.¹⁷⁰

¹⁶⁴ Judgment of the ECJ in *Mattern*, C-10/05, EU:C:2006:220, paragraph 22.

¹⁶⁵ Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; judgment of the ECJ in *Brown*, 197/86, EU:C:1988:323, paragraph 21; judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 14; judgment of the ECJ of 17 July 2008, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*, C-94/07, EU:C:2008:425, paragraph 34.

¹⁶⁶ Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 35; judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 12.

¹⁶⁷ Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 46; judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36; judgment of the ECJ of 10 September 2015, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllenheim*, C-47/14, EU:C:2015:574, paragraph 46; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 37; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 69.

¹⁶⁸ Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 18.

¹⁶⁹ Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 18; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

¹⁷⁰ Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

- That the person must carry out instructions and must observe rules.¹⁷¹
- The sharing of the commercial risks of the business.¹⁷²
- The freedom for a person to engage his own assistants.¹⁷³
- That the conditions relating to work and pay are governed by collective labour agreements.¹⁷⁴
- That a person is ‘in fact engaged under fixed-term contracts of employment’.¹⁷⁵
- That the person is, for the duration of that relationship, incorporated into the undertaking concerned and thus forms an economic unit with it.¹⁷⁶
- The substance of the contract and the arrangements for giving effect to this document.¹⁷⁷
- That the contractual partner has powers of management and supervision and, where appropriate, may sanction the working person.¹⁷⁸
- That the contractual partner exercises powers of supervision.¹⁷⁹
- That the working person has more leeway in terms of choice of the type of work and tasks to be executed and of the manner in which that work or those tasks are to be performed.¹⁸⁰
- Who determines the time and place of work.¹⁸¹

For **members of the Board of Directors** of a capital company, the ECJ developed the following relevant criteria for the application of secondary law:

- The circumstances in which the Board Member was recruited.¹⁸²
- The nature of the duties entrusted to that person and the context in which those duties were performed.¹⁸³
- The scope of the person’s powers and the extent to which he was supervised within the company.¹⁸⁴
- The circumstances under which the person could be removed.¹⁸⁵

171. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 18.

172. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36.

173. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36; judgment of the ECJ of 10 September 2014, *Iraklis Haralambidis v Calogero Casilli*, C-270/13, EU:C:2014:2185, paragraph 33.

174. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 25. The *Becu* case concerned competition law, therefore some of the findings have to be seen in this context.

175. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 25.

176. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26.

177. Judgment of the ECJ in *Raccanelli*, C-94/07, EU:C:2008:425, paragraph 35.

178. Judgment of the ECJ in *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 30.

179. Judgment of the ECJ in *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 30.

180. Judgment of the ECJ in *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 33; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

181. Judgment of the ECJ in *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 33; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

182. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 47; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 38.

183. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 47; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 38.

184. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 47; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 38.

185. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 47; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 38.

- That the person is an integral part of the company.¹⁸⁶
- That the person has to report on his management to the supervisory board and to cooperate with that board.¹⁸⁷
- The fact that the dismissal decision can be adopted by a body which the person does not control and which is able at any time to take decisions contrary to the person's wishes.¹⁸⁸
- The fact that the working person is bound by a lasting bond which brought him to some extent within the organisational framework of the business of the company.¹⁸⁹
- The extent to which the manager, in his capacity as a shareholder in the company, is able to influence the will of that company's administrative body.¹⁹⁰
- Who had authority to issue the manager with instructions and to monitor their implementation.¹⁹¹
- That the manager carries out his activities under the direction or supervision of another body of that company.¹⁹²
- That the person can, at any time, be removed from his duties without such removal being subject to any restriction.¹⁹³
- That a director does not hold any shares in the company for which he carries out his functions.¹⁹⁴

A person who is the director of a company of which he is the sole shareholder does not carry out his activity in the context of a relationship of subordination, and therefore is to be treated not as a 'worker' but as pursuing an activity as a self-employed person.¹⁹⁵ However, the personal and property relations between spouses that result from marriage do not rule out the existence, in the context of the organisation of an undertaking, of a relationship of subordination characteristic of an employment relationship between the company and the spouse of the director of a company of which he is the sole shareholder.¹⁹⁶

2.8. Remuneration

It is an essential element of every employment relationship, in the context of Article 45 TFEU, that the working person receives remuneration in return for his activities.¹⁹⁷ This requirement has its origin in the fact that the rules on the free

186. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 48; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 39.

187. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 49.

188. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 50.

189. Judgment of the ECJ in *Holterman*, C-47/14, EU:C:2015:574, paragraph 45.

190. Judgment of the ECJ in *Holterman*, C-47/14, EU:C:2015:574, paragraph 47.

191. Judgment of the ECJ in *Holterman*, C-47/14, EU:C:2015:574, paragraph 47.

192. Judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraphs 39 et seq.

193. Judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraphs 39 et seq.

194. Judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraph 40.

195. Judgment of the ECJ of 27 June 1996, *P. H. Asscher v Staatssecretaris van Financiën*, C-107/94, EU:C:1996:251, paragraph 26; confirmed in the judgment of the ECJ in *Meeusen*, C-337/97, EU:C:1999:284, paragraph 13.

196. Judgment of the ECJ in *Meeusen*, C-337/97, EU:C:1999:284, paragraph 15.

197. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17; judgment of the ECJ in *Raccanelli*, C-94/07, EU:C:2008:425, paragraph 34.

movement of workers guarantee only the free movement of persons who pursue an economic activity.¹⁹⁸

The ECJ had to assess different constellations and, as far as we are aware, never negated the qualification of employment relationship only because of the requirement of remuneration. For example, it has stated that the fact that a person engaged in part-time work earns less than a person employed full time is irrelevant.¹⁹⁹ It is also irrelevant that the remuneration is below the level of the minimum means of subsistence²⁰⁰ and that the person seeks to supplement it by other lawful means of subsistence.²⁰¹ Even the fact that the remuneration is substantially less than the guaranteed minimum wage cannot be taken into account.²⁰²

The sole fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis does not deprive that person of his status of worker.²⁰³ It is also irrelevant that the remuneration mostly consists of benefits in kind (and only some pocket money) as long as these benefits constitute the consideration for the services performed.²⁰⁴

The origin of the funds from which the remuneration is paid is irrelevant²⁰⁵, even if the remuneration is largely provided by subsidies from public funds because of the fact that the person's productivity is low.²⁰⁶ Furthermore, it is not necessary that the remuneration is paid directly by the contractual partner.²⁰⁷

It is even possible to assume an employment relationship if a community (in this case, the Bhagwan Community) provides for the material needs of its members (and pays some pocket money) in any event, irrespective of the nature and the extent of their activities, if this work constitutes an essential part of participation in that community, because the services that the community provides to its members may be regarded as being an indirect *quid pro quo* for their work.²⁰⁸ For the qualification of 'window prostitutes' as self-employed (and therefore already allowed to work in the Netherlands in the transitional period), the ECJ required that the remuneration be paid to the person directly and in full.²⁰⁹ This requirement is likely to be met because of the special circumstances of the case and the activities in question. If this requirement was of general application to all contracts involving three parties, the person performing the tasks would always be considered a worker because of the share paid to the mediating party.

198. Judgment of the ECJ in *Walrave*, 36/74, EU:C:1974:140, paragraphs 4 and 10.

199. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 21.

