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# The Evolving Concept of “worker” in EU law

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### Abstract

The Court of Justice of the European Union has been shaping over the last thirty years the concept of “worker” for the purpose of determining the scope of application of employment rights provided by EU labour law. The concept, initially elaborated with a view to enhance the free movement of workers within the common market, has then been extended to other pieces of EU labour legislation and to the so-called labour exception to antitrust law. The outcome of the Court’s jurisprudence is the expansion of the employment protections granted by EU labour law beyond the employment contract, to the benefit of non-subordinate workers economically and/or operationally dependent from a client/principal.

**Keywords:** European Union law; Court of Justice of the European Union; free movement of workers; equal pay; employment protection Directives; antitrust law; scope of application; dependent contractors; casual workers.

### 1. Introduction.

The Court of Justice of the European Union (CJEU) has played over the last thirty years an increasingly important role in the identification of the scope of employment protection provided for by EU labour law. In the framework of the preliminary reference procedure, the Court has had the chance to shape it in order to address the issues related to non-standard and precarious work arrangements, not falling within the domain of labour law. Namely, work relations where supposed independent contractors are economically and/or functionally and/or operationally dependent from one main client.

The CJEU elaboration has initially been confined in the field of the free movement of workers (§ 2); then, starting from the beginning of the twenties, it has dealt with the scope of the employment rights provided by EU primary and secondary law (§ 3) and the labour exception to antitrust law (§4). The outcome of the CJEU jurisprudence is a broad concept

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of “worker”, much broader than most of the national concepts of “employee”, which will be most likely influenced by it (§ 5).

## 2. The concept of “worker” as part of the making of the single market.

EU law has never clearly provided a definition of “worker” or “employment contract” in order to size the gateway to its system of employment protection<sup>1</sup>. The CJEU has therefore been in charge of developing it.

In this regard, in *Hoekstra*<sup>2</sup> the Court gave to the concept of worker a “community meaning” for the purpose of enhancing the free movement of workers within the Union granted by article 45 TFEU. The Court expressly recognized that if this concept was on national laws, member states could eliminate at will the protection afforded by EU law to migrant workers.

The content of the concept was for the first time finalised in *Lawrie-Blum*<sup>3</sup>, referring to any person that for a certain period of time performs services:

- [a] “for and under the direction of another person”
- [b] “in return of which he receives remuneration” engaged in
- [c] “effective and genuine activities”.

The subsequent CJEU jurisprudence has thoroughly investigated and developed the elements (b) and (c).

The economic nature of the activity performed has thus been considered the relevant element for the purpose of granting the rights attached to free circulation. It has been widely recognized, excluding only those activities “on such a small scale as to be regarded as ‘purely marginal and ancillary’” (*Levin, Meeusen*)<sup>4</sup>, which do not include in principle: temporary engagement of two and a half months (*Ninni-Orasche*)<sup>5</sup>; part-time employment providing an income lower than that which is considered as the minimum required for subsistence (*Levin*); on-call workers without any obligation to show up for work when requested and no guarantee as to the hours to be worked (*Raulin*)<sup>6</sup>; professional traineeship performed by a trainee lawyer (*Kranemann*)<sup>7</sup>; activities performed by members of a community based on religion or another form of philosophy (*Udo Steymann*)<sup>8</sup>.

<sup>1</sup> The only reference to something that may be similar to a definition is included in Directive 89/391, article 1 (1)(c): “worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants”.

<sup>2</sup> CJEU, 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.

<sup>3</sup> CJEU, Case C-66/85 *Deborah Lawrie-Blum v Land Baden- Württemberg* ECLI:EU:C:1986:284. See Nogler L., *Rethinking the Lawrie-Blum Doctrine of Subordination: A Critical Analysis Prompted by Recent Developments in Italian Employment Law*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2010, 26 (1), 83-102

<sup>4</sup> CJEU, Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*, [1982] ECR 1035; CJEU, Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep*, ECLI:EU:C:1982:105.

<sup>5</sup> CJEU, C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, ECLI:EU:C:2003:600.

<sup>6</sup> CJEU, Case C-357/89 *J. M. Raulin v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:87.

<sup>7</sup> CJEU, Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen*, ECLI:EU:C:2005:187.

<sup>8</sup> CJEU, Case C-196/87 *Udo Steymann v Staatssecretaris van Justitie*, ECLI:EU:C:1988:475.

A quite “generous” approach concerned also the “remuneration” indicator, since it has not been given any relevance to the fact that the remuneration was supplemented by financial assistance payable out of the public funds (*Kempf*)<sup>9</sup>.

The reference to the “direction”, characterising the difference between an employee and a self-employed person, has never received any real consideration for the purpose of the freedom of circulation<sup>10</sup>. A worker can circulate as employee or self-employed to the same extent. As made clear by the Court in *Asscher*<sup>11</sup>, when he/she performs a work activity in a foreign country, equality of conditions, within the meaning of article 45 (2) TFEU, are addressed to national employee or self-employed, depending on the classification given by the Member State to that worker.

At the end of the day, once a minimum amount of work is performed and some sort of remuneration granted, very few activities have been excluded from the Court’s definition of “worker”. One of the few examples available were those performed as a part of a rehabilitation program for drug addicts (*Bettray* C-344/87)<sup>12</sup>. The concern of the CJEU was to boost the economic freedoms and the sound functioning of the single market. It had little to do with the social purposes of labour law. This is the reason why the Court focused its attention mainly on the pursuit of genuine economic activities somehow remunerated, leaving aside the status of subordination.

