TURUN YLIOPISTO
Oikeustieteellinen tiedekunta

The Definition of the Concept of Worker in the EU Law in Relation to Certain New Forms of Employment

Re-examining the Foundations of the EU Law
Master's thesis

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Abstract

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This thesis examines the core definition of worker in the EU law and its clarifying definitions. It also examines how these definitions take into account certain new forms of employment: casual work, platform work and voucher-based work. If a definition takes into account new forms of employment it means in the thesis that according to the definition a person working in a new form of employment is considered a worker. The thesis's main sources are EU case law and law articles.

There is no definition of worker in primary law and no proper definition in secondary law. Previous secondary law, the Directive on Transparent and Predictable Working Conditions and the Platform Work Directive do not take into account new forms of employment.

The core definition of worker (Lawrie-Blum formula) has been given in the case law and in it a worker is defined as one fulfilling the criteria of work, subordination and remuneration. The work criterion means that a person must pursue effective and genuine activity.

According to the case law, effective and genuine activity means work of an economic nature and subordination can mean the authority of a superior to exercise direction and control. Regarding the renumeration criterion, what matters primarily is that there is renumeration of some kind. The case law discussed in this thesis takes only partially or not at all into account new forms of employment.

The thesis argues that the EU should define in its legislation that a person performing platform work is considered a worker.

Key words: European Union law, new forms of employment, worker.

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Abstract

Pro gradu -tutkielma

Oppiaine: Oikeustiede
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Tämä tutkielma tutkii sitä, mikä on keskeinen työntekijän määritelmä EU-oikeudessa ja mitä tarkentavia määritelmiä sille on. Lisäksi se tutkii, kuinka määritelmät ottavat huomioon eräät uudet työskentelymuodot: tilapäinen työ, alustatyö ja voucher-pohjainen työ. Sillä, että määritelmä ottaa huomioon uudet työskentelymuodot tarkoitetaan tutkielmassa sitä, että määritelmän perusteella henkilö, joka tekee jotakin uuden työskentelymuodon mukaista työtä, katsotaan työntekijäksi. Tutkielman keskeisiä lähteitä ovat EU:n oikeustapaukset ja oikeustieteelliset artikkelit.

Työntekijää ei ole määritelty EU:n primäärioikeudessa ja sekundäärioikeudessa sitä ei ole määritelty kunnolla. Aiempi sekundäärioikeus, avoimista ja ennakoitavista työehdoista Euroopan unionissa annettu direktiivi ja alustatyödirektiivi eivät ota huomioon uusia työskentelymuotoja.

Työntekijän keskeinen määritelmä (Lawrie-Blum-kaava) on annettu oikeuskäytännössä ja sen mukaan työntekijä on sellainen, joka täyttää työn, alaisuussuhteen ja palkan kriteerit. Työ-kriteeri tarkoittaa sitä, että henkilön täytyy tehdä tuottavaa ja tuloksellista työtä.

Oikeuskäytännön mukaan tuottava ja tuloksellinen työ tarkoittaa luonteeltaan taloudellista työtä ja alaisuussuhde voi tarkoittaa esihenkilön oikeutta ohjata ja valvoa työntekijää. Palkkakriteeriä koskien lähinnä sillä, että jonkinlainen palkka maksetaan, on merkitystä. Tutkielmassa käsitellyt oikeustapaukset ottavat vain osittain tai eivät ollenkaan huomioon uusia työskentelymuotoja.

Tutkielmassa katsotaan, että EU:n tulisi määritellä lainsäädännössään, että alustatyötä tekevä henkilö katsotaan työntekijäksi.

Avainsanat: Euroopan unionin oikeus, työntekijä, uudet työskentelymuodot.

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List of Abbreviations

Court	The European Court of Justice/The Court of Justice
DTPWC	The Directive on Transparent and Predictable Working Conditions
EEC Treaty	The Treaty Establishing the Economic Community
EU	The European Union.
PWC	Platform Work Directive
TFEU	The Treaty on the Functioning of the European Union
WSD	Written Statement Directive

1 Introduction

1.1 Context

The concept of worker is a concept that has not been properly defined neither in the primary nor in the secondary law. This work was left for the European Court of Justice (the Court) which from the start considered that the definition of worker was an issue of EU law, not national law, to avoid the chance "for each Member State to modify the meaning of the concept of migrant worker" at will and to "frustrate the objectives of the Treaty"[1].[2] The Court has during the years given several judgements regarding the definition of worker. Some notable judgements include *Levin*[3] and *Lawrie-Blum*[4].

The concept of worker is significant, first of all, as the free movement of persons, which includes workers, is one of the four fundamental freedoms of EU law in addition to free movement of goods, services, and capital.[5] The fundamental freedoms are crucial for the proper functioning of the internal market.[6] The free movement of persons enables employed persons to go work in another EU Member state and be treated in the same way as the nationals of that EU Member state. The basic rule regarding the free movement of workers is set out in the Treaty on the Functioning of the European Union (TFEU) Article 45[7][8].

The rationale for the free movement of workers may be both economic and social. The economic rationale for the free movement is to assure what economists call the optimal allocation of resources within the EU. The value of labour in the EU is claimed to be maximised if workers are able to move to the area or country which values them the most, economically speaking. It

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[1] Case C-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)*. ECLI:EU:C:1964:19.

[2] Craig et al. 2015, p. 749.

[3] Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*. ECLI:EU:C:1982:105.

[4] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg*. ECLI:EU:C:1986:284.

[5] Craig et al. 2015, p. 744.

[6] Février *European Labour Law Journal* 2021, p. 179.

[7] Craig et al. 2015, p. 745.

[8] See the subchapter 2.1 for more information on this.

has also been suggested that promoting movement of workers helps to create "an ever closer Union of the peoples of Europe", and is connected with a larger notion of European solidarity.[9]

Second of all, the concept of worker is significant as it may be seen as "the gateway to the access to the protection of labour and social security law" [10]. This refers to matters such as the protection against the dismissal and the right to holiday. In the beginning, European Union Law did not have a lot of concern in this area, as it was viewed as a delicate issue and belonging to the power of the Member States[11]. If there existed labour and social security law dispositions in the Treaty of Rome[12], they were not legally enforceable rights. The European Union had – and up to a point still has – as its focus economic aims, especially the establishment of the internal market.

However, the social policy issues entered into European law through the window of the internal market and its freedoms. It was in the area of free movement of workers the Court for the first time had to come up with a specific, autonomous, Union-wide concept of worker.[13] This first direct definition was provided in *Lawrie-Blum*. Many other definitions exist in conjunction with that definition. Some of the definitions are to do with minimum-income and working time requirements and others with the purpose of the employment.[14] The field in which the concept of worker has been most widely defined is the field of free movement of workers.[15]

A considerate number of persons work in an EU Member State of which citizenship they do not have. According to Eurostat statistics in the EU in 2019, the number of these kinds of EU citizens in total employment was 4 % and the number of non-EU citizens was 5 %. When regarding these in more detail, by sector, the numbers were 3 % for other EU-citizens, and 5 % for non-EU citizens in the service sector, 4 % for both in the industrial sector and 3 % for other EU-

[9] Craig et al. 2015, p. 745.

[10] Février *European Labour Law Journal* 2021, p. 179.

[11] Février *European Labour Law Journal* 2021, p. 179.

[12] Nowadays called officially the Treaty establishing the European Economic Community.

[13] Février *European Labour Law Journal* 2021, p. 179.

[14] Craig et al. 2015, pp. 749-756.

[15] Risak and Dullinger 2018, p. 18.

citizens and 4 % for non-EU citizens in agriculture. The service sector is therefore out of these three sectors the one that employs the greatest number of foreign persons in the EU.

When comparing different Member States, the statistics show that the Member States with the biggest number of other EU-citizens in total employment were Luxembourg (47 %), Cyprus (12 %) and Ireland and Austria (10 %). The biggest number of non-EU citizens in total employment were found in Malta (15 %), Estonia (13 %) and Latvia (11 %). To take an example by a sector, in the service sector the largest proportions of other EU-citizens were in Luxembourg (46 %), Cyprus (11 %) and Ireland and Austria (10 %), and of non-EU citizens in Malta (15 %), Estonia (11 %) and Latvia (10 %).[16]

As an example of the flow of EU workforce is the case of Foxconn in the Czech Republic. At the height of production, Foxconn employed between 9000 and 10,000 people across the two of its factories. Foxconn hired directly about half of the workforce which was made up of Czechs and small number of other nationalities including Slovaks. The rest of the workers were employed by temporary work agencies which included Slovaks, Poles, Romanians, and Bulgarians.[17]

Recent years have seen a rise in new forms of employment. These new forms of employment may change the relationship between employer and employee, some transform work organisation and work patterns, and some have both of these qualities.[18] Some examples of these include casual work and platform work.

1.2 Research questions, theoretical basis, methods and the structure

The research questions of the thesis will be the following. Firstly, what is the core definition of the concept of worker in the EU law, specifically in the fields of labour and employment law[19][20] and what are some clarifying definitions of it? Secondly, how certain new forms of employment

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[16] 2.2 Working abroad. (20.02.2024)

[17] Andrijasevic and Saccheto *Transfer* 2016, p. 223.

[18] New forms of employment | European Foundation for the Improvement of Living and Working Conditions. (Accessed 20.2.2024)

[19] This will be for the most part answered in the Chapter 4.

[20] In addition to these fields, definitions of a worker exist also in the European social security law (Article 48 TFEU and Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community).

(casual work, platform work and voucher-based work) are taken into account in the EU definitions of worker?

The following theoretical basis is given to the reader, so they understand what constitutes a law in the author's view. Furthermore, the methods derive from the author's understanding of what law is. Theoretically, this thesis is based legal positivism. Legal positivism is one of the most important philosophical theories of the nature of law and is distinguished by these two theses: 1) the existence and content of law is dependent completely on social facts (for instance human behaviour and objectives), and 2) there is not necessarily a connection between law and morality. A legal positivist H.L.A Hart argued that "every legal system is a union of obligation-imposing ("primary") rules and power-conferring ("secondary") social rules"; in the last-mentioned case, an adequate number of officials of the system accepts these rules as instructions to their behaviour and standards of assessment of the behaviour of other legal participants. The most important secondary rule of the system is what Hart named a "rule of recognition" which states the fundamental criteria of legal validity (for instance, "what Parliament enacts is law").[21] What comes to the EU law, in the author's view it consists of the legislation of the EU, including its fundamental rights, and its case law.

The methods used in this thesis are textual interpretation, analysis of legal norms and other texts and critical analysis of legal norms. The sources of the thesis consist mainly of the EU Treaties and directives, the EU case law and legal research articles and books.

The structure of the thesis is as follows. The second chapter will discuss new forms of employment. The third chapter will discuss the definition of the concept of worker in primary and secondary law. The fourth and fifth chapter will discuss the definition of the concept of worker in case law, the fourth chapter focusing on Levin and Lawrie-Blum cases and the fifth chapter on clarifying cases. The sixth chapter will discuss criticism on the definition of the concept of worker. The final chapter will present a conclusion in which a summary of the thesis will be given.

[21] Legal positivism – Philosophy – Oxford Bibliographies. (20.02.2024)

2 New forms of employment

2.1 Generally about new forms of employment

In this chapter new forms of employment will be discussed. Nowadays work is not only performed within a traditional standard or non-standard employment relationship.[22] This traditional employment relationship relies on one-to-one relationship between employer and employee.[23] Alongside these traditional forms of employment new forms of employment have emerged (or become more common[24]) across Europe. Parts of these change the relationship between employer and employee, some transform work organisation and work patterns, and some have both of these qualities.[25] Some also feature unconventional places of work. These new forms have emerged throughout Europe because of societal and economic developments, for instance the demand for higher flexibility by both employers and workers.[26]

Even though the standard employment contract is still the most common method of organizing the work, its social significance has decreased.[27] The information is revealing: during the years 2006-2016, more than half of all new occupations were non-standard in the EU. The number of workers in the EU who had contracts with the duration of less than a month grew from 373,000 in 2002 to 1.3 million in 2016, with a great number of people (3.8 million) working less than 8 hours per week.[28] Next, types of new forms of employment will be discussed.

2.2 Types of new forms of employment

Eurofound study (2015) found nine large types of new employment forms of which two are included in the thesis in addition to platform work which was not included in the study. Before discussing these employment forms, some words are in place about the Eurofound study's

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[22] New forms of employment | European Foundation for the Improvement of Living and Working Conditions. (Accessed 20.2.2024)

[23] Eurofound 2015, p. 1.

[24] Eurofound 2015, p. 5.

[25] New forms of employment | European Foundation for the Improvement of Living and Working Conditions. (Accessed 20.2.2024)

[26] Eurofound 2015, p. 1-2.

[27] Georgiou *European Journal of Industrial Relations* 2022, p. 195.

[28] European Commission 2017b, pp. 13 and 17.

methodology. According to the study, given the diversity of Europe's economic and labour market frameworks, conditions, and developments along with institutional structures, there is presently no agreed-upon definition of what new forms of employment are.

Nonetheless, in order to guarantee a certain degree of similarity throughout the research outcomes, certain standards were created to direct the national input. Therefore, employment that fit into one or more of the following categories was eligible for considering.