200. Judgment of the ECJ in *Nolte*, C-317/93, EU:C:1995:438, paragraph 19.

201. Judgment of the ECJ in *Kempf*, 139/85, EU:C:1986:223, paragraph 14; judgment of the ECJ in *Vatsouras/Koupatantze*, C-22/08, EU:C:2009:344, paragraph 28.

202. Judgment of the ECJ in *Fenoll*, C-316/13, EU:C:2015:200, paragraph 33.

203. Judgment of the ECJ in *Agregate*, C-3/87, EU:C:1989:650, paragraph 36.

204. Judgment of the ECJ in *Trojani*, C-456/02, EU:C:2004:488, paragraph 22.

205. Judgment of the ECJ in *Kurz*, C-188/00, EU:C:2002:694, paragraph 32.

206. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 15.

207. Judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455, paragraphs 22, 49 and 51.

208. Judgment of the ECJ in *Steymann*, 196/87, EU:C:1988:475, paragraphs 4, 11 and 12.

209. Judgment of the ECJ in *Jany*, C-268/99, EU:C:2001:616, paragraph 70.

2.9. Subject of the activity

It is not possible to draw any conclusion with regard to the status of a person performing activities from the work carried out or from a comparison of the work and that carried out by another person.²¹⁰ The ECJ has also stated that the activities referred to in Article 56 TFEU are not to be distinguished by their nature from those in Article 45 TFEU, but only by the fact that they are performed outside the ties of a contract of employment.²¹¹ However, the nature of the activity is relevant for the question as to whether an activity is effective and genuine.²¹²

2.10. Nature of the relationship between the parties

The ECJ held very early that the nature of the relationship between the working person and the person receiving the work is of no consequence in regard to the definition of worker in EU law.²¹³ Therefore the national qualification of the working person as civil servant²¹⁴ or self-employed²¹⁵ is irrelevant. It is also irrelevant that the relationship is a relationship *sui generis* in national law.²¹⁶ The ECJ similarly stated that it was irrelevant that a person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association.²¹⁷

210. Judgment of the ECJ in *Raccanelli*, C-94/07, EU:C:2008:425, paragraph 36.

211. Judgment of the ECJ in *Walrave*, 36/74, EU:C:1974:140, paragraph 23.

212. Judgment of the ECJ in *Fenoll*, C-316/13, EU:C:2015:200, paragraphs 29 and 42; judgment of the ECJ in *Trojani*, C-456/02, EU:C:2004:488, paragraph 24; judgment of the ECJ in *Ninni-Orasche*, C-413/01, EU:C:2003:600, paragraph 27; judgment of the ECJ in *L. N.*, C-46/12, EU:C:2013:97, paragraph 43.

213. Judgment of the ECJ in *Bettray*, 344/87, EU:C:1989:226, paragraph 16; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 70.

214. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284.

215. Judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 71.

216. Judgment of the ECJ in *Fenoll*, C-316/13, EU:C:2015:200, paragraph 30; judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674, paragraph 40.

217. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 28; judgment of the ECJ of 10 December 1991, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, C-179/90, EU:C:1991:464, paragraph 13.

3. Conclusions of the review of the case law of the European Court of Justice

3.1. General trend: autonomous concept of 'worker' in EU law

The study of the case law of the ECJ shows that the Court frequently **goes beyond the national understanding of the concept of 'worker'** either by using the argument that an autonomous understanding must be applied or by applying the principle of *effet utile* in the case of directives that refer to a national understanding.

On the one hand, this concerns **public servants** who are not considered 'workers' in many Member States but are allocated a category of their own. As early as in the leading case *Lawrie-Blum*, the Court stated that the exception in Article 45 (4) TFEU ('employment in the public service') must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality. The posts excluded are confined to those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above.²¹⁸ In these cases, the ECJ does not refer to the status of the persons concerned but to the way in which the work is done – and if it is done in subordination, i.e. 'under the direction of another person', they fall within the scope of application of the relevant legislation.

The second approach that goes beyond the national concept of 'worker' involves the inclusion of **members of the board of directors** of a capital company who are sometimes not considered workers under national labour laws.²¹⁹ In its

²¹⁸. Judgment of the ECJ in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 27; see Temming F. (2016) Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven, *Soziales Recht*, 6 (4), p. 159.

²¹⁹. Judgment of the ECJ in *Danosa*, C-232/09, EU:C:2010:674; judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455; judgment of the ECJ in *Holterman*, C-47/14, EU:C:2015:574. See judgment of the ECJ in *Asscher*, C-107/94, EU:C:1996:251, paragraphs 24 et seqq.; judgment of the ECJ of 7 May 1998, *Clean Car Autoservice GesmbH v Landeshauptmann von Wien*, C-350/96, EU:C:1998:205, paragraphs 18 et seqq.; judgment of the ECJ in *Meeusen*, C-337/97, EU:C:1999:284, paragraphs 13 et seqq.; Temming F. (2016) Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven, *Soziales Recht*, 6 (4), p. 160.

more recent decisions, the ECJ extends this approach to **persons undergoing requalification training**²²⁰ as well as to **members of associations**²²¹. In this connection, however, the Court also considers the prerequisite of subordination to be fulfilled, and these decisions therefore do not hold much potential for any further development of the concept of 'worker' beyond the *Lawrie-Blum* formula.

On the other hand, there are also judgments of the ECJ indicating that the qualification of the relationship under national law influences the qualification under EU law. However, these cases concerned only the requirement of a real and genuine activity and not the question of whether the activities were performed for and under the direction of another person.²²²

In short, the ECJ has a **tendency to unify the concept of 'worker'** not only with regard to primary law but also in the field of secondary law. This is also the case with those directives that refer explicitly to a national understanding. Only recently, the ECJ argued in the context of the Temporary Agency Work Directive (2008/104/EC) that refers explicitly to the national understanding of 'worker' in Article 3(1)(a) as follows:

“To restrict the concept of “worker” as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law (...) is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.”²²³

Accordingly, it is very likely that the ECJ does not intend to limit the freedom of Member States to define the concept of 'worker' at national level but mainly seeks to avoid a situation where Member States exclude at their discretion certain categories of persons from the benefit of the protection intended by the directive concerned, even though the relationship between those persons and their contractual partners is not substantially different to the relationship between employees having the status of workers under national law and their employer.²²⁴ This approach serves to safeguard a consistent concept of 'worker' at national level and would most probably allow exemptions at national level where these can be attributed to factual differences and can thereby justify exclusion from the scope of protection of the directive concerned. It should be pointed out, however, that this line of argument merely circumvents restrictions to the concept of 'worker' at national level and does not extend the scope of protection beyond that already defined.

²²⁰. Judgment of the ECJ in *Balkaya*, C-229/14, EU:C:2015:455.

²²¹. Judgment of the ECJ in *Ruhrlandklinik*, C-216/15, EU:C:2016:883.

²²². Judgment of the ECJ in *Genc*, C-14/09, EU:C:2010:57, paragraph 27; judgment of the ECJ in *O*, C-432/14, EU:C:2015:643, paragraph 25.

²²³. Judgment of the ECJ in *Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 36.

²²⁴. See judgment of the ECJ in *Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraph 37.

3.2. Limited relevance of economic factors

For the purpose of this study, i.e. to understand how the ECJ goes beyond the perceived concept of the ‘worker’ by emphasising the core element of subordination, there are only a few factors to be identified that hold some potential for a different interpretation of the concept of ‘worker’ that also takes into account **economic aspects**. In addition to those elements highlighted in the field of competition law, we have identified four aspects that concern different elements of economic subordination and the (non-)performance of the person concerned on the market.