- Relationships between employers and employees differ from the traditional one-to-one employment relationship.
- Supply of work on a discontinuous or intermittent basis or for relatively short periods of time as opposed on a continuous or regular basis. Seasonal and conventional part-time work were not regarded as novel unless they included additional characteristics that made it relevant to the study.
- Networking and cooperation arrangements among the self-employed, particularly freelancers, that surpass the typical relationships along the supply chain, the sharing of premises or the conventional carrying out of project work.[29]

For the purposes of the study, Eurofound concentrated on forms of employment that have either become into existence around the year 2000 or that already were in existence but have grown in popularity since then.[30]

The new forms of employment that the study found were employee sharing, job sharing, interim management, casual work (on-call/on-demand work, zero-hour contracts), ICT-based mobile work, voucher-based work, portfolio work, crowd employment and collaborative employment.[31] Out of these the following two were chosen to be discussed in the thesis: *casual work* and *voucher-based work*. They were chosen because they were considered relevant from the

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[29] Furthermore, the relevant employment types could be, but needed not be, characterized by the following attributes:

• an off-site workplace where the worker is mobile and works from several locations, potentially including their own office (traditional teleworking was not taken into consideration);

• a strong or widespread use of ICT, such as iPads, PCs, cell phones, or other devices that alter the nature of work relationships or work processes. Source: Eurofound 2015, p. 5.

[30] Eurofound 2015, pp. 4-5.

[31] Eurofound 2015, pp. 7-8.

perspective of the definition of the concept of worker. Other new forms of employment that were found in the study were not chosen to be discussed in the thesis because they were not regarded as relevant and/or to simplify the focus of the thesis. In addition to these two new forms of employment, *platform work* was also chosen to be discussed in the thesis as platform work is an important and common new form of employment nowadays. One of the new forms of employment also found in the study was *crowd employment* which nowadays, according to Eurofound, may be considered a specific type of platform work[32]. Platform work therefore encompasses crowd employment. For this reason, crowd employment is not discussed as a separate form of employment in this thesis. Later in the thesis the term new forms of employment will refer to these aforementioned three employment forms. Next, definitions for these three forms will be given.

Casual work is a type of employment where the employer is not compelled to provide the employee with work on a regular basis but instead has the freedom to ask them to work as needed. The employment is inconstant and non-continuous. Casual work is described by the European Parliament as "work that is irregular or intermittent with no expectation of continuous employment". Workers' possibilities of receiving this kind of work are dependent on changes of the workload the employers have.

Platform work means a type of work where traditional tasks such as driving, cleaning, and running errands, as well as clerical work, are executed through applications. Companies operate these applications, and the companies also are responsible in setting minimum service requirements and selecting and managing the workforce.[33] Examples of these kinds of companies are the taxi service company Uber and the food delivery companies Deliveroo and Wolt. As mentioned before *crowd employment* is a type of platform work which may be defined the following way: it usually refers to "working activities that imply completing a series of tasks through online platforms".[34] The kind of tasks carried out on crowd employment platforms might differ greatly. It frequently entails microtasks: minute, repetitive tasks that are extremely dispersed but nevertheless call for human-level judgment (e.g., labelling photographs, assigning values to emotions, determining if a site or text is suitable, filling out surveys). Other times, larger and

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[32] Platform work | European Foundation for the Improvement of Living and Working Conditions. (Accessed 3.6.2024)

[33] De Stefano *Comparative Labor Law & Policy Journal* 2016, p. 471-472.

[34] De Stefano *Comparative Labor Law & Policy Journal* 2016, p. 471.

more significant works—like developing a website, designing a logo, or starting a marketing campaign—can be crowdsourced.[35] Many times, the term *gig-economy* refers to platform work[36].

Voucher-based work is a type of employment where an employer accepts a voucher from a third party (typically a governmental body) in lieu of monetary payment for labour provided by a worker. The services offered are frequently specific or short-term jobs, making them related to casual and portfolio work[37].[38]

[35] De Stefano *Comparative Labor Law & Policy Journal* 2016, p. 474.

[36] De Stefano *Comparative Labor Law & Policy Journal* 2016, p. 471.

[37] Portfolio work means "small-scale contracting by freelancers, the self-employed or micro enterprises who work for a large number of clients". Source: Eurofound 2015, p. 103.

[38] Eurofound 2015, p. 82.

3 The definition of the concept of worker in primary and secondary law

3.1 Primary law

This subchapter will discuss shortly primary law[39] relating to the definition of the concept of worker. It is to be noted first that there does not exist one definition of a worker in EU law: it is dependent on the area in which the definition is to be used. This means that the definition used in the area of free movement of workers (Article 45 TFEU[40]) might not correspond to the definition used in the area of coordination of social security systems (Article 48 TFEU[41]).[42] The definition of worker that is discussed in this thesis is the one used in labour law (specifically the area of free movement of workers) and employment law.

Firstly, in primary law, Article 45 TFEU mentions the concept of worker[43]. However, it does not give the definition for it even though it is an essential part of the article. *Barnard* has described the concept of worker as the lynchpin to the Article[44]. According to Article 45:

> 1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail 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.

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[39] What is meant by primary law in this thesis are the EU Treaties, such as the TFEU. Source: https://commission.europa.eu/law/law-making-process/types-eu-law_en.

[40] See below.

[41] "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States."

[42] Case C-85/96 *María Martínez Sala v Freistaat Bayern*. ECLI:EU:C:1998:217, para 31.

[43] See the subchapter 1.1 for the partial quote of the Article.

[44] Barnard 2012, p. 144.

> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of Member States for this purpose;
>
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
>
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

The right expressed in the part 3(d) is expanded by Regulation No 492/2011.[45][46]

Secondly, the concept of worker is also mentioned in Article 153 TFEU: With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: … (d) protection of workers where their employment contract is terminated.

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[45] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, Article 7:

"1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States."

[46] The Court was to decide how far this expansion would go. For example, if the worker loses their job and plans to study at a university, such studies have to lead to a professional qualification which is directly connected to the preceding job. This kind of link is not, however, needed if the migrant worker who starts such studies loses their job involuntarily beforehand. Sources: 1) Case C-39/86 *Sylvie Lair v Universität Hannover*, ECLI:EU:C:1988:322, para 39; 2) Case C-357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:89, para 21; 3) Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, ECLI:EU:C:2003:600, para 26.

Furthermore, the concept is mentioned in Article 157 TFEU (equal pay for men and women) which states as follows: "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

3.2 Secondary law

3.2.1 Previous secondary law

Before discussing the Directive on Transparent and Predictable Working Conditions (2019/1152)[47] and the Platform Work Directive, we will discuss previous secondary law that has defined or mentioned the concept of worker. The following is not to be taken as an exhaustive list of all the directives that mention the concept of worker but as an overview to these kinds of regulations and directives.

In secondary law, an explicit legal definition of the concept of worker can be found in the Occupational Safety and Health Framework Directive (89/391/EEC)[48]. Its Article 3(a) defines worker as "any person employed by an employer, including trainees and apprentices but excluding domestic servants". 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". As *Risak* and *Dullinger* note this definition is not particularly specific.[49] It may indeed be considered a broad definition.

Many other directives do not have explicit definitions. Furthermore, variable terms are used. In some directives the term worker is used, in others employee. Some of the directives refer to the national definitions of the concept of the worker, others do not. The usage of terminology is therefore not consistent and there is inconsistency also found in the fact that some directives refer to the national definitions and others do not.

[47] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

[48] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[49] Risak and Dullinger 2018, p. 23.

An example of a directive that mentions the term worker and that refers to the national definitions is the Posted Workers Directive (96/71/EC)[5051]. Other directives for instance the Pregnant Workers Directive (92/85/EEC)[52], the Part-Time Work Directive (97/81/EC)[53], the Collective Redundancy Directive (98/59/EC)[54], the Fixed-Term Work Directive (1999/70/EC)[55], the Temporary Agency Work Directive (2008/104/EC)[56] and the Work–life Balance Directive (2019/1158)[57] utilise mainly the term worker but do not specifically refer to the national definitions. Some directives for example the Transfer of Undertakings Directive (2001/23/EC)[58] and the Employer Insolvency Directive (2008/94/EC)[59] utilise mainly the term employee and refer to the national definition[60].

The case law related to the definition of the concept of worker will be discussed in the Chapters 4 and 5.

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[50] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[51] Article 2(2): "For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted."

[52] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast-feeding.

[53] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

[54] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[55] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[56] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[57] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[58] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[59] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

[60] The Employer Insolvency Directive Article 2(2): "This Directive is without prejudice to national law as regards the definition of the terms 'employee'…"

The Transfer of Undertakings Directive Article 2(d): ""employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law."

3.2.2 The Directive on Transparent and Predictable Working Conditions

One of the most recent directives which regulates the concept of worker is the Directive on Transparent and Predictable Working Conditions (2019/1152, abbreviation: DTPWC). The directive also regulates, inter alia, workers' right of information. The previous law regulating employees' rights to information was the Written Statement Directive[61] (91/533/EEC) which was repelled by the DTPWC. One of the reasons there was a need for new regulation was the ambiguity around the worker categories that the WSD covered or in other words who were considered workers and thus were covered by the WSD.[62] This ambiguity was one of the issues found in the European Commission's REFIT document.[63] The European Commission's Impact Assessment (Accompanying the Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union) marked the following: "the EU labour law acquis, including but not limited to the WSD, does not apply uniformly to all workers, creating disparities and leading to inequalities in terms of working conditions and protection in general".[64]

As an example, despite cases like Danosa (C-232/09)[65] and Balkaya (C-229/14)[66][67] that say that senior managerial executives should be treated as workers for the purposes of the Maternity Protection (92/85/EEC) and Collective Redundancy (98/59/EC) Directives, comparative legal research revealed that people in management roles were not regarded as employees in Sweden[68]. Furthermore, even though the rulings by the Court require Member States to apply the

[61] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

[62] Georgiou *European Journal of Industrial Relations* 2022, p. 194.

[63] European Commission 2017a, p. 6.

[64] European Commission 2017b, p. 17.

[65] C-232/09 *Dita Danosa v LKB Līzings SIA*. ECLI:EU:C:2010:674.

[66] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*. ECLI:EU:C:2015:455.

[67] These cases will be discussed in more detail in the subchapter 5.3.

[68] European Commission 2017a, p. 24.

Directives uniformly in both the public and private sectors[69], public servants were not considered to be workers in Lithuania and Austria[70].

In addition, the uncertainty around who is classified as a worker has been made worse in recent years through the appearance of new forms of employment, which have been discussed in the previous chapter[71] (Chapter 2), which can be seen to have created a need for new regulation regarding what constitutes a worker.

DTPWC's Article 1(2) states: "This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice."

The Article does not give a proper definition for the concept of worker but instead gives the Member States the responsibility to evaluate what constitutes a worker. The wording in the Article is very similar to the referral text in Young People at Work Directive (94/33/EC)[72][73]. However, importantly it acknowledges the case law in which the Court has defined the concept of worker and states that it should be taken into account when evaluating what is a worker. Furthermore, and what is essential, especially from the perspective of new forms of employment, The Preamble states that:

> In its case law, the Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker (5). The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive.

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[69] Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)*. ECLI:EU:C:2006:443. & Case C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*. ECLI:EU:C:2006:517.

[70] European Commission 2017a, p. 24.

[71] Georgiou *European Journal of Industrial Relations* 2022, s. 195.

[72] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work.

[73] "This Directive shall apply to any person under 18 years of age having 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."

The Directive thus highlights the significance of the Court's jurisprudence in the transfer of the Directive into Member States' jurisdictions.[74]

It has been argued that the hybrid definition used by the Directive may cause problems with regard to its implementation.[75] According to *Bednarowicz* "the wording of this provision remains rather ambiguous and may prove difficult for the Member States not only to implement it properly in its full capacity but also for the judiciary to effectively have it enforced". It may appear that Article 1(2) represents some type of hybrid legal definition of worker not been seen before in the social acquis. It refers primarily to national legislation, collective agreements, or practices, but it also calls for taking into account case law of the Court regarding the concept of worker.

It is the proviso's last section that raises most questions in Bednarowicz's view. What happens if the national definition of worker differs from the EU definition and cannot be reconciled with it? In that case, it becomes unclear which one should be chosen and how much the national notion would be influenced by the EU model. In general, EU law ought to supersede national law.[76] I agree with the last sentence of Bednarowicz here. It is a principle of the EU law that EU law supersedes national law (the principle of primacy of EU Law[77]), so in these cases where national and EU law have a conflict of this kind, this rule should be followed. I do not see this issue as problematic to solve but an issue that is easily resolved by one of the basic principles of the EU law.

Bednarowicz argues that it must be said that the Commission bears a major duty to support Member States in the implementation process and to ensure that the material rights established in the Directive are properly applied for the widest categories of workers. Furthermore, the hybrid concept of worker presupposes a larger duty on the part of national courts to not only be knowledgeable about EU case law but also to make the concept of worker often incorporated in hard law more adaptable and open to alternative interpretations. This might be challenging

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[74] Georgiou *European Journal of Industrial Relations* 2022, p. 197.

[75] Georgiou *European Journal of Industrial Relations* 2022, p. 201.

[76] Bednarowicz *Industrial Law Journal (London)* 2019, p. 612-613.

[77] Also referred to as the precedence or supremacy of EU law. EUR-Lex - primacy_of_eu_law - EN - EUR-Lex. (20.2.2024)

in regions where primarily the social partners govern labour and social regulations, particularly the Nordic nations, which are not strong proponents of EU interfering in these domains.

Maybe the Commission might allay these worries if it provided judges sufficient training and released a thorough summary of all the Court case law pertaining to the concept of worker. This would act as a guidance for national judges, who are usually accustomed to applying national laws in a simple and straightforward fashion - often without realizing that such laws may have originated from the EU.[78] Even though the national judges should be familiar with the EU law, perhaps it could be a good idea, as Bednarowicz suggested here, for the Commission to provide a summary of the Court case law relating to the concept of worker. This is especially so if it comes into the knowledge of the EU that many national judges are not familiar with the Court case law relating the concept of worker.

Georgiou argues that the 27 Member States that make up the EU have radically varied labour legal systems and traditions.[79] In the Nordic Member States, for example, such as Denmark, Sweden and Finland, the social partners who prefer the EU not interfering in their domestic matters, govern labour and social security laws.[80] Other nations rely on tripartite classification schemes that do not use the dualistic strategy used by the EU. For example, “para-subordinate”, “arbeitnehmer ahnliche Personen”, and “trabajadores autónomos económicamente dependientes”, respectively, are intermediate classifications of workers introduced in Italy, Germany, and Spain that fall between the two extreme opposites. The Court's jurisprudence is not always easily applied in these Member States and the application might need modifications. Finally, certain domestic jurisdictions have distinctive definitions of worker, while others characterize working persons using a variety of distinct indicators that are rarely cited in the Court's case law. National judges and lawmakers may find it difficult to correctly implement the DTPWC in the absence of comprehensive advice on the EU worker definition and the criteria used to identify subordinate working individuals.[81]

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[78] Bednarowicz *Industrial Law Journal (London)* 2019, p. 613.

[79] Georgiou *European Journal of Industrial Relations* 2022, p. 201.

[80] Bednarowicz *Industrial Law Journal (London)* 2019, p. 613.

[81] Georgiou *European Journal of Industrial Relations* 2022, p. 201.

3.2.3 The Platform Work Directive

The Platform Work Directive (PWC)[82] is a directive which has not yet come into force but a provisional agreement regarding it between the Council's presidency and the European Parliament's negotiators was confirmed by the EU employment and social affairs ministers on the 8th of February 2024. The purpose of the directive is to enhance working conditions and regulate the use of algorithms by digital labour platforms. The PWC will also assist in accurately determining the employment status of those who work for platforms, allowing them to benefit from any applicable labour rights.[83]

Next, some of the provisions in the proposal text of the PWC relating to the definition of the concept of worker are discussed. The primary compromise components of the proposal text centre on a legal presumption that will assist in identifying the accurate employment status of those employed by digital platforms[84]. According to Article 5 (1), a provision giving the definition, a contractual relationship between a digital labour platform and an individual using the platform to do platform work will be presumed to be an employment relationship when facts suggesting control and direction are discovered. "Those facts will be determined according to national law and collective agreements" or practice in force in Member States, while also considering EU case law[85]. The provision gives the guidelines for when a platform worker is considered a worker. According to the same article if the digital labour platform aims to rebut the legal presumption, it is up to the digital labour platform to demonstrate that the contractual relationship in question is not an employment relationship.

According to Article 5 (4) individuals employed by the digital labour platform and, in compliance with national law and practice, their representatives may start administrative or judicial proceedings to establish that they have been incorrectly classified. Furthermore, according to Article 5 (5) if a competent national authority is of the view that an individual undertaking

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[82] The Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work.

[83] Platform workers: Council confirms agreement on new rules to improve their working conditions – Consilium. (14.5.2024)

[84] Platform workers: Council confirms agreement on new rules to improve their working conditions – Consilium. (14.5.2024)

[85] Platform workers: Council confirms agreement on new rules to improve their working conditions – Consilium. (14.5.2024)

platform work may have been incorrectly classified, it will take the necessary steps, in compliance with national law and custom, to determine the individual's employment status. This is a measure that may be seen to improve the adherence of the provisions in Article 5 (1) if in some Member States these measures are not already possible. Presumably more digital labour platforms adhere to the provisions if proceedings are likely in the case of not adhering to the provisions. Furthermore, if a worker is not treated with a correct employment status, through the proceedings the right status will be given.

3.3 How are new forms of employment taken into account in secondary law?

Before discussing the topic of this subchapter, what is meant by "taking into account new forms of employment" in this thesis is defined. A definition in a piece of legislation or a case takes into account new forms of employment if according to it casual workers, platform workers *or* voucher-based workers are considered workers. If a definition includes a defining or crucial feature of a new form of employment (casual work, platform work or voucher-based work) in a way that it is more likely that workers of this new form of employment are classified as workers than if it was not included, they take *partially* into account new forms of employment.

Starting with the Occupational Safety and Health Framework Directive's definition of worker, the definition is of such a general kind that it cannot be said to take into account the new forms of employment.

What comes to the DTPWC and how new forms of employment are taken account in its definition, in Georgius' view, the new hybrid worker definition offers the potential to extend the protection to new worker types that were previously not covered by the WSD's personal scope. Due to the reliance on the Court's precedent, a Member State will not be able to unjustifiably remove protection from categories of workers who meet the Court's definition of worker. The jurisprudence of the Court in the area would need to be taken into account by the national judges and legislators and the national legislation implementing the Directive interpreted correspondingly. As a result, definitions would be more comprehensive and uniform across national approaches, leading to an improvement in the coherence, certainty, transparency, and predictability of the EU labour market.[86]

[86] Georgiou *European Journal of Industrial Relations* 2022, p. 201.

It is indeed important that in the DTPWC the Court's case law is acknowledged. Even though the Court's case law binds Member States anyway, it carries more weight in the eyes of the Member States if it is also mentioned in the legislation. In that case it is very unlikely that a Member State would try to unjustifiably remove protection from workers who meet the Court's definition of worker. The acknowledgment of the Court's case law in itself does not extend the definition of worker to include new forms of employment but whether this happens is dependent on how case law defines a worker. However, it is notable that the Court mentions that for example on-demand workers, intermittent workers, voucher based-workers and platform workers could be included in the scope of the Directive (in other words be classified as workers) if they fulfil the criteria for a worker that the Court has set. This may encourage Member States to interpret more often persons who work in new forms of employment as workers although it is self-explanatory that if these workers fulfil the criteria for a worker, they should be classified as workers.

However, the DTPWC fails to give a proper definition of worker and the main addition relating to the definition of worker in it, is the acknowledgment of the relevant case law of the Court. While important, it does not add anything new to the definition. The persons who are now classified as workers because of the DTPWC and who were not classified as them before could have been classified as them before as well[87] if a Member State had taken into account the case law of the Court which bound them also back then. From the point of view of new forms of employment, the DTPWC's quasi-definition is disappointing and does not take into account new forms of employment.

Georgiou remarks that as the Court's subordination formula and its accompanying control and business risk-assumption criteria are utilised, casual workers[88] will not receive protection. People are required to take on a variety of business risks under many contemporary casual job arrangements. Although they do not have the opportunity to profit from the potential positive payoffs of their risk-taking actions, under the current system, their adoption of such risks would automatically classify them as self-employed. Additionally, businesses today adopt a variety of

[87] This should have been the case.

[88] Casual worker means "a worker on a temporary employment contract with generally limited entitlements to benefits and little or no security of employment. The main attribute is the absence of a continuing relationship of any stability with an employer, which could lead to their not being considered 'employees'". Casual worker | European Foundation for the Improvement of Living and Working Conditions. (7.5.2024)

creative techniques to control employees. Although the Court has occasionally acknowledged more nuanced power dynamics, it is unclear how it will rule in situations involving casual types of work.

As a result, while bogus self-employed people - those who are completely under the control of their employer and have no business risks - will be (re-)classified as workers and receive protection under the DTPWC, the same isn't always true for quasi-subordinate employees. Those who are not strictly under their principal's control and who have been required to take on a certain amount of business risks, domestic legislation implementing the DTPWC may not apply to them.[89] Therefore, despite earlier projections calling for the Directive to include 2-3 million workers previously unprotected by EU law[90] (including 3% of platform workers), the actual number will be significantly lower[91].

The fact that people who need to take business risks but are partly under the control of their employer might not be classified as workers shows the problem with the definition of DTPWC (and the Court's case law). This is problematic because while they have to take business risks, which is a downside of being self-employed, they cannot fully enjoy the benefits of being self-employed for this reason that they are at least partly under control of their employer.

Georgiou argues that although the reference to the Court's jurisprudence may give protection to a greater group of workers, it does not go far enough to include people who are not strictly under the control of the employer and have had to take on business risks[92]. Therefore, in spite of its apparently broad personal scope, the DTPWC may not include many of the casual workers it initially intended to.[93]

Georgiou provides a suggestion on how the definition of worker could be improved to what it is in the DTPWC. The EU could adopt a broader definition of worker that would include platform employees as well as other people doing casual forms of labour. The EU would profit from the adoption of a different risk criterion based on involuntary assumption of business risks,

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[89] Georgiou *European Journal of Industrial Relations* 2022, p. 201-202.

[90] European Commission (b) 2017, p. 45.

[91] Georgiou *European Journal of Industrial Relations* 2022, p. 202.

[92] Georgiou *European Journal of Industrial Relations* 2022, p. 205.

[93] Georgiou *European Journal of Industrial Relations* 2022, p. 205.

as determined by a person's inability to spread their risks. The idea behind this conceptualisation is that people are not in a place to make truly free choices when they lack the ability to spread their business risks (for instance, because they have little or no capital, have made sunk or job-specific investments, have no employees, have no other sources of income, and/or have little or no control over the business strategy). In these situations, the people are compelled to accept the terms being presented since they have no other options. As people's absorption of business risks in these circumstances cannot be regarded to be an expression of their free will, the State has a justifiable basis to intervene and categorise them as subordinate workers.

In contrast, when people possess the ability to spread their business-related risks (for instance, because they can transfer them on to consumers/clients through the price mechanism, have substantial capital, have their own employees or have many sources of income), the taking of those kinds of risk on their part is assumed to be a genuine choice. In these situations, the individuals have assumed the business risks and accepted the associated risk of being classified as self-employed. Thus, the State possesses no justifiable reason to intervene with their choice (as being stated in the contract) and re-classify them as workers. People who can spread their risks can choose to work under contracts as either subordinate workers or independent contractors determining in each situation the trade-offs they see as necessary and desirable. Although the suggested strategy does not significantly differ from previous case law, it is a revision designed to respond to recent market circumstances.

It is easily adoptable by EU legislators and judges since it does not depart much from preexisting jurisprudence; rather, it continues to rely on the concept of risk, but with a different emphasis. Along with the control criterion, this alternative risk-based criterion would enable a more expansive conceptualisation of the worker concept within the EU. More specifically, it would broaden the protection's scope to cover platform and other casual workers, who are now not included in the EU's definition of worker.[94]

This is a good suggestion by Georgiou. The EU would need to update its definition of worker. It is true that for example platform workers are in large parts comparable to a normal worker but have to take business risks because they do not have other choice if they are to do that work. They also cannot truly have a say on the working terms that are given for them to accept by the

[94] Georgiou *European Journal of Industrial Relations* 2022, p. 207.

employer and cannot affect the business strategy, to iterate some of the points made by Georgiou. As said, the DTPWC leaves a lot to wish for what comes to the definition of worker.

What comes to the Platform Work Directive's proposal text's definition and how it takes into account new forms of employment (in this case platform work), its idea of a legal presumption of an employment relationship in platform work sounds promising. However, because the presumption is made if facts suggesting control and direction are discovered, and those facts are determined by national law and collective agreements or practice in force in Member States and the EU case law, it does not provide anything new what comes to defining the concept of worker. The existence of control and direction are already used to determine whether one (including a platform worker) is a worker in the EU law[95] and the PWC's definition refers to other sources to determine what is meant by control and direction. It does not define itself what is meant by control and direction. What is slightly new, is that the PWC's definition indirectly determines that a platform worker fulfils other conditions, besides control and direction, of the definition of worker by default. However, this fact is relatively insignificant as determining whether a platform worker fulfils the other conditions[96] is not problematic per se. Because of these issues, the PWC's definition is also disappointing and cannot be seen to take into account new forms of employment[97].

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[95] See the Chapters 4 and 5 for a discussion of these criteria (subordination).

[96] The work and remuneration criteria. See the Chapters 4 and 5 for a discussion of these criteria.

[97] Previous proposal text of the PWC (agreed on the 13th of December 2023) took platform work into account more extensively. Likely many more platform workers would have been classified as workers if this version had come into force.

According to it, people who meet at least two of the following five conditions will be legally assumed to be employees of a digital platform rather than self-employed. These are:

- The maximum amount of money that employees can be paid;

- monitoring of their performance, involving by electronic methods;

- control over task distribution or assignment;

- control over working conditions and limitations on the hours that they can choose to work;

- limitations on their ability to organize their work; and rules regarding their appearance or behaviour.

Source: Rights for platform workers: Council and Parliament strike deal – Consilium 2023.

4 The definition of the concept of worker in case law: Levin and Lawrie-Blum cases

4.1 Levin

In this chapter the definition of the concept of worker in case law will be discussed. Before a crucial case *Lawrie-Blum*[98] is discussed, we will discuss one of the first cases where the Court provided some indirect definition of a worker: *Levin*[99]. The questions asked from the Court were related to the interpretation of Article 48 of the Treaty Establishing the Economic Community[100] [(abbreviation: the EEC Treaty), nowadays this article is the TFEU Article 45] and of certain provisions of Union regulations and directives on the free movement of persons within the Union.[101] In the case Mrs. D. M. Levin, a British citizen, made an application for a residence permit in the Netherlands. The Dutch authorities rejected her application based on their view that it was not in the public interest to grant a residence permit because Mrs. Levin had not worked after the start of 1978 and thus could not be seen as a "favoured EEC citizen" according to the Dutch Aliens Order. The appellant applied to the Judicial Division of the Raad van State (after first applying to the Staatssecretaris van Justitie which did not provide a response to her) and stated that she should be seen as a "favoured EEC citizen" based on the fact that her nationality was of another Member State and she had later on started a job in the Netherlands. Furthermore, she and her husband had sufficient funds to be able to support themselves. The case was later taken into the Court to consider.