3.2.1. Sharing of the commercial risks of the business

In a relatively early decision concerning the restriction associated with the transitional arrangements on the free movement of workers, the ECJ had to qualify share fishermen who were paid on the basis of the proceeds of sale of their catches. The Court ruled that the question as to whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterising the arrangements between the parties, such as the sharing of the commercial risks of the business. In any event, the sole fact that a person is paid a ‘share’ and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker.²²⁵

3.2.2. Freedom to engage his/her own staff

As early as its judgment in *Agegate*²²⁶, the Court refers briefly to the freedom for a person to engage his own assistants as an argument against the status of ‘worker’. In the case of *Haralambidis*, it is also mentioned as a feature which is typically associated with the functions of an independent service provider that he has more freedom in the recruitment of his own staff.²²⁷ As an *argumentum e contrario*, it can be concluded that the fact that a person is not allowed to engage his own assistants is an indication of his qualification as a worker. On the other hand, it can also be argued that the use of auxiliary persons and even substitutes does not, under all circumstances, preclude the status of ‘worker’.

Another area in which the jurisdiction of the ECJ applies a broader understanding of the notion of ‘worker’, albeit one unconnected to economic dependence, involves the question of whether there has to be a **mutuality of obligations**. According to the case law of the ECJ, it is possible that a person who is not obliged to work when asked to do so is an employee.²²⁸ In *Allonby*, the ECJ clearly focused on the question of who is to determine the working time, the workplace and the content of the work and not

²²⁵. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36.

²²⁶. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36.

²²⁷. Judgment of the ECJ in *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 33.

²²⁸. Judgment of the ECJ in *Raulin*, C-357/89, EU:C:1992:87, paragraphs 9 et seqq; judgment of the ECJ in *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

of whether the employee is obliged to work when called upon to do so. However, it is unclear whether the ECJ views these cases as fixed-term employment contracts for each individual assignment or whether it is possible to have an employment contract without the obligation to work. Nevertheless, this could lead to an improvement in conditions for workers because of the restriction on consecutive fixed-term contracts that could result in the conclusion of an open-ended employment contract.

3.2.3. Conditions relating to work and pay are governed by collective labour agreements

The fact that conditions relating to work and pay are not negotiated individually between the provider and the recipient of the service but are governed by some kind of collective labour agreement is also considered an indication of an employment relationship. This is mentioned in the judgment in *Agegate*²²⁹ and also in *Becu*²³⁰ in the context of competition law.

However, this line of argument is somewhat circular: on the one hand, being subject to a collective agreement is an indicator of an employment contract; on the other, collective agreements are permitted under Article 101 TFEU only if they regulate employment relationships. Nevertheless, the main purpose is probably to provide a mechanism for determining remuneration. If the matter of pay is not freely negotiated between the contractual parties but is subject to other processes outside their direct influence, the service providers clearly do not really perform on a market, and this is therefore an argument in support of the status of 'worker'.

3.2.4. Being incorporated into the undertaking of the service recipient and forming an economic unit with it

In the context of competition law, performance on the market is a core element of being considered an 'undertaking', and the ECJ therefore emphasises that workers do not conduct themselves in this way. In its judgment in *Becu*²³¹, the Court states that, since the dockers whose status is in dispute are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, they do not in themselves constitute 'undertakings' within the meaning of Community competition law. The ECJ again refers to this in the recent case of *FNV Kunsten*.²³²

At present, this appears to be the argument with the greatest possible potential to go beyond the accepted concept of 'worker'. It should be borne in mind, however, that this argument was developed by the case law of the ECJ in defining an exemption from the ban on cartels that has a different aim to that of the application of protective labour laws.

²²⁹. Judgment of the ECJ in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36.

²³⁰. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 25.

²³¹. Judgment of the ECJ in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26.

²³². Judgment of the ECJ in *FNV Kunsten*, C-413/13, EU:C:2014:2411, paragraph 34.

3.2.5. Conclusion

As a **general conclusion**, it can be stated that the ECJ has so far discussed economic aspects mostly in the context of potentially excluding persons working in a relationship of personal subordination from the scope of application of provisions covering workers. This concerns the Court's reference to economic activity (see Chapter 2.5) and to real and genuine activities (see Chapter 2.6). It has not used such economic factors to extend the scope of application beyond those persons working not in a relationship of 'personal' subordination but in one based on some form of economic dependency, since they are not really performing on the market but are working in person for only one or a very small number of contractual partners. In only a few cases, most of which concerned not social policy but competition law, have such elements been taken into account.

4. Outlook: Is there any potential for change?

4.1. A purposive approach to defining the concept of 'worker'

As pointed out above, the concept of 'worker' is of relevance to both primary and secondary EU law and has been developed in the context of the fundamental freedom of movement for workers (Article 45 TFEU). The review of the case law shows that the basis for the concept of 'worker' remains the oft-cited *Lawrie-Blum* formula. At the core of this definition lies the element of subordination or – to use the legal terminology of Austria and Germany – of *persönliche Abhängigkeit* (personal dependency). Economic elements, usually the reference to a 'real and genuine activity', come into play only in the context of potentially excluding persons working in a relationship of personal subordination from the scope of application of provisions covering workers.

It is doubtful that the concept of 'worker' as embodied under Article 45 TFEU is a suitable starting point for the development of an autonomous European concept of 'worker' to be applied to more typical fields of labour law. Article 45 TFEU establishes a fundamental freedom to be made use of by workers and employers with a view to their deriving greater benefit from the European single market. This market-creating and, therefore, efficiency-oriented purpose is very different from those pursued by provisions usually included in the body of labour laws such as minimum wages, paid sickness leave, annual leave, working time regulation, collective bargaining and dismissal protection. These provisions are more concerned with safeguarding equity and voice²³³ or, as Davidov recently put it, countering democratic deficits and dependency²³⁴.

These observations on the purpose of the provisions referring to the concept of 'worker' are especially important in terms of going beyond the perceived scope of application of labour law associated with the employment contract as a relationship of personal subordination. In the context of the free movement of workers, many decisions involve issues of transitional periods with new Member States limiting the free movement of workers but not the freedom to provide services as a self-employed person. It is here that the difference between the two freedoms becomes readily apparent, but it will become less so after the transitional period has

²³³. See Beford S.F. and Budd J.W. (2009) *Invisible hands, invisible objectives: bringing workplace law and public policy into focus*, Stanford, Stanford University Press, p. 5.

²³⁴. Davidov G. (2016) *A purposive approach to labour law*, Oxford, Oxford University Press, p. 119.

expired and the freedoms are fully established. As for issues concerning the core of labour law, the object is altogether different, and a teleological interpretation based on the purpose (the *telos*) can lead to different results. Caution is therefore advised when transferring the concept of the employee developed in the context of the fundamental freedoms to other fields of labour law based on other considerations.²³⁵ For a purposive approach can lead to a different understanding of the concept of ‘worker’ in secondary law.

When defining the concept of ‘worker’, **the different aims of the various acts of EU primary and secondary legislation** must be taken into account. Criteria that apply in cases that concern classification in relation to one fundamental freedom or another may differ from those that involve protective standards for persons working with limited real autonomy owing to their economic restrictions. The review of the case law clearly shows that this line of argument has not been used to distinguish between the different purposes of the various legislative acts, and that it has the potential to push the boundaries of the concept of ‘worker’. It should therefore be pursued in future cases at the outer boundaries of the traditional concept of ‘worker’.