To simplify, the first question that was asked from the Court considered whether a person who earns less than the minimum income for subsistence in another Member State is considered a "favoured EEC citizen". The second question considered whether there should a be difference between persons who have additional income in addition to the income they earn and those who do not. The third question considered whether a person could still rely upon the right to free

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[98] Case C-66/85 *Deborah Lawrie-Blum v Land Baden*-Württemberg. ECLI:EU:C:1986:284.

[99] Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*. ECLI:EU:C:1982:105.

[100] This was the previous name of the TFEU.

[101] C-53/81 *Levin*, para 1.

admission and establishment in the case it is shown or it is likely that the main motive for residing is something other than working or providing services. [102]

Mrs. Levin regarded that the Union law does not rule out from the sphere of Article 48 of the EEC Treaty persons whose work is not able to provide them with income which is at least same as the minimum income in the host state. This would be in opposition to the goal of free movement of workers as it would set the persons concerned in a less favourable position compared to nationals of the host state who may choose to work on a part-time basis for a wage which is below the minimum wage. In addition to that, restricting the freedom of those persons to reside in the host state cannot be justified on the basis of protecting the diminishing of the host state's national resources as that goal is already satisfactorily guaranteed by legislative rules which permit to refuse the residence permit of those persons who do not have or who do not anymore have enough funds to support themselves.[103]

The Netherlands Government regarded that the provisions of Article 48 are solely to be relied upon by persons who are given a wage which is at least comparable to the means of subsistence regarded as needed in the legislation of the Member State in which they are working, or who at least work the same number of hours as what is considered working full time in the sector in question. As there are no provisions regarding these matters (minimum wage and hours) in the Union legislation, the Netherlands Government suggested that one would need to refer to national criteria for the intention of defining both the minimum wage and the minimum number of hours.[104]

The Court was in favour of Mrs. Levin's side and made similar points in its decision. The Court stated that under Article 48: "…freedom of movement for workers is to be secured within the Community. That freedom is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and is to include the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made, to move

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[102] C-53/81 *Levin*, Section I (paras 1-3).

[103] C-53/81 *Levin*, Section II [paras 1(a) and 1(b)].

[104] C-53/81 *Levin*, para 10.

freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment and to remain there after the termination of that employment."

The implementation of the provision was done inter alia by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community[105]. According to its Article 1[106] "any national of a Member State is, irrespective of his place of residence, to have the right to take up activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, or administrative action governing the employment of nationals of that State."

However, the Court noted that the terms "worker" and "activity as an employed person" are not explicitly defined in the provisions on the subject. The Court did not accept the view that worker and activity as an employed person ought to be defined in referring to the national laws of the Member States, but these have a Union meaning. If this was not so, the rules of the Union on freedom of movement for workers would be made redundant because it would be possible to fix and change the meaning of those terms one-sidedly by national laws. This would mean that the Union institutions would not have a say on the matter. These laws then could exclude some categories of persons from benefiting from the EEC Treaty.[107] The Court had stated for the first time that the concept of worker needs to have a Union meaning already in *Unger*[108] but then it did not provide a definition for it.[109]

This would especially be so if enjoying the rights given by the principle of freedom of movement for workers was to be made dependent on the criterion of what the legislation of the host State considers to be a minimum wage. In this way the Union rules on this matter might differ among Member States. The Court regarded then that the meaning and the scope of the terms worker and activity as an employed person therefore ought to be defined in light of the legal order of the Union. The Court also emphasised that these terms "define the field of application

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[105] This regulation has been repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance.

[106] Nowadays Article 1 of the regulation mentioned in the previous footnote.

[107] C-53/81 *Levin*, paras 7–9 and 11.

[108] Case C-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)*. ECLI:EU:C:1964:19.

[109] C-75-63 *Unger*, para 2.

of one of the fundamental freedoms guaranteed by the Treaty" and as such are not to be interpreted in a restrictive way.[110] As free movement of workers is one of the four fundamental freedoms, *Février* regards that it is logical that the Court would not allow the Member States to define the concept of worker which is the precondition to the protection given by the TFEU Article 45 (Article 48 the EEC Treaty).[111]

I agree with the Court and Février here. It would be problematic indeed if a Member State would be able to set their own definition for worker and activity as an employed person. In this way as the Court notes, a Member State would be able to restrict greatly nationals from other Member States to use their right to come to work and reside in that Member State. The principle of freedom of movement for workers could be made quite useless in this way. It would also be problematic for Member States to be able to provide their own definitions for these concepts as it could hinder legal security. If there were different definitions in different Member States, it could be that a person would be able to enter one Member State but not another with the circumstances being the same with that person.

Advocate General's (Sir Gordon Slynn) opinion on the matter[112] was that a person who is offered a job and who takes it is a worker for the purpose of the legislation despite the fact that he is paid less than the earnings necessary in the State in question to meet the cost of subsistence. However, the worker has to showcase that he aims to enter and reside for the purpose of working. This purpose has to be a genuine and substantial one. The fact that there are not so many hours as in a full-time job in a certain Member State, and that the earnings are less than the minimum subsistence level, do not as such mean that the purpose is not genuine or substantial. Individual responsibilities, disability or age may mean that one cannot do more work; it is possible, even with a part-time job, that one receives a rise in the standard of living of the applicant and his family. One may have a wish for more hours and a greater wage in the future.

Then again, the person whose real goal in entering is studying or retiring, or not doing anything which could be considered employment, might not be entering for the goal of employment even in the case they work a few hours a week or occasionally. The fact that one works merely for a

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[110] C-53/81 *Levin*, paras 12-13.

[111] Février *European Labour Law Journal* 2021, p. 179.

[112] Case 53/81 *Opinion of Mr Advocate General Sir Gordon Slynn delivered on 20 January 1982*. ECLI:EU:C:1982:17.

few hours a week might be significant in determining whether work is the genuine and substantial goal for residing. The fewer hours one works the harder it might be to show that work is a genuine and substantial purpose. In the same manner a low pay might be one factor with other factors that justifies a limitation being put on the free movement.

However, even though the goal of working has to be genuine and substantial, the Advocate General deemed that it does not have to be demonstrated to be the main goal. The legislation itself does not demand this, and this would be hard in reality to implement. A person may want to work in a specific country mainly because their spouse's family resides there, or for the reason that they want their children to profit from a specific education system, or for cultural or health reasons. The fact that this is the first, main reason does not prevent the goal of work of being genuine and substantial.[113]

The Court stated that part-time employment even though it may provide a salary smaller than the minimum needed for subsistence is for many persons an effective way to better their living conditions. If the rights given by the principle of freedom of movement for workers were only meant for those in full-time employment and earning at least the minimum wage, the effectiveness of Union law would be hindered and attaining the objectives of the EEC Treaty would be endangered.[114] I agree with the Court here too. The EEC Treaty does not state that the right should consider only full-time employment. One can justify the inclusion of part-time workers on the basis that it enables more people to enjoy the right of freedom movement for workers which is in line of the objectives of the EEC Treaty.

The Advocate General answered the first and second question in the following manner: A national of one Member State who, on the area of another Member State takes on paid work under an employment contract is seen as a worker in the meaning of Article 48 of the EEC Treaty and its implementing legislation although such employment is of a such limited scope that its income is lower than the minimum that allows to meet the cost of subsistence in that State.[115]

The Court's answer to the first and second question was the following. The provisions of Union law which are to do with freedom of movement for workers also include a national of a Member

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[113] Case 53/81 *Opinion of Mr Advocate General Sir Gordon Slynn*, pp. 1060-1061.

[114] C-53/81 *Levin*, para 15.

[115] Case 53/81 *Opinion of Mr Advocate General Sir Gordon Slynn*, pp. 1061.

State pursuing in another Member State an activity as an employed person which has an income lower than which is, in the latter State, the minimum income for subsistence. This is so irrespective of the fact whether that person receives extra income from their activity as an employed person and then attains the said minimum or is content with an income lower than that "*provided that he pursues an activity as an employed person which is effective and genuine", "to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary"*.[116] "Effective and genuine activity" is one of the three defining criteria of the concept of worker in the *Lawrie-Blum formula*. The criterion is called work.[117] According to this criterion in order to be regarded as a worker one must pursue an effective and genuine activity. Other two criteria, subordination and renumeration[118], were created in Lawrie-Blum[119].

With this answer the Court considered that a worker is also one who earns less than the minimum income for subsistence. The Court added an extra condition on top of that and that was the condition of "effective and genuine activity" and that this kind of activity is not considered to be one which is marginal and ancillary. The definition is a broad one. The expression of effective and genuine activity is somewhat ambiguous, and it does not clearly tell what its boundaries are. "The marginal and ancillary" addition does provide little clarification on the matter, but it is also ambiguous, especially in difficult cases. However, other cases have provided some clarification on these concepts. More discussion on the work criterion is found in this paper's subchapter 5.2.

Anon argues that even though the formula (effective and genuine activity without being marginal and ancillary) is well-established and seems straightforward, applying it can be very challenging in reality. The Court has never declared a de minimis norm in the context of the free movement of labour despite occasionally receiving requests from national referring courts or

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[116] C-53/81 *Levin*, paras 17-18.

[117] Février *European Labour Law Journal* 2021, pp. 179-180 and Menegatti *Italian Labour Law E-Journal*, 2019, p. 72.

[118] See these explained in detail in the Chapter 4.2.

[119] Février *European Labour Law Journal* 2021, pp. 179-180 and Menegatti *Italian Labour Law E-Journal*, 2019, p. 72.

arguments from intervening Member State governments to this effect.[120] In *Genc*[121], the referring court noted that "the Court's case-law does not contain a threshold, determined on the basis of working time and level of remuneration, below which an activity would have to be regarded as being marginal and ancillary, and that this contributes to a lack of precision in the concept of marginal and ancillary activity"[122]. The Court stated in response: "It is one of the essential characteristics of the system of judicial cooperation established under Article 234 EC[123] that the Court replies in rather abstract and general terms to a question on the interpretation of European Union law referred to it…".[124]

In the framework of such a preliminary reference, the Court seems to be between two fires. The more case-specific and concrete its reasoning is, the more likely its decision is to be followed by a series of additional references that aim to establish whether the prior fact-specific decision may be applied to a new set of circumstances set in a different national, legislative context. If the response is no, this can be seen as zigzagging. The more abstract and general a decision, the more the national referring court, as well as, at a later stage or level, the national legislature and national administrative authorities, have to deal with a general rule which is well-established but of which practical consequences in EU Member States with different social security and social welfare systems may be very unlike to each other.[125]

Taking into account what Anon says here, perhaps the best approach the Court could take[126] would be to give a more precise definition (in the work criterion of Lawrie Blum Formula) without it being case-specific. This general definition would then be applied to the case in which the definition is given. When the definition is precise but case-specific, one encounters the problem described by Anon; there will be requests to know whether the condition/conditions

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[120] Anon *Common Market Law Review* 2014, p. 733.

[121] Case C-14/09 *Hava Genc v Land Berlin*. ECLI:EU:C:2010:57.

[122] C-14/09 *Genc*, para 29.

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[124] C-14/09 *Genc*, para 31.

[125] Anon *Common Market Law Review* 2014, p. 734.

[126] The best solution of all, in my view, would be for the definition to be given in the EU legislation. In this case there would be no need to wait for a right type of case to emerge for the Court to give the new definition.

set out in a definition apply in a different context. When the case-specificity is removed from the equation, this problem goes away.

The opinion of Advocate General to the third question presented was the following: The right of a person whose main motive for residing is shown or is likely to be other than working or providing services to enter and reside in the Member State depends on it being demonstrated that the work in the Member State is a genuine and substantial purpose of this person even though it does not have to be their main purpose.[127]

The Court's answer to the third question was the following: The motives which may have caused a worker to find employment in another Member State are not to be considered in regard to their right to enter and live in the latter State "provided that he pursues or wishes to pursue an effective and genuine activity."[128] That is then the only condition and motives are disregarded. The motives would be hard to prove first of all and second, it is hard to argue why they should matter as long as the person actually "pursues or wishes to pursue an effective and genuine activity." This was an excellent and simple answer given to the question.

The Opinion of Advocate General as a whole was not substantially different and carried definite similarities to the Court's view. Next, I will discuss about these similarities and differences between the opinion of Advocate General and the Court's view. Firstly, both the Court and the Advocate General regarded that a worker is also a national of a Member State who works in another Member State in a job which has an income lower than which is, in the latter State, the minimum income for subsistence. The Court also uses the term employed person whereas the Advocate General uses the expression "under an employment contract" but this is not significant because clearly the Court means with an employed person a person with an employment contract, either written or oral. One cannot really work without contract of some kind.

On the question about the right of an aforementioned person to enter and reside in the Member State, the Court and the Advocate General differed somewhat. The Court emphasised that a worker's motives which have caused a worker to find employment in another Member State are not of relevance, but a worker needs to pursue or must wish to pursue an effective and genuine activity. The Court thus does not think a motive is relevant but one simply has to have

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[127] Case 53/81 *Opinion of Mr Advocate General Sir Gordon Slynn*, pp. 1062.

[128] C-53/81 *Levin*, para 23.

an *intention* of working in the country. However, the Advocate General thought that one has to have a genuine and substantial *purpose*. The word may be interpreted as meaning a motive here. Furthermore, the Court uses words effective and genuine to describe what kind of activity one needs to have as their intention and somewhat differently the Advocate General uses the words genuine and substantial to describe the needed purpose.