4.2. Going beyond the received concept of ‘worker’

One of the major findings of our review is that the ECJ has not yet used economic factors to extend the scope of application beyond those persons working not in a relationship of ‘personal’ subordination but in one based on some form of economic dependency, since they are not really performing on the market but are working in person for only one or a very small number of contractual partners. In only a few cases, most of which concerned **competition law**, have such elements been taken into account, albeit with no real conclusive findings. We feel that it would be most appropriate to develop this further, while taking into account that the ban on cartels that serves to safeguard a functioning market is also not applicable to the mentioned group, as they are confronted with the same issues as ‘workers’ who provide their services in a position of subordination. Given that the exemption from Article 101 TFEU is an unwritten one, progress in extending the scope of protection beyond those working in a relationship of subordination is, in our view, most likely to be made in this field.

As pointed out, the group of persons in a comparable position to workers are those who do not work in a relationship of subordination (or of personal dependency) but who are economically dependent on their contractual partners, as they do not perform fully on the market. The following criteria may serve as indicators of this economic dependency:

- The services are provided in person; the right to use substitutes is limited or does not make sense economically.

²³⁵ This is also pointed out by Rebhahn R. and Reiner M. (2012) Article 153, paragraph 6, in Schwarze J. (ed.) EU-Kommentar, 3rd ed., Baden-Baden, Nomos Verlag, paragraph 6.

- The work is provided for only one or a very small number of contracting parties. The person concerned therefore does not perform fully on the market but depends on a limited number of contractual partners.
- Lack of own operating resources and/or employees;
- Restrictions to work for other parties;
- Dependence on the earnings for the living of the person concerned.

However, it is important to note that, in our view, these elements are to be considered as mere indicators and that they should be used in a flexible way in response to the existing diversity of work arrangements and also to take account of any new developments. This implies that the above-mentioned criteria do not necessarily have to be met in any given individual case, but rather that it suffices to demonstrate that the criteria that define persons as being economically dependent on their contractual partners outweigh those that are typical for an entrepreneur conducting his or her own business on the market.

This group of persons is in a similarly vulnerable situation to that of traditional workers. This is mainly the result of the fact they do not have the necessary bargaining power to secure fair contracts that reflect their interests in an appropriate way. The provisions of labour law should therefore also apply to them where necessary. Accordingly, this brings us full circle back to competition law and the exemption of collective bargaining that exists because of market failures and because collective bargaining is able to circumvent them with as little state intervention as possible.

By applying the indicators referred to above, the following groups are likely to be included in this extended concept of 'worker': journalists, freelancers (especially in the communications and creative industries), partners in law firms, crowdworkers, contractors in the research sector and craftsmen. Of major importance will be the fact that they work for only a limited number of contractual partners.

4.3. Relevance of the regulatory level

In the introduction, we mentioned the proposal of the European Commission for a Directive on Transparent and Predictable Working Conditions in the EU²³⁶ and that the European Commission suggests clarifying the personal scope of this Directive in line with the parameters set out by the ECJ to identify an employment relationship by including criteria which would help achieve more consistency in the personal scope of application of this Directive. It intends to make clear that the Directive applies to every type of person that, for a certain period of time, performs services for and under the direction of another person in return for remuneration (Article 2 (1) (a) of the proposed Directive), including domestic workers, temporary agency workers, on-demand workers, intermittent workers, voucher-based workers and platform workers (recital 7). Although we very much welcome the clarification that certain types of contractual arrangements do

²³⁶ COM(2017) 797 final.

not exclude persons *per se* from the scope of protection of the Directive, we do not think that the definition goes beyond the received concept of ‘worker’, as it uses the ‘classic’ *Lawrie-Blum* formula. If one sees a necessity to go beyond this concept, this proposal may prove counterproductive, as it closes the door to the line of argument proposed here to interpret the concept of ‘worker’ in an expansive way and to substitute, where appropriate, a lack of subordination with economic arguments.

We would therefore recommend making full use of the opportunity afforded by the proposal for a Directive on Transparent and Predictable Working Conditions in order to go beyond the received concept and also to include the group described in Chapter 4.2 in the definition. This is in line with the response of the European Trade Union Confederation (ETUC) to the first phase consultation: ‘However, ETUC argued additionally for the inclusion of self-employed in the scope of application. Trade unions stated the need to cover, in particular, casual workers, and those in new and atypical forms of employment.’²³⁷ Furthermore, we would warn against including a definition that does not go beyond the received concept, as it has the potential not only to provide a rather narrow definition of the scope of protection but also to influence the interpretation of the concept of ‘worker’ in other contexts.

This example clearly demonstrates the advantages and pitfalls of a statutory definition of the concept of ‘worker’ at European level. On the one hand, it secures uniform application within the EU by providing transparent guidelines and prevents Member States from sidestepping the European concept by means of exemptions and loopholes. On the other hand, an excessively narrow definition hampers the application of labour regulations to persons who are in a similar situation and, therefore, are also in need of protection but do not fall under the definition.

²³⁷. COM(2017) 6121 final, p. 4.

References

- Barnard C. (2012) EU employment law, 4th ed., Oxford, Oxford University Press.
- Beford S.F. and Budd J.W. (2009) Invisible hands, invisible objectives: bringing workplace law and public policy into focus, Stanford, Stanford University Press.
- Brodil W., Risak M. and Wolf C. (2016) Arbeitsrecht in Grundzügen, Vienna, LexisNexis.
- BusinessEurope (2018) Commission proposal for a Directive on transparent and predictable working conditions – BusinessEurope's views, Brussels, 26.02.2018. <https://www.buinessurope.eu/publications/commission-proposal-directive-transparent-and-predictable-working-conditions>
- Davidov G. (2016) A purposive approach to labour law, Oxford, Oxford University Press.
- Davies A.C.L. (2012) EU labour law, Cheltenham, Edward Elgar Publishing.
- Davies P. and Freedland M. (1983) Kahn-Freund's labour and the law, London, Stevens.
- De Stefano V. (2016) The rise of the 'just-in-time workforce': on-demand work, crowdwork and labour protection in the 'gig-economy', Geneva, International Labour Office.
- ETUC (2018) ETUC Position on the draft Transparent and Predictable Working Conditions Directive, adopted at the Executive Committee Meeting of 7-8 March 2018, Brussels, ETUC. https://www.etuc.org/sites/default/files/document/files/etuc_position_on_the_draft_transparent_and_predictable_working_conditions_directive_updated.pdf
- European Commission (2006) Green paper – Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final, 22 November 2006.
- European Commission (2007) Outcome of the public consultation on the Commission's green paper "Modernising labour law to meet the challenges of the 21st century", COM(2007) 627 final, 24 October 2007.
- European Commission (2016a) Key economic, employment and social trends behind a European Pillar of Social Rights, SWD(2016) 51 final, 8 March 2016.
- European Commission (2016b) Launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final, 8 March 2016.
- European Commission (2017a) First phase consultation of social partners under Article 154 TFEU on a possible revision of the written statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, COM(2017) 2611 final, 26 April 2017.
- European Commission (2017b) Second phase consultation of social partners under Article 154 TFEU on a possible revision of the written statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, COM(2017) 6121 final, 21 September 2017.
- European Commission (2017c) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final, 21 December 2017.