Craig and de Burca discuss that Levin showed that the freedom to receive a job is crucial not just as a way towards the formation of a single market for the advantage of Member State economies, but as a right for the worker to improve their standard of living. The requirement that the work taken up should be genuine economic activity was likely a response to Member States' worries that their social security systems would become overburdened because of migrants coming from other countries who do not have such generous social security systems and who do not aim to do effective work.[129] The requirement may well have been this kind of response as the requirement seems to address that fear and possibly lessens that.

4.2 Lawrie-Blum

Lawrie-Blum is one of the most important judgments regarding the concept of worker. In it, the Court directly defined the concept of worker and, in doing so, elaborated it more[130]. In Lawrie-Blum, the Court was enquired of the interpretation of Article 48 of the EEC Treaty and Article 1 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Union. The question was put forth in proceedings against the Land- Baden-Württemberg by Deborah Lawrie-Blum, a British national. She had passed, at a German university, the examination for becoming a teacher at a Gymnasium but was rejected from a period of preparatory service that continues to the examination after which you are qualified to work as a teacher.

She took the matter to the Administrative Court of Freiburg for the repelling of the decision. However, both the Administrative Court and the Higher Administrative Court for Baden-Württemberg (appeal court) rejected her application based on the view that Article 48 (4) provided that the rules regarding freedom of movement for workers did not concern employment in the

[129] Craig et al. 2015, p. 751.

[130] Craig et al. 2015, p. 752 and Février *European Labour Law Journal* 2021, p. 178.

public service. The appeal court also said that the State school system was not a part of the scope of the EEC Treaty since it was not a part of economic life.

Mrs Lawrie-Blum made an appeal to the Bundesverwaltungsgericht, which reached a decision to delay the proceedings until the Court had given a preliminary ruling on the question that follows[131] (in a simplified form):

> 1) "whether a trainee teacher undergoing a period of service as preparation for the teaching profession during which he enjoys civil service status and provides services by conducting classes for which he receives remuneration must be regarded as a worker within the meaning of Article 48 of the EEC Treaty and"
>
> 2) "whether such preparatory service must be regarded as employment in the public service within the meaning of Article 48 (4) to which nationals of other Member States may be refused admission."

The Bundesverwaltungsgericht was of the opinion in its reference that a trainee teacher assigned as a temporary civil servant is not to be viewed as a worker within the meaning of Article 48 of the EEC Treaty and that in any case the exception in Article 48 (4) covers him as he exercises powers that are given to him by public law or plays a part in protecting the general interests of the State.

The Court stated that as freedom of movement for workers is one of the fundamental principles of the Union, the term worker in Article 48 is not to be interpreted differently according to what each Member State's law states but has a Union meaning. As it defines the extent of that fundamental freedom, the Union notion of a worker is to be interpreted in a broad fashion, restating the same idea which was stated in Levin[132].[133]

The concept ought to be, according to the Court, defined in line with objective criteria which differentiate the employment relationship by referring to the rights and responsibilities of the persons in question. After stating this, the Court defined the concept of worker: "*The essential feature of an employment relationship, however, is that for a certain period of time a person*

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[131] C-66/85 *Lawrie-Blum*, paras 2, 8 and 9.

[132] C-53/81 *Levin*, para 13. See also Chapter 3.1 of this paper.

[133] C-66/85 *Lawrie-Blum*, paras 10-11 and 16.

performs services for and under the direction of another person in return for which he receives remuneration."[134]

This definition with the work criterion may be seen to be the core definition of the concept of worker in the EU law because the Court refers to it often. The definition featured the two other criteria of the Lawrie-Blum formula which was firstly discussed in the Chapter 4.1. The other one of these is called the subordination: "under the direction of another person".

The final criterion, the remuneration, is the part where the Court considered that a person performing said services for a said period of time must receive remuneration for it: "in return for which he receives remuneration". [135] Thus, the work may not be unpaid and someone who is in an employment relationship where they do not receive a payment for their work is not considered to be a worker according to this criterion.

The definition is a broad one. However, in the Chapter 5 some of the cases which have clarified these criteria, will be discussed.

Giubboni notes that when examined more closely, it can be determined that merely the subordination criterion helps to identify and classify a relationship as employment (to set it apart from self-employed activities). However, the work and renumeration criteria are fundamentally intended to determine the true economic nature of the service that a worker does.[136] Indeed the work and renumeration criteria would be essential in determining whether someone is self-employed. Therefore, only the subordination criterion is the critical criterion in distinguishing a worker from a self-employed person.

In the case, the Court regarded that all these criteria are fulfilled in this case. This is because during a great part of the preparatory service one must give lessons to the school's pupils and therefore one gives a service of certain economic value to the school. The amounts that one is given can be viewed as remuneration for the services given and for the responsibilities that are entailed in completing the preparatory service.

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[134] C-66/85 *Lawrie-Blum*, para 17.

[135] Février *European Labour Law Journal* 2021, pp. 179-180 and Menegatti *Italian Labour Law E-Journal*, 2019, p. 72.

[136] Giubboni *European Labour Law Journal* 2018, p. 227.

The Court was of the opinion that even though a teacher's preparatory service, as other kinds of apprenticeships, may be viewed as practical preparation directly to do with the actual pursuing of the occupation in question is not an obstacle to the application of Article 48 (1) if the service is done under the conditions of an activity as an employed person.

The Court remarked it cannot be said that services given in education do not come under the scope of the EEC Treaty for the reason that they are not of an economic nature. All that is needed for the application of Article 48 is that the activity ought to be "in the nature of work performed for remuneration", regardless of the sphere in which it is performed. Furthermore, the Court noted that the economic nature of those activities may not be denied on the basis that they are performed by persons whose status is determined by public law, as the Court showed in *Sotgiu*[137] according to which the nature of the legal relationship between employee and employer, regardless of whether it has a public law status or there is a private law contract, is irrelevant what comes to the application of Article 48.

The Court also referred to *Levin* in another point as well. The fact that trainee teachers give lessons merely for a few hours per week and are remunerated less than the starting wage of a qualified teacher does not mean that they are not to be considered as workers. In Levin, the Court regarded that the concepts worker and activity as an employed person have to be understood in a way that includes persons who, because they work on a part-time basis, are given a wage which less than a wage for a full-time employment, as long as the activities performed are effective and genuine. The latter prerequisite was not questioned in this case.

Therefore, the Court saw as the response to the first part of the question that… "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 Article 48 (1) of the EEC Treaty, irrespective of the legal nature of the employment relationship."

To the second part of the question the Court stated that the period of preparatory service for the profession of a teacher is not to be seen as employment in the public service within the meaning

[137] Case 152-73 Giovanni Maria Sotgiu v Deutsche Bundespost. ECLI:EU:C:1974:13

of Article 48 (4)[138] for which nationals of other Member States can be refused access to.[139] The powers that are given to a trainee teacher do not fulfil the conditions that the Court has set for an employment in the public service to be within the meaning of Article 48 (4).[140]

Opinion of Advocate General (Mr. Lenz)[141] regarding the case was as follows: Article 48 of the EEC Treaty ought to be interpreted as including a relationship of which purpose entails not merely in the supply of personal services in exchange for renumeration, but which has a form of an employment relationship or at least shows features of an employment relationship. The legal form which that relationship has in national law is not critical for the aims of Union law. The exception considering the public service in Article 48 (4) of the EEC Treaty only rules out those posts which contain direct or indirect involvement in the exercise of powers given by public law and also "the functions for safeguarding the general interests of the State".[142] What may be seen from this is that the Court and the Advocate General viewed the case in a similar way. The Advocate General, however, gave a more of an indirect answer considering the interpretation of Article 48 in relation to the case whereas the Court gave more of a direct answer.

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[138]: "'employment in the public service' within the meaning of Article 48 (4), which is excluded from the ambit of Article 48 (1), (2) and (3), 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." C-53/81 *Levin*, para 27.

[139] C-66/85 *Lawrie-Blum*, paras 18-22.

[140] C-66/85 *Lawrie-Blum*, para 23.

[141] Case 66/85 *Opinion of Mr Advocate General Lenz delivered on 29 April 1986*. ECLI:EU:C:1986:179.

[142] Case 66/85 *Opinion of Mr Advocate General Lenz delivered on 29 April 1986*, Section C.

5 The definition of the concept of worker in case law: clarifying cases

5.1 The structure

In this chapter some cases which clarify the definition of the concept of worker in the EU law will be discussed. These cases will be analysed mainly by the categorisation provided by the Lawrie-Blum formula which is the following: work, subordination, and remuneration. Other cases which do not fall smoothly under one of these categories, will be discussed in the sub-chapter 5.5.

5.2 Work

Regarding the work criterion, in the *Bettray*[143] case, Mr. Bettray, on the basis of a national law, was employed by the Dutch local authorities with the purpose of rehabilitation or reintegration for the reason that he had a drug addiction. According to the case, a genuine and effective activity means an economic activity, and an activity cannot be considered as such if it forms only a way of rehabilitation or reintegration for the persons in question and the purpose of the paid employment, which is modified to the physical and mental possibilities of each person, is to make it possible for those persons at some point to get back their capacity to receive regular employment or to live as normal as possible a life.[144]

In the *Trojani*[145] case, in which Mr. Trojani was employed as a part of the reintegration programme by the Salvation Army, the Court did not evaluate whether the work there constituted a genuine and effective activity[146], and handed the question over to the national court.[147] These two cases share an important feature; in both cases the work was carried out as a part of a reintegration programme. For some reason, the Court did not evaluate in Trojani whether the work there constituted a genuine and effective activity. It states in the case that according to the

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[143] Case C-344/87 *I. Bettray v Staatssecretaris van Justitie.* ECLI:EU:C:1989:226.

[144] C-344/87, para 4, 5 and 17.

[145] Case C-456/02 *Michel Trojani v Centre Public d'aide sociale de Bruxelles* (CPAS). ECLI:EU:C:2004:488.

[146] The Court uses the expression "real and genuine activity" in this case but means "genuine and effective activity". See C-456/02 *Trojani*, para 18.

[147] C-456/02 *Trojani*, para 29.

Bettray case "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"[148]. However, the Court states that this conclusion can only be explained by the unique facts of the case in question, which involved a person who, due to his drug addiction, had been hired on the basis of a national law with the purpose to provide employment for people who, for an indefinite period of time, are unable, due to circumstances related to their situation, to work under normal conditions.

However, in the Trojani case, Mr. Trojani worked for the Salvation Army and under its supervision for around thirty hours per week on a variety of tasks as part of a personal reintegration program. In exchange, he received pocket money and in-kind benefits.[149] In my view, the Court fails to properly explain why it did not evaluate whether the work in question in Trojani case was a genuine and effective activity, even though it evaluated that a similar type of work in Bettray was not a genuine and effective activity. These cases carry some dissimilarities, but share an important common feature for which reason it may be argued that the Court should have provided this kind of explanation or evaluated whether the work in question in Trojani was considered a genuine and effective activity.

Some other examples that fulfil the work criterion were professional athletes in *Bosman*[150] and *Jyri Lehtonen*[151] cases, trainees in *Lawrie-Blum*[152], *Bernini*[153] and *Kraneman*[154] cases and PhD students in *Raccanelli*[155] case where the Court found that genuine and effective activities existed.[156] It is not surprising that the Court found research work done by a PhD student genuine

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[148] C-456/02 *Trojani*, para 18.

[149] C-456/02 *Trojani*, para 19-20.

[150] Case C-415/83 *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.* ECLI:EU:C:1995:463.

[151] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*. ECLI:EU:C:2000:201.

[152] This case was discussed comprehensively in the subchapter 4.1.

[153] Case C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*. ECLI:EU:C:1992:89.

[154] Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen*. ECLI:EU:C:2005:187

[155] Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*. ECLI:EU:C:2008:425.

[156] C-94/07 *Raccanelli*, para 33.

and effective as similar work may be done in many other environments as well. However, it is interesting that the Court regarded that a PhD student may be considered a worker as perhaps conventionally one would not regard a PhD student a worker[157].

In the *Brian Francis Collins* case, an Irish American binational was not granted the status of a worker and the right to remain in the United Kingdom. His claim was solely based on the fact that he had a part time job for a short time years before, in the context of an activity which did not have any connection with his current stay in the country.[158] Thus, this kind of person is not seen to be pursuing or wishing to pursue an effective and genuine activity. It is understandable that the Court has come to this conclusion. If one only has a part time job for a short period of time which was years before it is hard to justify that they still are pursuing an effective and genuine activity and thus that they are a worker. Without making this kind of limitation, the worker status might become too extensive and the social welfare system too expensive for the Member States.

As a final point, the threshold for economic activity is low[159] and many types of activities can be seen to fulfil that condition as can be seen from the cases discussed here.

5.3 Subordination

The Court does not often give as much attention on the subordination criterion as to the other Lawrie-Blum criteria. Examining the Bettray case, *Menegatti* accounts this for the fact that the Court has its focus more on the seamless functioning of the internal market and the development of the economic freedoms than on the protection of the workers.[160]

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[157] The Court argued that a researcher who makes a doctoral thesis based on a grant agreement with The Max Planck Society for the Advancement of Science (the researcher in the case had these features) has to be considered a worker only in the case his activities are done for a specific time period under the direction of an institute which is a part of that association and if, in exchange for those activities, he is paid remuneration. Para 37.

[158] C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, paras 26-28.

[159] van Peijpe *European Labour Law Journal* 2012, p. 37.

[160] Menegatti *Italian Labour Law E-Journal*, 2019, p. 73.

However, some cases have regarded the subordination criterion. Before discussing some of these cases, a few words are in place about subordination. Subordination has typically been seen to mean merely the control over the workers' activities by the employer. Especially, the employment relationship has been seen as a hierarchical structure with democratic shortfalls under which the employer has to be in a power position so it can determine "the type of work and tasks to be executed, the manner in which that work or those tasks are to be performed, and the time and place of work".[161] However, the Court has found subordination existing in other types of situations as well as can be seen from some of the cases discussed in this subchapter.

In the *Asscher*[162] case, the question was whether someone who was regarded as a self-employed person under national fiscal law, might be classified as a worker under free movement law and thus benefit from this protection so as to rebut proceedings against him. The person being discussed, a Belgian person, was the Director of a Dutch company where he was the sole shareholder too. The Court came to a conclusion by applying the Lawrie-Blum formula that there did not exist the link of subordination.[163]

In the *Jany*[164], *Van der Steen*[165] and *Zako*[166] cases, the Court chose to extend the concept of subordination by including qualities which are regarded as not being part of it, such as the question of engaging to the risks or economic dependence. However, these cases are to do with uncommon situations in the field of free movement and thus Février sees that one should not generalise the thinking of the Court to the whole field.[167] Out of these cases as an example we will discuss in more detail *van der Steen*, which dealt with value added tax. In the case van der Steen had an employment agreement with the cleaning business he owned. He performed all tasks for the business on his own. He was paid a fixed monthly salary and did not carry financial risk and depended on the company to decide his renumeration. The Court was thus of the view that van der Steen was a worker (in the Court's words: "performed his work under a contract

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[161] Georgiou *European Journal of Industrial Relations* 2022, p. 199.

[162] Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën*. ECLI:EU:C:1996:251.

[163] Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën*. ECLI:EU:C:1996:251.

[164] Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie.* ECLI:EU:C:2001:616.

[165] Case C-355/06 *J. A. van der Steen v Inspecteur van de Belastingdienst Utrecht-Gooi/kantoor Utrecht*. ECLI:EU:C:2007:615.

[166] Case C-452/17 *Zako SPRL v Sanidel SA*. ECLI:EU:C:2018:935.

[167] Février *European Labour Law Journal* 2021, p. 181.

of employment"). This is even though the Court did not show that van der Steen was under subordination.[168] This was also a point that van Peijpe noted[169]. However, as mentioned Février interpreted that in this case the Court viewed subordination including other than typical elements, such as risk engagement and economic dependence.

FNV Kunsten[170], an Article 101 TFEU case, dealt with the question of whether substitute orchestra musicians were self-employed persons or workers. The Court took the time to provide national courts with guidance on how to identify false self-employment.[171] Recalling its prior rulings in the area of labour (*Haralambidis*, *Allonby*, *Agegate*), the Court concluded that "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"[172]. What is implied here is that this kind of person (entirely dependent on their principal) would be classified as a worker then.

Similar statements were made in *B v Yodel*[173]. The case regarded the employment status of B, a courier for parcels for Yodel, under the Working Time Directive (2003/88/EC)[174]. The Court concluded that, as a rule, persons will be classified as self-employed provided they have discretion to: a) "to use subcontractors or substitutes to perform the service which he has undertaken to provide", b) "to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks", c) "to provide his services to any third party, including direct competitors of the putative employer" and d) "to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer". [175] However, taking into account its earlier

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[168] C-355/06 van der Steen, paras 8, 10, 22, 23 and 30.

[169] van Peijpe *European Labour Law Journal* 2012, p. 46.

[170] C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*. ECLI:EU:C:2014:2411.

[171] C-413/13 *FNV Kunsten*.

[172] C-413/13 *FNV Kunsten*, paras 33-36.

[173] Case C-692/19 *B v Yodel Delivery Network Ltd*. ECLI:EU:C:2020:288.

[174] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[175] C-692/19 *B v Yodel*, paras 3, 5 and 45.

judgments in Allonby and FNV Kunsten, the Court explained that persons lose their status of an independent trader if their independence is only notional. It was up to domestic courts to decide whether B truly was independent or whether he actually was in a subordinate position to the alleged employer.[176] The definitions given in FNV Kunsten and B v Yodel are not direct definitions of worker but indirect ones.

In cases involving customs agents, doctors, lawyers and chartered accountants, the taking of financial risks in their activities has meant that the Court has found them not being subordinate to their principal.[177] In most of these cases the Court has stated the taking of financial risks meaning that should there be an imbalance between these persons' expenses and revenues, these persons would be responsible for covering the deficit.[178]

Allonby[179] involved an hourly-paid lecturer who was terminated from her position at the university where she worked. She was then immediately rehired by the same institution through an intermediate agency as self-employed, only to discover that her compensation had decreased and was now less than that of an equivalent male teacher in the University. The Court stated that the definition of pay in Article 141 (2) of the EEC Treaty[180] makes it evident that the Treaty's writers did not intend for the term worker, as used in Article 141 (1) of the said Treaty, to cover independent service providers who are not in a subordinate relationship to the person receiving the services. However, the Court also stated that the parties' de facto working relationship should be taken into consideration rather than how the contract describes it legally. People who are officially categorized as self-employed by domestic law should be regarded as

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[176] C-692/19 *B v Yodel*, paras 30-31 and 56.

[177] 1) Case C-35/96 *Commission of the European Communities v Italian Republic*. ECLI:EU:C:1998:303.

2) Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*. ECLI:EU:C:2002:98

3) Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*. ECLI:EU:C:2013:127

4) Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*. ECLI:EU:C:2000:428

[178] C-35/96 *Commission vs. Italy*, C-309/99 *J. C. J. Wouters* and C-1/12 *Ordem dos Técnicos Oficiais de Contas*.

[179] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*. ECLI:EU:C:2004:18.

[180] "Pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."

workers under if their independence is just notional.[181] What may be inferred from this is that national judges should reclassify the individuals as workers if, after considering all the relevant information, they conclude that they are in fact subordinate to their principal[182].

The control which is exercised by the employer does not need to be direct or absolute – also subtler types of power relations have sometimes been considered.[183] In the previously shortly discussed case *Danosa* for instance, which was a Latvian case dealing with excluding a pregnant member of the board of directors of a capital company from the personal scope of Pregnant Workers Directive (92/85/EEC), the Court made the interpretation that the concept of subordination is more than merely the right by the superior to micro-manage how one works. It was emphasized that this could effectively equate to a power of ”direction or supervision", particularly where such employees are an integral part of the business for which they perform their services. As a result of her reporting to and cooperation with the supervisory board, Miss Danosa had to be regarded as a worker.[184] As *van Peijpe* rightly notes, the Court did not limit its scrutiny to the formal definition of subordination but took into account different factors of dependence, involving the risk of termination of employment.[185]

A similar case to Danosa is another previously shortly discussed case called *Balkaya*. In it, the Court was, first of all, of the opinion that the concept of worker must have an autonomous and independent meaning within the EU legal system and the employment relationship’s type under national law bears no relevance in determining whether or not they qualify as a worker under EU law. The case considered a member of the board of directors of a capital company, as did Danosa. Despite German case law not classifying him as an employee, the Court came to the opposite conclusion, classifying him as a worker, in light of the same factors taken into account in Danosa: his appointment was done by the general meeting of the company shareholders, which "may revoke his mandate at any time, even against his will”, he was under the same

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[181] C-256/01 *Allonby*, paras 17-19, 28, 68, 72 and 79.

[182] Georgiou *European Journal of Industrial Relations* 2022, p. 198.

[183] Georgiou *European Journal of Industrial Relations* 2022, p. 199 and Case C-270/13 *Iraklis Haralambidis v Calogero Casilli*. ECLI:EU:C:2014:2185. Para 33.

[184] C-232/09 *Danosa*, paras 23-24, 27-28, 49, 51 and 56.

[185] van Peijpe *European Labour Law Journal* 2012, p. 40.

body's direction and supervision, and he had no ownership in the company for which he performed his tasks.

5.4 Remuneration

Regarding the remuneration criterion, the case law that Février has analysed in their article showcases that many types of remuneration are accepted. The Court accepts many situations which differ from the normal pattern where the employer pays a wage in the form of money to a worker.[186] For instance, the origin of the remuneration does not seem to have an importance. Therefore, in the *Bettray* case, the fact that the remuneration was essentially provided by public funds and not by the employer was not an issue for the Court.[187] In the aforementioned case *Balkaya* the Court also acknowledged that a person completing a traineeship program with financial support from a public authority likewise qualifies as a worker under the law. To this end, the Court referred to its case law regarding Article 45 TFEU, which holds that it is irrelevant if a person's productivity is low or if they do not perform all of their duties, work only a few hours per week and thus receive little pay, or *if they obtain pay through public grants*.[188]

The restricted nature of the remuneration also does not have any effect whatsoever.[189] The nature of the remuneration may differ, and the Court acknowledged, in the *Steymann* case, that services and benefits given by a religious community to one of its members in return for his work had to be regarded as equal to a wage.[190]

In *Agegate*[191] fishermen who were reimbursed as share fishermen, which means on the basis of the proceeds of sale of their catches, were regarded as workers. The Court regarded that the mere fact a person is paid a share and that their remuneration might be calculated on a collective basis does not mean such a person would not be considered a worker. When considering whether a relationship is not an employment relationship, in each case one needs to take account

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[186] Février *European Labour Law Journal* 2021, p. 180.

[187] C-344/87 *Bettray*, para 15.

[188] C-229/14 *Balkaya*, paras 35, 40 and 50.

[189] *Trojani*, para 15, *Levin*, para 16 and C-10/05 *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi*. ECLI:EU:C:2005:789, para 22.

[190] Case C-196/87 *Steymann v Staatsecretaris van Justitie*. ECLI:EU:C:1988:475, para 12.

[191] Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate* Ltd. ECLI:EU:C:1989:650.

all the factors and conditions depicting the agreements between the parties, such as how much one shares the commercial risks of the business, how freely one may decide their working hours and recruit their own assistants.[192]

Indeed, the Court does not give much importance to the renumeration criterion. To summarise, the remuneration may be provided from the public funds, may be in the form of services and benefits and may even be a paid share which is calculated based on what a group of people earn together. As long as there is remuneration of some kind, that is considered enough. This mainly excludes voluntary work. An interpretative problem might raise because of the fact that many voluntary jobs may include some kind of benefits and services given in exchange for the work done by the worker. In that way they might be equated justifiably to the Steymann case where services and benefits provided by the Church were considered remuneration. It must also be noted that the work criterion (one must pursue a genuine and effective activity) does not mean that someone who does voluntary work could be not be considered as a worker as one may do voluntary work which is considered economic activity. Even though many of the organisations who provide voluntary work are not companies, many of them may participate in economic activities.

However, one would think that the Court would not be willing to extend the concept of worker to cover voluntary workers as this could be something that many Member States would not be willing to accept. This may be argued from the presumption that if voluntary workers were classified as workers, many of them would use social benefits in the Member State without contributing to their financing. The reason why it may be argued that Member States could be unaccepting towards these kinds of situations is the critique of *benefit tourism*. Benefit tourism may be defined as follows: A migration of Union citizens from other Member States to a host State with the purpose of using the social benefits in the host State without making a contribution to their financing[193]. This kind of benefit tourism, sometimes based on highly anecdotal evidence, has been criticised openly by politicians and the popular press in many Member States.[194] Voluntary workers, even if their purpose would not be to use social benefits without contributing to their financing, could do exactly that if they were classified as workers. The

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[192] C-3/87 *Agegate*, paras 33 and 36.

[193] Verschueren *Common Market Law Review* 2015, p. 363.

[194] Verschueren *Common Market Law Review* 2015, p. 363.

Steymann case therefore appears to be more problematic than what at the first glance it would seem.

5.5 Other cases and unitary concept of worker

5.5.1 Other cases

In *Kempf*[195]a German national who was residing and working in the Netherlands as a music teacher with about 12 weekly lessons was not granted a residence permit. The Dutch and Danish governments were of the opinion that work that has an income less than the minimum level of means of subsistence in the host state ought not to be considered as genuine and effective work in the case the person claims social benefits from public funds. The Court did not agree with this view. It was of the opinion that it is not relevant whether additional means of subsistence originate from property or from the job of a family member, which was the case in Levin, or whether, as in this case, they are received from financial assistance from the public funds given by the Member State in which they live as long the work they do is of effective and genuine nature.[196] This is a very interesting and significant judgement from the Court. In Levin, the Court did not state that a person who earns less than the minimum level for subsistence could supplement their earnings with financial assistance from the public funds and still be classified as a worker. However, in this case, the Court saw that these kinds of persons may also be classified as workers. This judgement may be seen to have helped and encouraged people to take up low-paid work in another EU Member State and enabled these kinds of workers to receive benefits without having to fear the removal of a worker status.

Fenoll[197] dealt with a right recognized by Working Time Directive, namely the right to annual paid holidays. The decision concerned individuals who had been accepted into a special work rehabilitation centre, which provided seriously disabled individuals who were unable to work in an ordinary setting possibilities for a variety of work activities, medical, social, and educational support, as well as living arrangements. The Court concluded that they might be categorized as workers within the meaning of the Directive in question in spite of the distinctive nature

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[195] Case C-139/85 *Kempf v Staatssecretaris van Justitie*. ECLI:EU:C:1986:223.

[196] C-139/85 *Kempf*, paras 2-4, 7 and 14.

[197] 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*. ECLI:EU:C:2015:200

of their job activity, the individuals in question's lower level of productivity, and the modest amount of compensation they received.[198][199] This case bears similarity to the aforementioned *Trojani* and *Bettray* cases as these cases also dealt with working in a rehabilitation context.

Betriebsrat der Ruhrlandklinik[200] case involved a member of a not-for-profit association (Ms. K) who worked as a nurse in a clinic in exchange for payment, under a secondment of personnel arrangement between her association and the clinic. Because of her lack of worker status under national law as she did not have an employment contract, the Court was inquired whether she was a worker under EU law for the purposes of applying the Temporary Agency Work Directive 2008/104[201].