- European Commission (2017d) REFIT evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), SWD(2017) 205 final, 26 April 2017.
- Harris S.D. and Krueger A.B. (2015) A proposal for modernizing labor laws for twenty-first-century work: the 'independent worker', Discussion Paper 2015-10, Washington, DC, The Hamilton Project.
- Junker A. (2016) Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs, Europäische Zeitschrift für Arbeitsrecht, 2.
- Lobel O. (2016) The gig Economy & the future of employment and labor law, Research Paper Series 16-223, San Diego, University of San Diego School of Law Legal Studies.
- Rebhahn R. (2016) Neue Formen der Arbeit – Unionsrechtliche Aspekte, in Risak M. and Tomandl T. (eds.) Wie bewältigt das Recht moderne Formen der Arbeit?, Vienna, New Academic Press.
- Rebhahn R. and Reiner M. (2012) Article 153, paragraph 6, in Schwarze J. (ed.) EU-Kommentar, 3rd ed., Baden-Baden, Nomos Verlag.
- Riesenhuber K. (2012) European employment law, Cambridge, Intersentia.
- Risak M. (1999) Verwirrungen um den Arbeitnehmer-Begriff des Arbeitnehmerschutzgesetzes, Vienna, Manz Verlag.
- Risak M. (2010) Labour law in Austria, The Hague, Kluwer Law International.
- Risak M. (2015) 2003/88/EC: working time, in Schlachter M. (ed.) EU labour law: a commentary, The Hague, Kluwer Law International, 385-420.
- Schlachter M. (ed.) (2015) EU labour law: a commentary, The Hague, Kluwer Law International.
- Schneider H. and Wunderlich N. (2012) Article 45 TFEU, in Schwarze J. (ed.) EU-Kommentar, 3rd ed., Baden-Baden, Nomos Verlag.
- Temming F. (2016) Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven, Soziales Recht, 6 (4), 158-161.
- UEAPME (2018) UEAPME position on a proposal for a directive on transparent and predictable working conditions in the European Union COM(2017) 797, Brussels, UEAPME, 26.02.2018. https://ueapme.com/IMG/pdf/180226_UEAPME_position_on_transparent_and_predictable_working_conditions.pdf
- Weiss M. and Schmidt M. (2008) Labour law and industrial relations in Germany, The Hague, Kluwer Law International.
- Ziegler K. (2011) Arbeitnehmerbegriffe im Europäischen Arbeitsrecht, Baden-Baden, Nomos Verlag.

All links were checked on 30.04.2018.

Annex I

List of cases included in the review of the case law of the European Court of Justice

- Case 152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost*, EU:C:1974:13
- Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale and Others*, EU:C:1974:140
- Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)*, EU:C:1976:56
- Case 13/76, *Gaetano Donà v Mario Mantero*, EU:C:1976:115
- Case 53/81, *D.M. Levin v Staatssecretaris van Justitie*, EU:C:1982:105
- Case 139/85, *R. H. Kempf v Staatssecretaris van Justitie*, EU:C:1986:223
- Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, EU:C:1986:284
- Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland*, EU:C:1988:323
- Case C-3/87, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.*, EU:C:1989:650
- Case 196/87, *Udo Steymann v Staatssecretaris van Justitie*, EU:C:1988:475
- Case 344/87, *I. Bettray v Staatssecretaris van Justitie*, EU:C:1989:226
- Case 171/88, *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG*, EU:C:1989:328
- Case C-102/88, *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten*, EU:C:1989:639
- Case C-357/89, *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen*, EU:C:1992:87
- Case C-3/90, *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*, EU:C:1992:89
- Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, EU:C:1991:464
- Case C-27/91, *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir SARL*, EU:C:1991:441
- Case C-444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz*, EU:C:1995:442
- Case C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, EU:C:1995:438
- Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, EU:C:1995:463
- Case C-107/94, *P. H. Asscher v Staatssecretaris van Financiën*, EU:C:1996:251
- Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, EU:C:2000:201
- Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430

- Case C-350/96, *Clean Car Autoservice GesmbH v Landeshauptmann von Wien*, EU:C:1998:205
- Case C-85/96, *María Martínez Sala v Freistaat Bayern*, EU:C:1998:217
- Case C-1/97, *Mehmet Birden v Stadtgemeinde Bremen*, EU:C:1998:568
- Case C-337/97, *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, EU:C:1999:284
- Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, EU:C:1999:419
- Case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, EU:C:2001:616
- Case C-188/00, *Bülent Kurz, né Yüce v Land Baden-Württemberg*, EU:C:2002:694
- Case C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, EU:C:2003:600
- Case C-256/01, *Debra Allonby v Accrington & Rossendale College and Others*, EU:C:2004:18
- Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)*, EU:C:2004:488
- Case C-543/03, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, EU:C:2005:364
- Case C-109/04, *Karl Robert Kranemann v Land Nordrhein-Westfalen*, EU:C:2005:187
- Case C-10/05, *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi*, EU:C:2006:220
- Case C-213/05, *Wendy Geven v Land Nordrhein-Westfalen*, EU:C:2007:438
- Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772
- Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, EU:C:2006:784
- Case C-116/06, *Sari Kiiski v Tampereen kaupunki*, EU:C:2007:536
- Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*, EU:C:2008:425
- Case C-319/07 P, *3F v Commission of the European Communities*, EU:C:2009:435
- Case C-22/08, *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, EU:C:2009:344
- Case C-428/09, *Union syndicale Solidaires Isère*, EU:C:2010:612
- Case C-14/09, *Hava Genc v Land Berlin*, EU:C:2010:57
- Case C-232/09, *Dita Danosa v LKB Līzings SIA*, EU:C:2010:674
- Case C-519/09, *Dieter May v AOK Rheinland/Hamburg*, EU:C:2011:221
- Case C-149/10, *Zoi Chatzi v Ypourgos Oikonomikon*, EU:C:2010:534
- Case C-46/12, *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, EU:C:2013:97
- Case C-316/13, *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, EU:C:2015:200
- Case C-270/13, *Iraklis Haralambidis v Calogero Casilli*, EU:C:2014:2185
- Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411
- Case C-47/14, *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllenheim*, EU:C:2015:574

Case C-229/14, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*,
EU:C:2015:455
Case C-432/14, *O v Bio Philippe Auguste SARL*, EU:C:2015:643
Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*,
EU:C:2016:883

Annex II

Overview of the facts and the main findings of selected important ECJ decisions

1. ECJ 53/81 – *Levin*

Facts of the case: Mrs Levin, a British national, applied for a residence permit in the Netherlands. Her application was rejected on the ground that *inter alia* she could not be regarded as a ‘favoured EEC citizen’ because her salary was too low.

The ECJ had to answer the questions of whether Mrs Levin was a worker within the meaning of EU Law and whether the right to enter and reside in the territory of a Member State may be denied to a worker whose main objectives, pursued by means of his or her entry and residence, are different from that of the pursuit of an activity as an employed person.

Main findings of the ECJ: The terms ‘worker’ and ‘activity as an employed person’ may not be defined by reference to the national laws of the Member States but have a Community meaning and may not be interpreted restrictively. The concepts of ‘worker’ and ‘activity as an employed person’ must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact, obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration. No distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income. However, whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.

The advantages which Community law confers in the name of that freedom may be relied upon only by persons who actually pursue or seriously wish to pursue activities as employed persons. Provided that they pursue or wish to pursue an activity which is an effective and genuine activity as an employed person, the motives which may have prompted the worker to seek employment in the Member State concerned are of no account and must not be taken into consideration.

2. ECJ 66/85 – *Lawrie-Blum*

Facts of the case: *Deborah Lawrie-Blum* is a British national, who, after passing the examination for the profession of teacher at a *Gymnasium* [secondary

school], was refused admission, on the ground of her nationality, to the *Vorbereitungsdienst*, a period of preparatory service leading to the Second State Examination which qualifies successful candidates for appointment as teachers in a *Gymnasium*. A trainee teacher undergoing a period of service as preparation for the teaching profession enjoys civil service status and provides services by conducting classes for which he receives remuneration.

Main findings of the ECJ: The term 'worker' must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. **The essential feature of an employment relationship, however, is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration.** [NB: This phrase is widely referred to as the *Lawrie-Blum* formula.] In the present case, it is clear that, during the entire period of preparatory service, the trainee teacher is under the direction and supervision of the school to which he is assigned. It is the school that determines the services to be performed by him and his working hours, and it is the school's instructions that he must carry out and its rules that he must observe. The fact that teachers' preparatory service, like apprenticeships in other occupations, may be regarded as practical preparation directly related to the actual pursuit of the occupation in point is not a bar to the application of Article 48 (1) of the EEC Treaty (now: Art. 45 (1) TFEU) if the service is performed under the conditions of an activity as an employed person. Consequently, a trainee teacher who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration must be regarded as a worker within the meaning of Art. 48 (1) of the EEC Treaty, irrespective of the legal nature of the employment relationship.

The period of preparatory service for the teaching profession cannot be regarded as employment in the public service within the meaning of Art. 48 (4) of the EEC-Treaty (now Art. 45 (3) TFEU) to which nationals of other Member States may be denied access.

3. ECJ 3/87 – *AGEGATE*

Facts of the case: The applicant in the main proceedings is the owner of a fishing vessel, which is registered in the United Kingdom and flies the British flag. The conditions relating to the crew of the fishing vessel, which was fishing with use of English quotas, were worded as follows: "(i) *At least 75% of the crew must be British citizens, or EEC nationals [...] ordinarily resident in the United Kingdom, Isle of Man or Channel Islands [...].* (ii) *The skipper and all the crew must be making contributions to United Kingdom National Insurance [...].*"

Main findings of the ECJ: While Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must be nationals of the Member States of the Community, Community law precludes a Member State from

requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State. Save in those cases where Regulation No 1408/71 of the Council otherwise provides, Community law does not preclude a Member State from requiring that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that Member State.

Articles 55 and 56 of the 1985 Act of Accession (Spain) introduce a derogation from the principle of the free movement of workers laid down in Article 48 of the EEC Treaty (now: Art. 45 TFEU) for Spanish nationals. The national court asks whether fishermen working on board British vessels must be regarded as workers when they are paid as share fishermen, that is to say on the basis of the proceeds of sale of their catches. This question was important, because no such derogation existed for self-employed.

The question whether a given relationship falls outside an employment relationship must be answered in each case on the basis of all the factors and circumstances characterizing the arrangements between the parties, such as, for example, **the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants**. In any event, the sole fact that a person is **paid a “share”** and that his **remuneration may be calculated on a collective basis** is not of such a nature as to deprive that person of his status of worker.

4. ECJ 357/89 – *Raulin*

Facts of the case: Ms *Raulin*, a French national, requested study finance in the Netherlands after working there under an “on-call contract” (*oproepcontract*). Under such a contract, no guarantee is given as to the hours to be worked and, often, the person involved works only a very few days per week or hours per day. The employer is liable to pay wages and grant social advantages only in so far as the worker has actually performed work. Furthermore, the Government stated at the hearing that under such an *oproepcontract* the employee is not obliged to heed the employer’s call for him to work.

Main findings of the ECJ: In order to be regarded as a worker, a person must perform **effective and genuine activities to the exclusion of activities on such a small scale as to be purely marginal and ancillary**. The essential characteristic of an employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration. In this context, the **nature of the legal relationship between the employee and the employer is not decisive** in regard to the application of Art. 48 of the EEC Treaty (now: Art. 45 TFEU). Therefore a worker employed under an *oproepcontract* is not precluded by reason of his conditions of employment from being regarded as a worker within the meaning of Art. 48 of the EEC Treaty.

The national court may, however, when assessing the **effective and genuine nature of the activity** in question, take account of the **irregular nature** and **limited duration of the services actually performed** under a contract for occasional employment. The fact that the person concerned worked only a **very limited number of hours** in a labour relationship may be an indication that the activities exercised are **purely marginal and ancillary**. The national court may also take account, if appropriate, of the fact that the person must remain available to work if called upon to do so by the employer.

5. ECJ C-22/98 – *Becu*

Facts of the case: Mr *Becu* and Mrs *Verweire* and the companies NV *Smeg* ('*Smeg*') and NV *Adia Interim* ('*Adia Interim*') were accused of having caused dock work to be performed in the Ghent port area by non-recognised dockers. According to the law organising dock work joint committees of employers and workers are to be established by the King. Collective agreements may be concluded within the joint committees. In that case they may, at the request of one of the organisations or the body within which they have been concluded, be made mandatory by the King. *Smeg* operates a grain warehousing business in the Ghent port area. Its activities consist in the loading and unloading of grain boats and in the storage of grain on behalf of third parties. For work carried out on the quays, that is to say 'dock work' *stricto sensu Smeg* used recognised dockers. For the other work, which takes place when the grain is in the silos it uses not recognised dockers but workers whom it employs itself or temporary workers made available to it by *Adia Interim*.

Main findings of the ECJ: First the ECJ assessed whether the dockers in this case could be **qualified as undertakings or had to be qualified as workers**. "The conditions relating to work and pay, in particular those of recognised dockers in the Ghent port area, are governed by collective labour agreements [...]. Furthermore, the Belgian Government maintains, without being contradicted on this point, that the recognised dockers used by the various undertakings which commission dock work are in fact engaged under fixed-term contracts of employment, as a rule for short periods, and for the purpose of performing clearly defined tasks. It must therefore be concluded that the employment relationship which recognised dockers have with the undertakings for which they perform dock work is characterised by the fact that they **perform the work in question for and under the direction of each of those undertakings**, so that they must be regarded as 'workers' within the meaning of Article 48 of the EC Treaty [...]. Since they are, for the duration of that relationship, **incorporated into the undertakings** concerned and thus **form an economic unit with each of them**, dockers **do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law.**" [highlighting by the authors]

It should be added that, even taken collectively, the recognised dockers in a port area cannot be regarded as constituting an undertaking. A person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association.

6. ECJ C-456/02 – *Trojani*

Facts of the case: Mr *Trojani* is a French national who after a short stay in Belgium in 1972, during which he is said to have worked as a self-employed person in the sales sector, returned there in 2000. He resided first at a campsite and then from December 2001 in Brussels. He was given accommodation in a Salvation Army hostel, where in return for board and lodging and some pocket money he did various jobs for about 30 hours a week as part of a personal socio-occupational reintegration program. As he had no resources, he approached the *Centre public d'aide sociale de Bruxelles* and applied for the minimum subsistence allowance.

Main findings of the ECJ: Neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law.