The Court started its answer by discussing the concept of worker. The Court stated that it is important to keep in mind that, according to the Temporary Agency Work Directive's Article 3(1)(a), the term worker refers to "any person who, in the Member State concerned, is protected as a worker under national employment law". As a result, it can be implied from the wording of that provision that, for the purposes of that directive, the term worker refers to any individual who works and who is afforded protection in accordance with that definition in the Member State in question. Then the Court reiterated the definition given in Lawrie-Blum which is: "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 re-turn for which he receives remuneration." Furthermore, the Court reiterated its view given in *Danosa* according to which the legal status of the relationship under national law, its form and the legal relationship between an employer and a worker is not of relevance.

The Court also stated that it follows from Article 1(1) of the Temporary Agency Directive and Article 3(1)(c), which provides the definition for the term temporary agency worker, that the directive also applies to workers who have employment relationship with a temporary work agency but have not signed a contract of employment with them. Therefore, in order to determine whether or not the individual in question qualifies as a worker under the Temporary

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[198] C-316/13 *Fenoll*, paras 2, 10, 11, 18, 34 and 43.

[199] Menegatti *Italian Labour Law E-Journal* 2019, p. 77.

[200] Case C-216/15 *Betriebsrat der Ruhrlandklinik*. ECLI:EU:C:2016:883.

[201] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Agency Directive, it is not relevant to consider how an individual's relationship with the temporary work agency is characterised legally under national law or to consider the legal nature or form of their relationship.

Consequently, the mere fact that a person, such as Ms. K. did not have an employment contract with the temporary work agency and, as a result, did not have the status of a worker under German law did not exempt her from the definition of worker under that directive and, consequently, from its jurisdiction. This conclusion may not be questioned by the fact that, under Article 3(2) of the Temporary Agency Directive, the directive is not to determine the definition of worker in national law. The purpose of that provision, as noted by the Advocate General in point 29 of his Opinion, is simply to maintain the authority of the Member States to determine individuals who fall under the concept of worker for the purposes of national law and who are entitled to protection under their domestic laws. The Temporary Agency Directive does not seek to harmonise this aspect.

However, that clause cannot be read as the EU legislature waiving its authority to decide the range of the concept of worker for the purposes of the Temporary Agency Directive and, consequently, the rationae personae of that directive. According to the ruling's paragraphs 25 and 26, the EU legislature defined the concept's parameters in Article 3(1)(a) of the directive rather than leaving it up to the Member States to do so. It also defined the parameters of the concept temporary agency worker in Article 3(1)(c) of the same directive. It follows that, for the aim of interpreting that directive, this concept includes any individual who, as a result of their work, is protected in the Member State in question and who has an employment relationship in the sense described in paragraph 27 of this decision.[202]

What was significant in this case was the fact that the Court saw that it was of no importance that Ms. K. was not regarded as a worker in domestic law, but it saw that it fell under its jurisdiction to determine whether she was a worker or not. Menegatti views that it would hardly be a stretch to suggest that the Court has introduced a novel strategy in Betriebsrat der Ruhrlandklinik, in opposition to Danmol minimalism[203], one that may be relevant to all Directives pertaining to employment protections, regardless of whether or not they limit their applicability to

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[202] C-216/15 *Betriebsrat der Ruhrlandklinik*, pp. 10, 11, 14, 18, 22, 25-29 and 30-33.

[203] Case 105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation*. ECLI:EU:C:1985:331. In the case the Court determined that "directive no 77/187 is intended to achieve only

national concepts of worker or not[204]. Since they are all equally focused on, along with the Directive on temporary agency work, creating "a protective framework for... workers,", the conclusions of Betriebsrat der Ruhrlandklinik on the need to connect the scope of the labour law Directives to an EU autonomous concept of worker seem appropriate for all of them, beyond what their wording is.[205]

In *Jessy Saint Prix*[206] the Court stated that a woman who suspends her activities or ends searching for jobs because she is pregnant may still be classified as a worker. This is because the free movement of workers is regarded as fundamental and has to be interpreted broadly.[207] In *Brown*[208], the Court stated that a Member State national who works in an employment relationship in another Member State for eight months with the intention of taking up university studies in the same field, and who would not have been given the job by his employer had he not been granted university admission, is considered a worker.[209]

5.5.2 Summary and unitary concept of worker

By thinking back to the earlier discussed *FNV Kunsten* case, *Menegatti* sums up that whether one is a worker or not may be determined on the basis of three conventional employment tests:

(a) Direction (or subordination): The employer sets the terms of employment, such as the location and hours of labour. (b) Integration into the corporate organisation of the employer. (c) The

partial harmonization", as opposed to the field of free movement of workers, and therefore that "it follows that directive no 77/187 may be relied upon only by persons who are, in one way or another, protected as employees under the law of the member state concerned". The "Danmols orthodoxy," which is based on the notion that the instruments it refers to are instruments of "partial harmonization," held up over time with relatively great success, at least until the beginning of the twenty-first century, with a few small exceptions. Kountouris 2018, p. 201.

[204] Menegatti *Italian Labour Law E-Journal* 2019, p. 78-79.

[205] Menegatti *Italian Labour Law E-Journal* 2019, p. 78-79.

[206] Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*. ECLI:EU:C:2014:2007.

[207] C-507/12 *Jessy Saint Prix*, para 40.

[208] Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland*. ECLI:EU:C:1988:323.

[209] Case 197-86 *Brown*, para 20.

worker's economic reality: they do not risk loss, they do not employ people, and they have no direct market access.[210]

In addition to these conditions, one has to also remember the Lawrie-Blum formula. Although the Menegatti's summary includes the subordination criterion of the formula, it does not include the other two conditions, i.e. work and renumeration element.[211]

What comes to unitary concept of worker, Février comes to a conclusion that there exists no unitary concept of worker in the EU law. Février recognises that the Court mostly tries to apply the Lawrie-Blum case law. However, a person might be regarded a worker under free movement law (and the Social Policy Directives) where an EU concept of worker has been established but not under some other Directives which make a reference back to the national definitions. Thus, no unitary concept of worker exists. Février believes that it is not likely in the near future that the Lawrie-Blum case law would be expanded to Directives which make a reference back to the national definitions.[212] Also van Peijpe sees there is not a uniform and comprehensive EU definition for the concept of worker. This is partly because of the same challenges that arise in a national setting: the differentiating criteria are inevitably inexact, and the real world of work employment relationships is in constant change, which means that old definitions are not always matching the new relationships.[213]

However, in Menegatti's view, despite the fact that the decisions regarding the concept of worker address distinct regulatory goals, the concept's extension does not involve a logical leap from one to the next. The Lawrie-Blum definition of worker to which the Court has appended the detailed modifications, serves as the unifying factor throughout the several rulings.[214] I agree with Menegatti here. More often than not the Court refers to the Lawrie-Blum definition as the baseline definition in its different judgements, even in different areas of law.

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[210] Menegatti *Italian Labour Law E-Journal*, 2019, p. 80.

[211] These were discussed in the Chapter 4 and in more detail in the subchapters 5.2 and 5.4.

[212] Février *European Labour Law Journal* 2021, pp. 186 and 190.

[213] van Peijpe *European Labour Law Journal* 2012, p. 38.

[214] Menegatti *Italian Labour Law E-Journal* 2019, p. 80.

5.6 How are new forms of employment taken into account in the case law?

In this subchapter it will be discussed how new forms of employment are taken into account in the EU's case law's definition of the concept of worker. In Menegatti's view the Court has expanded the definition of worker and so expanded the scope of employment rights that were previously limited to traditional employment relations in most Member states. The Court's approach is based on a widespread application of the purposive method of interpretation, which is reinforced by the EU's social goals gaining more significance and, finally, by the Charter of Fundamental Rights of the European Union coming into effect following the Lisbon Treaty.

This could give rise to the idea that the process of granting EU employment rights to workers who are not subordinates will continue. As demonstrated by the recent case *Betriebsrat der Ruthrlandklinik*, the Court's stance on the interpretation of the employment protection Directives' scope is likely to expand the application of the EU concept of worker beyond what is stated in the directives. However, it is anticipated that in parallel, national courts would increasingly be required to align their interpretations with the Court's, granting access to the employment rights based on the EU's definition of a worker.

In this regard, it is likely that many member states will have to abandon the strict binary of worker vs self-employed and the outdated "all or nothing" approach to employment rights that goes along with it. An increasing number of under protected workers who do not fall under the "employment" category may benefit from this. It might also be advantageous for national courts, which are regularly asked to provide a remedy against worker exploitation but having to use frequently insufficient tools of conventional employment tests. Finally, they would be released from the need to expand the concept of worker beyond its fair bounds in order to grant non-subordinate workers the essential employment protections.[215] What can be implied from Menegatti's evaluation is that he views that the Court's case law takes into account new forms of employment fairly well. He also appears to believe that the Court may broaden the limits of the EU concept of worker.

Next up, I will give my own evaluation of how new forms of employment included in this thesis (casual work, platform work and voucher-based work) are taken into account in the case law's definitions of worker that have been discussed in the chapters 4 and 5. It was defined in *the*

[215] Menegatti *Italian Labour Law E-Journal*, 2019, pp. 81-82.

Levin case that someone who works part-time may be considered a worker too and even a person who earns less than the minimum income for subsistence may be considered a worker too.

Out of the new forms of employment mentioned, Levin's definition of "part-time worker may be a worker as well" can be considered to take partly into account casual work as casual work may be part-time work and oftentimes indeed is. Furthermore, as a result of it often being part-time work, one often earns from it less than the minimum income for subsistence and according to Levin this type of worker may still be considered a worker. It is however unclear whether a person who receives casual work very irregularly (for instance once a month) would be considered a worker.

Considering the core definition of the worker, i.e. Lawrie Blum formula (based on Levin and Lawrie-Blum cases), it does not take into account any of the new forms of employment included in the thesis. The criterion of work ("effective and genuine activity") included in Levin and criteria of subordination ("under the direction of another person") and renumeration ("in return for which he receives remuneration") are too vague for them to take into account the new forms of employment included in the thesis.

Next, it will be discussed which of the clarifying cases may be considered to take into account new forms of employment. The definitions of *FNV Kunsten* and *B v Yodel* may be seen to partially take into account platform work. Starting with FNV Kunsten which concluded that "a service provider can lose his status of an independent trader… 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". In *B v Yodel* it was stated that persons will be seen as self-employed provided they have discretion to: a) "to use subcontractors or substitutes to perform the service which he has undertaken to provide", b) "to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks", c) "to provide his services to any third party, including direct competitors of the putative employer" and d) "to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer". As said earlier in the thesis, these are not direct definitions of worker but indirect ones.

These definitions by the Court could possibly be interpreted in a way which provides at least some platform workers a worker status. However, to say that some platform workers, or let

alone all, would be guaranteed a worker status in another EU Member State based on these cases is uncertain as the Court did not clearly state that persons who do these kinds of jobs are classified as workers and neither did it give its opinion whether B was seen as a worker or an independent trader. Instead, it redirected this question to the Member state.

All in all, the discussed EU case law takes only partly or not at all into account new forms of employment discussed in this thesis. Voucher-based work is a form of employment that is not taken into account in the cases. Considering platform workers, they may be seen to be in a grey area where they might be seen as workers, but they also might not in the eyes of the EU case law[216]. This is unacceptable as the legal certainty and possibly freedom of movement[217] suffer from this situation. In my view, the EU should add platform work into the definition of worker. This could be done for example by defining that persons performing platform work are considered workers and at the same time giving a definition of platform work.

This may be justified when one considers that platform work resembles in many respects traditional employment forms and platform workers' vulnerable position in the marketplace. They are not getting many upsides from being self-employed, such as the possibility to have their own employees or increasing their profit margins, but at the same time they are getting several downsides of it. The downsides include, for example, having to cover their medical and accident insurance and not having the protections that employees have (for example redundancy protection)[218].

The best way to give the definition would be by legislation and not wait for the Court to give the definition, as giving a new definition requires that a relevant case is put forth into the Court. Furthermore, on a specific case, the Court might not be able to give a full and clear definition but a partial definition which is relevant to the case in hand.

Another issue is that at the moment the task of defining a worker has been primarily left for the Court to do. Should this be the case? It is one of the tasks of the Court to give a ruling on the interpretation of the EU law if initiated by a national court. However, because the EU legislator

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[216] This applies to casual workers as well. The EU should also determine more clearly when casual workers are considered workers.

[217] In the sense that not many people are probably willing to go into another Member state to work if it is uncertain whether they are seen as a worker.

[218] See more of the downsides discussed in the subchapter 6.2.

has not properly defined a worker, defining a worker cannot be considered just interpreting the law but more of lawgiving. The importance of the definition of worker is also great and therefore the Court has had significant legislative power in the issue. However, to respect the trias politica model, this kind of legislative power should be left for the legislator.

Georgiou proposes that the EU would add a risk-related worker criterion to the definition of worker which would be based on "the 'involuntary assumption of business risks' measured by the 'inability of a person to spread his risks'". When one is unable to spread his risks (for example, due to low or no capital, sunk or job-specific investments, lack of employees, lack of other sources of income, and/or lack of control over the business strategy), they cannot be considered to make sincerely free decisions. The person's only choice in these situations is to accept the terms that are being offered since they do not really have a choice. That "defects" their risk-taking decisions in these situations, which justifies a certain amount of labour protection. Since it is impossible to claim that the individual took on these economic risks "voluntarily", the state has a legitimate basis to interfere with the individual's will - as defined by the contract - and reclassify them as a de facto subordinate worker.[219] This is a good proposition by Georgiou. It is hard to see why one would take work in which there are business risks and at the same time inability to spread those risks, unless they had to take it, for instance due to financial reasons. Therefore, taking these risks, is not truly a voluntary decision. Having this criterion in the definition would allow, for instance, many platform workers to be classified as workers.