The Court has held that activities cannot be regarded as a real and genuine economic activity if they constitute merely a **means of rehabilitation or reintegration** for the persons concerned. However, that conclusion can be explained only by the particular characteristics of the case in question, which concerned the situation of a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, are unable to work under normal conditions. In the present case Mr *Trojani* performs, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration program, in return for which he receives benefits in kind and some pocket money. The Salvation Army has the task of receiving, accommodating and providing psycho-social assistance appropriate to the recipients in order to promote their autonomy, physical well-being and reintegration in society. The national court must in particular ascertain whether the services actually performed by Mr *Trojani* are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration program, and the nature and details of performance of the services.

7. ECJ C-14/09 – *Hava Genc*

Facts of the case: Ms *Genc* entered Germany in 2000 on a visa in order to join her spouse, a Turkish national, who was already living in that Member State. The spouses separated at an unspecified date. Since 18 June 2004, Ms *Genc* has been working as a cleaner. According to the contract of employment the working time per week is 5.5 hours at an hourly rate of EUR 7.87. 2007 Ms *Genc* applied for a further extension of her residence permit. At that time, she was still receiving, in addition to the income from her employment, social security benefits. Those benefits stopped in May 2008 at Ms *Genc*'s request.

Main findings of the ECJ: Neither the **limited amount of the remuneration**, nor the fact that the person in question seeks to **supplement that remuneration by other means of subsistence** such as financial assistance drawn from the public funds of the State in which he resides, can have any consequence in regard to whether or not the person is a 'worker' for the purposes of European Union law. Having established that Ms *Genc* performs services for and under the direction of an employer in return for remuneration, the national court has established the existence of the constituent elements of any employment relationship, namely **subordination** and the **payment of remuneration in return for services rendered**.

However, the fact that a person works for only a **very limited number of hours** in the context of an employment relationship may be an indication that the **activities performed are marginal and ancillary**. But independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC. The overall assessment of Ms *Genc*'s employment relationship makes it necessary to take into account factors relating not only to the number of working hours and the level of remuneration but also to the right to 28 days of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years. Those factors are capable of constituting an indication that the professional activity in question is real and genuine.

8. ECJ C-232/09 – *Danosa*

Facts of the case: Ms *Danosa* was the **sole member** of LKB's – a public limited company – **Board of Directors**. LKB's supervisory board set the remuneration of the members of the company's Board of Directors, together with other related conditions, and entrusted the chairman of the supervisory board with concluding the agreements necessary to ensure implementation of that decision. The general meeting of shareholders of LKB decided to remove Ms *Danosa* from her post as a member of the Board of Directors.

Main findings of the ECJ: The concept of 'worker' for the purposes of the Pregnant Workers Directive 92/85 **may not be interpreted differently according to each national law**. The ECJ used the same concept as is used for Art. 45 TFEU. The ***sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law**.

Ms *Danosa* **provided services** to LKB, **regularly and in return for remuneration, by performing the duties assigned to her**, under the company's statutes and the rules of procedure of the Board of Directors, as

sole Board Member. It is irrelevant in that regard that Ms *Danosa* was herself responsible for the establishment of those rules. Whether a relationship of subordination exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties. The fact that Ms *Danosa* was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a **relationship of subordination** to that company: it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.

Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction, satisfy *prima facie* the criteria for being treated as workers.

9. ECJ C-428/09 – *Iseré*

Facts of the case: The French legislation did not provide an entitlement to a daily rest period with a minimum duration of 11 consecutive hours for casual and seasonal members of staff at holiday and leisure centres, employed under educational commitment contracts. The *Union syndicale Solidaire Iseré* claims that this decree is contrary to the Working Time Directive 2003/88.

Main findings of the ECJ: By its first question, the referring court asks whether persons employed under contracts such as the educational commitment contracts at issue, carrying out casual and seasonal activities in holiday and leisure centres, and completing a maximum of 80 working days per annum, fall within the personal scope of the Working Time Directive 2003/88. It must be borne in mind that Directive 2003/88 as well as Directive 89/391, to which it refers, do not provide that the definition of a 'worker' to be derived from national legislation and/or practices. The consequence of this is that, for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the law of Member States but has an **autonomous meaning** specific to EU law, which is the same as for Art. 45 TFEU. It is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved. The ***sui generis* legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law.** The fact that a person is employed under a **fixed-term contract is irrelevant.**

Having regard to the information provided by the referring court, it is evident that persons such as the casual and seasonal staff employed under the contract at issue in the main proceedings, completing a maximum of 80 working days per annum in holiday and leisure centres, come within the scope of the concept of 'workers' and therefore are within the scope of Directive 2003/88.

10. ECJ C-519/09 – *May*

Facts of the case: Mr *May* was unable to work for health reasons for most of the period from 24 April 2006 until leaving his post on 31 March 2009. Mr *May* took paid annual leave for the years 2008 and 2009 and now claims financial compensation in lieu of 11 days' annual leave from 2006 and 28 days' annual leave from 2007 that he was unable to take. The referring court asks, in essence, whether the concept of 'worker' for the purpose of Art. 7 of the Working Time Directive 2003/88 covers an employee of a body governed by public law in the social security sector.

Main findings of the ECJ: In that regard, it must be borne in mind, first, that in accordance with Art. 1(3) of Working Time Directive 2003/88, in conjunction with Article 2 of Directive 89/391, to which it refers, those directives **apply to all areas of activity, private and public**. According to settled case-law, the **concept of 'worker'** within the meaning of Article 45 TFEU is **independent in scope and must not be interpreted narrowly**. Any person who pursues **activities that are real and genuine**, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (note: application of the *Lawrie Blum*-formula). This information, given by the Court as regards the concept of 'worker' within the meaning of Article 45 TFEU, **applies in respect of the same concept used in the legislative measures referred to in Article 288 TFEU** (note: secondary EU law) too.

In that regard, it must be stated that there is nothing in the order for reference to cast doubt on the fact that the employment relationship between Mr *May* and his employer displayed the characteristics of an employment relationship. Finally, it should be pointed out that the Court has already decided that, there being no distinction in the exception referred to in Article 45 (4) TFEU, concerning employment in the public service, it is of no interest whether a worker is engaged as a workman (*ouvrier*), a clerk (*employé*), or an official (*fonctionnaire*) or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot, therefore, provide a criterion for interpretation appropriate to the requirements of European Union law.

11. ECJ C-413/13 – *FNV Kunsten*

Facts of the case: Independent service providers in the Netherlands have the right to join any trade union or employers' or professional association. Therefore, employers' federations and organisations representing employees may conclude a collective labour agreement in the name and on behalf not only of employees, but also of independent service providers who are members of those organisations. The Netherlands Musicians' Union, an employees' association, on the one hand, and the Association of Foundations for Substitutes in Dutch Orchestras, an employers' association, on the other, concluded a collective labour agreement relating to musicians substituting for members of an orchestra ('the substitutes'). That collective labour agreement laid down minimum fees not only for substitutes hired under an employment contract, but also for substitutes who carry on their activities under a contract for professional services, who are not regarded as 'employees'.

Main findings of the ECJ: Agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU (note: ban on cartels).

First, as regards the nature of that agreement, it is clear that the agreement was concluded in the form of a collective labour agreement. However, that agreement is the result of negotiations between an employers' organisation and employees' organisations which also represent the interests of self-employed substitutes. Although they perform the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are, in principle, 'undertakings' within the meaning of Art. 101(1) TFEU, for they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal. Therefore a collective labour agreement for self-employed services providers, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.

This is not true if these self-employed services providers are in fact '**false self-employed**', that is to say, service providers in a situation comparable to that of employees. A service provider can lose his status of an independent trader, and hence of an undertaking, if he does not **determine independently his own conduct on the market**, but is **entirely dependent on his principal**, because he **does not bear any of the financial or commercial** risks arising out of the latter's activity and **operates as an auxiliary within the principal's undertaking**. Also the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration. The **status of 'worker'** within the meaning of EU law is **not affected by the fact that a person has been hired as a self-employed**

person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his **freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.**

As regards the purpose of the collective labour agreement at issue in the main proceedings, it must be held that the analysis in the light of the case-law would be justified, on that point, only if the referring court were to classify the substitutes involved in the main proceedings not as 'undertakings' but as 'false self-employed'.

12. ECJ C-270/13 – *Haralambidis*

Facts of the case: Mr *Haralambidis*, a Greek national, was nominated for the office of the President of the Port Authority of Brindisi (Italy) and was appointed by decree of the Minister of Infrastructure and Transport. The referring court has doubts concerning the nature of the activity exercised by the President of a Port Authority.

Main findings of the ECJ: Subordination and the payment of remuneration are constituent elements of all employment relationships, in so far as the professional activity at issue is effective and genuine. With regard to subordination, it follows from the applicable law that the Minister has powers of management and supervision and, where appropriate, may sanction the President of a Port Authority. The Minister appoints the president of such an authority for a term of four years renewable once and may remove him if the three-year operational plan relating to management of the port is not approved and if the balance sheet is in deficit, that is to say, in the event of bad financial management. The termination of the mandate of the President of a Port Authority by the Minister may be ordered where there are found to be important irregularities concerning management. Furthermore, the Minister exercises powers of supervision in so far as he approves the decisions of the President of a Port Authority.

On the other hand the post of President of a Port Authority **lacks the features which are typically associated with the functions of an independent service provider**, namely, more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff. It follows that the duties of the President of a Port Authority are performed under the management and supervision of the Minister, and therefore in a relationship of subordination.

The powers of the President of a Port Authority are a marginal part of his duties, which are generally of a technical and financial management nature and which cannot be amended by the exercise of those powers. Furthermore, according to the Italian Government, those powers are intended to be exercised solely occasionally or in exceptional circumstances. Therefore, Art. 45 (4) TFEU must be interpreted

as not authorising a Member State to reserve to its nationals the exercise of the duties of President of a Port Authority.

13. ECJ C-229/14 – *Balkaya*

Facts of the case: *Kiesel Abbruch*, a limited liability company incorporated under German law, employed Mr *Balkaya*. *Kiesel Abbruch* terminated all of the contracts of employment of its employees, including Mr *Balkaya*. *Kiesel Abbruch* did not give notification of the projected collective redundancies to the *Bundesagentur für Arbeit*. 19 persons, including Mr *Balkaya*, were amongst the workers normally employed by *Kiesel Abbruch* in that establishment. However, the national court is unclear whether, in addition, two other persons must be counted in that category, in order to determine whether the threshold of 20 persons was attained. Therefore, the question arises as to whether it is appropriate also to include in that category of employed workers a **director** (Mr L.), and a **person undergoing requalification training** (Ms S.).

Main findings of the ECJ: By harmonising the rules applicable to collective redundancies, the EU legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for undertakings in the EU. Therefore the concept of 'worker', referred to in Article 1 (1) (a) of the Mass Redundancy Directive 98/59, cannot be defined by reference to the legislation of the Member States but must be given an **autonomous and independent meaning**. It must be observed that whether a relationship of subordination exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties. The fact that a person is a **member of the board of directors** of a capital company is not enough in itself to rule out the possibility that that person is in a relationship of subordination. It is necessary to consider the circumstances in which the board member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed. In the present case, it must be held that it is apparent that a director of a capital company, such as the director in question in the main proceedings, is appointed by the general meeting of shareholders of that company, which may revoke his mandate at any time against the will of the director. Furthermore, that director is, in the exercise of his functions, subject to the direction and supervision of that body, and, in particular, to the requirements and restrictions that are imposed on him in that regard. Moreover, although it is not by itself a decisive factor in that context, it must be observed that a director, such as the one in the main proceedings, does not hold any shares in the company for which he carries out his functions. In those circumstances, it must be found that, **even if such a board member of a capital company enjoys a degree of latitude in the performance of his duties that exceeds that of a worker within the meaning of German law, the fact remains that the board member is in a relationship of subordination vis-à-vis that company within the meaning of the case-law.**

The concept of 'worker' in EU law extends to a **person who serves a traineeship or periods of apprenticeship** in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer. That conclusion cannot be invalidated by the fact that the **productivity of the person** concerned is **low**, that he **does not carry out full duties** and that, accordingly, he works only a **small number of hours per week** and thus receives **limited remuneration**. Neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship is carried out, nor the origin of the funds from which the person concerned is remunerated and, in particular, in the present case, the funding of that remuneration through public grants, can have any consequence in regard to whether or not the person is to be regarded as a worker. Accordingly, it is necessary to regard as a worker for the purposes of that provision a person, such as the one in question in the main proceedings (Ms S.), who, while not receiving remuneration from her employer, performs real work within the undertaking in the context of a traineeship – with financial support from the public authority responsible for the promotion of employment – in order to acquire or improve skills or complete vocational training.

14. ECJ C-216/15 – *Ruhrlandklinik*

Facts of the case: *Ruhrlandklinik* operates an in-patient clinic and concluded an agreement with the German Red Cross association for the secondment of staff, under which the association undertook to supply nursing staff to that clinic, in return for financial compensation covering personnel costs plus a 3% flat-rate administrative charge. The nursing staff in question is comprised of **members of the association** who exercise their professional activity as their main occupation either within the association, or in medical and health care institutions under secondment agreements. **The legal basis of the obligation on members to carry out work lies in their membership of the association.** The works council of *Ruhrlandklinik* refused to give its consent to one of these secondments on the ground that the assignment was not designed to be temporary and was, consequently, prohibited.

Main findings of the ECJ: The concept of 'worker' for the purposes of that directive covers any person who carries out work and who is protected on that basis in the Member State concerned. It follows from Art. 1 (1) of the Temporary Agency Work Directive 2008/104, that that directive applies not only to workers who have concluded a contract of employment with a temporary-work agency, but also to those who have an 'employment relationship' with such an undertaking. Therefore, neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a 'worker' within the meaning of the Temporary Agency Work Directive 2008/104. Accordingly, for the purposes of interpreting that directive, that concept covers any person who has an

**European
Trade Union Institute**

Bd du Roi Albert II, 5
1210 Brussels
Belgium

Tel.: +32 (0)2 224 04 70
Fax: +32 (0)2 224 05 02
etui@etui.org
www.etui.org

D/2018/10.574/08
ISBN: 978-2-87452-474-5



etui.

employment relationship in the sense of Art. 45 TFEU and who is protected, in the Member State concerned, by virtue of the work that person carries out.

It is apparent that the members of the association have a certain number of rights, which are in part identical or equivalent to those enjoyed by persons characterised as workers under German law. Those members benefited from the mandatory employment law protection provisions and are subject to the Social Security code in the same way as workers. Furthermore those members benefit from the legislative rules applicable to workers as regards paid leave, sick leave, maternity and parental leave, and continued payment of remuneration in the event of incapacity for work caused by illness or accident. In the light of those factors, it appears, therefore, that the members of the association are protected in Germany by virtue of the work they carry out, this being, however, a matter for the referring court to determine.