[219] Georgiou 2022, pp. 30 and 32.

6 Criticism on the definition of the concept of worker

6.1 General criticism

The definition of worker in the EU law has been criticised of inadequately taking into account workers who participate in the new forms of employment. One critic, Charlotte O'Brien has heavily criticised how the Member States apply the concept and in effect indirectly also the definition. She argues that the free movement provisions may at times be interpreted restrictively and exclusively in the case of workers (in addition to those who are seeking a right to reside based on a citizenship). Although the EU narrative theoretically adopts a broad definition of work, free movement is actually perceived very differently "on the ground". Member States run the risk of going back to a time before the Maastricht Treaty and even before the Rome Treaty for individuals with low earnings and inconsistent and insecure work. She argues that the free movement hierarchy has for quite some time placed workers at the top, yet work is no longer necessarily sufficient. In a growing fashion, EU workers must work enough of the correct kind of employment, with adequate stability level, and have high enough income in order to cross national limits (for a worker status).

O'Brien sees that in the EU work is divided into legitimate and invalid work. States make a distinction between work that satisfies minimum wage or hour requirements and work that is deemed marginal and hence considered as an economic inactivity. The correct type of work is consistent, secure, and stable, which is quite at odds with the EU's increasingly flexible labour market and rising job insecurity. A sizable, vulnerable part of migrant workers may be financially and socially excluded as a result of this. Compared to nationals of the home State, migrants' likelihood to be employed in positions that pay less, offer less security and have unstable hours is bigger, and they are more susceptible to changes in the labour market. These most vulnerable workers run the risk of being shut out of social security benefits. Furthermore, O'Brien claims that there are Member States who take advantage of the consideration that are given to them in determining work, employment prospects, and held worker status to significantly cause social exclusion to other nationalities. Many persons who are classified as inactive are actually working, but not to a sufficient extent according to national standards.

People with low pay and irregular hours and have high degrees of job insecurity belong to the group of the most vulnerable workers, yet they more and more make up the labour force supporting Europe's economies. However, they run the possibility of being classified as non-persons for EU purposes due to an "anachronistic, parsimonious and disingenuous" implementation of the definition of work. The EU's gravitational centre is rapidly changing. The phrase "I trade, therefore I am" was used as the name of O'Brien's previous article to imply that it served as the guiding concept of personhood in the EU. However, this assertion might no longer be valid. She sees that the free movement is becoming the area of workers with good resources with working class being at increased possibility of poverty.[220]

What kind of work O'Brien may refer to here is at least casual work. The problems that O'Brien discusses are a reflection of the current EU definitions of worker. The EU definitions only take partially into account casual work. This allows the Member States to classify many of those working in this type of employment as non-workers.

O'Brien comments on 'the marginal and ancillary activity' part of the concept of worker[221]. It is a leftover category, and the State must prove marginality in order to disprove the assumption of work. This type of thinking is something that makes commentators to presume that the group of "economically inactive" is a tiny but significant group (significant for the reason that they serve as a benchmark for solidarity between Member States in welfare issues). However, the group of people who are treated as economically inactive is significantly larger than the group of people who are economically inactive.[222]

According to the European Commission study some states have formal or informal income thresholds[223], and some of them are relatively high. These are typically theoretically reinforced with a second stage test, allowing those who fall below the thresholds to be evaluated on an individual basis. But there isn't much information available on how these evaluations work, and in a few prominent instances, there exists some evidence that the threshold is almost certainly

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[220] O'Brien *Common Market Law Review* 2016, pp. 938-941.

[221] Work criterion of the Lawrie Blum formula.

[222] O'Brien *Common Market Law Review* 2016, p. 955.

[223] European Commission, pp. 24-25.

determinative. In these situations, falling below the threshold establishes an assumption of marginality that the claimant has to dispel. As a result, the worker may have a significant burden of proof.[224]

What can be inferred from this study is that people who could be argued to be economically active may be classified as economically inactive (having marginal activities). However, as marginal and ancillary activity is an open term and it has not been defined properly, it is open to interpretation what goes under it. Some EU Court cases have partly provided some clarification on the term, but it is still much open to interpretation. However, if some persons are unfairly classified as economically inactive, this is again something that the EU could change by updating its definition of worker.

If these problems that O'Brien presents in her article are something that one has a desire to solve, they could be solved by the EU creating a more inclusive but at the same time more precise definition. One way of doing this would be to mention specifically that persons working in a new form of employment (for example casual work) are considered workers and also to give definition of this form of employment.[225] If the definition of worker includes this form of employment, Member States have to implement and apply it or face the consequences of not doing so. It is understandable to blame the Member States for coming up with, from the perspective of new forms of employment, strict definitions and thresholds for a worker. In the case that the Member States are not faithful to the EU law, they are indeed to blame for these wrong applications of the EU definition. However, if they are faithful to the EU law, it is the EU's fault that they allow strict definitions and thresholds to exist by not having an inclusive and precise enough definition from the point of view of new forms of employment.

6.2 Some consequences of not being classified as a worker – a perspective of a platform worker

As was discussed in the subchapter 1.1 (Context) whether an EU citizen is classified as a worker or not in another EU Member State is an important issue. Georgiou discusses some problems or consequences which not classifying platform workers as workers has. Millions of platform

[224] O'Brien *Common Market Law Review* 2016, p. 955.

[225] As has been discussed, it is the author's view that of the discussed new forms of employment, platform workers should be considered workers in the EU definition of worker.

workers are these days directed through online platforms for the completion of all types of tasks. The platforms many times only claim to be just labour market intermediaries that connect supply and demand. However, by categorizing people as self-employed rather than employees, they can make large profits for themselves while bypassing labour and social security laws.[226] In practice, the platforms exert decisive control over the providers' activities[227].

More specifically, they frequently decide on the cost of the provided services and have the power to unilaterally change the workers' anticipated rate of return by arbitrarily changing the amount of commission kept. Furthermore, platforms many times put on place severe branding restrictions, burdensome exclusivity or non-circumvention clauses, and normally set minimum service quality standards. If a person falls underneath a certain limit which is set by the platform, they may get punished by getting one's account deactivated.[228] However, this last point can be likened to a termination of an employment in an employment relationship which can happen if a worker does not perform according to the standards of an employer. Therefore, in my view getting one's account deactivated is not necessarily a problem because the comparable consequences may result in an employment relationship.

However, algorithmic management may push workers who reject task proposals to the bottom of the option list resulting in receiving less work and receiving less compensation for it[229]. Giving less work to a platform worker in these cases is understandable from the point of view of the platform work company but very unfortunate from the point of view of the worker. Receiving less compensation sounds unfair taking into account the vulnerable and weak position of a platform worker.

Besides controlling workers, platforms also utilize their influence to transfer business-related fees to them. Individuals are required to pay for the material and human capital investment, redeployment, and maintenance costs under various contracts for platform work. More specifically, individuals are frequently required to provide and maintain their own equipment (such as vehicles and cleaning supplies) to a standard specified by the platform, as well as to cover

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[226] Georgiou *European Journal of Industrial Relations* 2022, p. 195.

[227] Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*. ECLI:EU:C:2017:981. & Case C-320/16 *Criminal proceedings against Uber France*. ECLI:EU:C:2018:221.

[228] Georgiou *European Journal of Industrial Relations* 2022, p. 195-196.

[229] Georgiou *European Journal of Industrial Relations* 2022, p. 196.

their own gas, insurance, taxes, and possible leasing fees. Furthermore, as they are 47% less likely to obtain training than their peers who are continuously employed, platform workers must invest in their own training in order to maintain their competitiveness in this unstable labour market. What is more, many of these contracts require individuals to be responsible for increased health and safety costs as well as third-party liability costs. Platform workers are also more likely to experience high levels of stress, anxiety, and depression due to their poor and unpredictable pay, long hours, and irregular schedules. Workers who suffer from these psychological health issues are under additional strain, which frequently results in physical health issues and higher health and safety costs.[230]

These are major problems and demonstrate well how problematic it is to not view platform workers as workers but instead as self-employed. Many of these aforementioned issues are normal in self-employment but the difference between a regular self-employed person and a platform worker is that a platform worker receives few benefits of self-employment because they are largely under the control of a platform company, while a regular self-employed person receives many more benefits. For this reason, it may be seen as problematic that platform workers do not have a status of worker.

[230] Georgiou *European Journal of Industrial Relations* 2022, p. 196.

7 Conclusion

The concept of worker is a significant concept in the EU law. First of all, it is significant because the free movement of persons, which includes workers, is one of the four fundamental freedoms of EU law in addition to free movement of goods, services, and capital. Second of all, it is significant as by being classified as a worker, one gets access to the protection of labour and security law, for example the protection against dismissal and the right to holiday to mention a few. The concept of worker has not been properly defined neither in the EU's primary nor in its secondary law. This was left for the Court to do. From the start it regarded that the definition of worker was a matter of EU law, not national law.

The research questions that this thesis has answered are:

1) What is the core definition of the concept of worker in the EU law, specifically in the fields of labour and employment law and what are some clarifying definitions of it? 2) How certain new forms of employment (casual work, platform work and voucher-based work) are taken into account in the EU definitions of worker?

The answers to these will be summarised by revisiting what was discussed in the Chapters 2-6.

The Chapter 2 of this thesis dealt with the concept of worker in primary law and new forms of employment. Regarding primary law, Article 45 TFEU mentions the concept of worker but gives no definition for it. Regarding new forms of employment, those which were included in the thesis were: casual work, platform work and voucher-based work. In the Chapter 3 the definition of the concept of worker in secondary law was discussed. In secondary law, the only autonomous legal definition of the concept of worker can be found in the Occupational Safety and Health Framework Directive according to which a worker' is "any person employed by an employer, including trainees and apprentices but excluding domestic servants". It cannot be said to take into account the new forms of employment.

In the Directive on Transparent and Predictable Working Conditions' the definition of worker is given in Article 1(2) according to which: "This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice." This definition cannot be considered a proper definition of worker and the main addition relating to the definition of worker in it, is

the acknowledgment of the relevant case law of the Court. While important, it does not add anything new to the definition. From the point of view of new forms of employment, the DTPWC's quasi-definition is disappointing and does not take into account new forms of employment.

The Platform Work Directive is a directive yet to come into force, but its proposal text has been agreed on. According to it a contractual relationship between a digital labour platform and an individual using the platform to do platform work will be presumed to be an employment relationship when facts suggesting control and direction are discovered. "Those facts will be determined according to national law and collective agreements" or practice in force in Member States, while also considering EU case law. Even though the directive's definition seems promising at a first glance, it does not provide anything new what comes to defining the concept of worker. Therefore, the PWC's definition is also disappointing and cannot be seen to take into account new forms of employment.

In the Chapter 4 the core definition of the concept of worker (the Lawrie-Blum formula) was discussed. This was provided by *Levin* and *Lawrie Blum* cases. In Levin, a worker was defined as someone who pursues an effective and genuine activity (to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary). This is called the work criterion of the Lawrie-Blum formula. In Lawrie-Blum, a worker was defined as follows: "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." According to this definition, a worker is someone who is in this type of an employment relationship. This definition featured two other criteria of the Lawrie-Blum formula: remuneration and subordination.

In the chapter 5 the clarifying case law regarding the definition of the concept of worker was discussed. There are multiple cases that have clarified the definition of worker given in Levin and Lawrie-Blum. Many of them have been discussed in this paper. Considering the work criterion, in *Bettray* it was established that the activity performed has to be economic in its nature. Furthermore, in cases regarding professional athletes (*Bosman*, *Jyri Lehtonen*), trainees and PhD students (*Lawrie Blum*, *Bernini*), the Court found that genuine and effective activities existed.

What comes to the subordination requirement the Court does not often give as much attention to it as to the other Lawrie-Blum criteria. However, there are some cases related to that criterion. For example in *Danosa*, the Court interpreted subordination as encompassing more than just a superior's ability to micromanage how an employee works. It was underlined that this can, in fact, be equivalent to having the authority to exercise “direction or supervision", especially in cases when the employees in question are "an integral part" of the company for which they work. According to *FNV Kunsten* case "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”. What is implied here is that this kind of person (entirely dependent on their principal) would be classified as a worker then.

Regarding the remuneration element, it does not matter so much what kind of remuneration one receives. The remuneration may be provided from the public funds, may be in the form of services and benefits and may even be a paid share which is calculated based on what a group of people earn together. What seems to matter primarily is that there is remuneration of some kind. This mainly excludes voluntary work.

The discussed EU case law takes only partly or not at all into account new forms of employment discussed in this thesis. Casual work and platform work it takes into account partly while voucher-based work it does not take into account at all in the cases.

In my view, it would be well-advised for the EU to create a wider definition of the concept of worker which would include platform work. This could be done by stating in a definition that persons performing platform work are considered workers and at the same time giving a definition of platform work. Justifications for this inclusion of platform work are the facts that platform work resembles in many respects traditional employment forms and when platform workers are classified as self-employed, they are receiving few upsides of self-employment while receiving several downsides of being one. This type of definition would be best to give in a directive as opposed to a Court case as then there would be no need to wait for a right type of case to emerge first and because the legislative power should be left for the legislator.

My prediction is that in the future a directive that will properly take into account platform work will be given by the EU. This kind of directive is much needed in the today’s society where platform work has become a common form of employment.