Still for the purpose of granting the sound functioning of the common market, the European concept of “worker” was then endorsed by the Court with regard to the application of the principle of equal pay for equal work for male and female workers ensured by article 157 (ex Article 141) TFEU. The concern addressed in *Allonby*<sup>13</sup> was, more precisely, that of assuring conditions of undistorted competition by preventing social dumping. After having emphasized the importance of the principle of equal pay, forming “part of the fundamental principles protected by the Community legal order”, the Court concluded that the term worker “cannot be defined by reference to the legislation of the Member States but has a Community meaning”. As for the definition, the Court moved beyond the *Lawrie-Blum* approach, in two ways: it emphasised the employer’s “hetero-organisation”, above the traditional “direction”, giving relevance to “the extent of any limitation on [workers] freedom to choose their timetable, and the place and content of their work”; it excluded any relevance to “the fact that no obligation is imposed on [the workers] to accept an assignment”<sup>14</sup>.

This last finding looks extremely important for the purpose of the present analysis. The commitment to an ongoing engagement, which has led some national courts to exclude the qualification in term of subordination of casual work arrangements - most recently for gig-workers<sup>15</sup> – bears no relevance for the CJEU.

<sup>9</sup> CJEU, Case C-139/85 R. H. *Kempf contro Staatssecretaris van Justitie*, ECLI:EU:C:1986:223.

<sup>10</sup> See Countouris N., *The concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2017, 47, 202.

<sup>11</sup> CJEU, Case C-107/94 P. H. *Asscher v Staatssecretaris van Financiën*, ECLI:EU:C:1996:251.

<sup>12</sup> CJEU, Case C-344/87 *Bettray v Staatssecretaris van Justitie*, ECLI:EU:C:1989:226.

<sup>13</sup> CJEU, Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional e Secretary of State for Education and Employment*, ECLI:EU:C:2004:18.

<sup>14</sup> *Allonby*, para 72.

<sup>15</sup> Tribunale di Milano 10 september 2018, <http://www.bollettinoadapt.it/wp-content/uploads/2018/09/28009967s.pdf> (accessed 11 July 2019); Tribunale di Torino 7 may 2018, <http://www.bollettinoadapt.it/wp-content/uploads/2018/05/7782018.pdf> (accessed 11 July 2019); Juzgado

### 3. The concept of “worker” as gateway to EU employment protection.

The market-making process, supporting the elaboration of a common EU concept of worker for the purpose of the mentioned Treaties provisions<sup>16</sup>, led the Court to a different approach in the area of employment protection directives. As stated in *Danmols*<sup>17</sup>, the Directive 77/187 on the safeguard of the rights of employees involved in a transfer of undertaking is not intended “to establish a uniform level of protection throughout the community on the basis of common criteria”. It just seeks a “partial” harmonisation for the purpose of smoothing excessive differences between member states legislations, which could hinder the creation of the single market. This did not include the scope of application of the Directive, which had to be addressed only to those who were “protected as an employee under national employment law”, as literally stated by article 2 of Directive 2001/23 (replacing Directive 77/187)<sup>18</sup>.

The Court’s approach started changing at the beginning of the new millennium, alongside the increasing relevance of the EU social sphere. Social protection started being considered an aim in itself of the Union action, no longer just instrumental in the creation of the common market. A process enhanced by the new role acquired by the Charter of the Fundamental Rights of the European Union (CFREU) after the Lisbon Treaty, and recently relaunched by the initiative of the European Commission “Establishing a European Pillar of Social Rights Social”<sup>19</sup>.

In the face of the increasing relevance and multiplication of atypical work arrangements, the Court started worrying about a narrow delimitation by member states of the scope of employment rights provided by EU labour law, which could jeopardise its social aims. It has

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de lo Social de Madrid, 4 April 2019, sentencia n. 53/19,

<http://www.ugt.es/sites/default/files/sentenciaestimatoriaglovovictor.pdf> (accessed 11 July 2019).

On the issues concerning gig-workers and their qualification there is a large literature. See, among the many fine works available, De Stefano V., *The rise of the «just-in-time workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig-Economy»*, in *ILO Paper Series*, 71, 2016; Prassl J., *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, 2018; Ales E., *Protecting Work in the Digital Transformation: Rethinking the Typological Approach in the Intrinsically Triangular Relationship Perspective*, in Aa.Vv., *Working in Digital and Smart Organizations Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave, 2018, 11; Cherry M.A., Aloisi A., *Dependent contractors in the gig economy: a comparative approach*, in *American University Law Review*, 66, 2017, 636.

<sup>16</sup> See Barnard C., *EU Employment Law*, Oxford University Press, 2012, 35-39. In this regard see also Giubboni S., *Being a worker*, in *European Labour Law Journal*, 2018, 2 where he recalls the distinction proposed by D’Antona M., *Sistema giuridico comunitario*, in Caruso B., Sciarra S. (eds.), *Scritti sul metodo e sulla evoluzione del diritto del lavoro – Scritti sul diritto del lavoro comparato e comunitario*, Milano, Giuffrè, 2000, 1, 377-380 between “cohesive” harmonization and “functional” harmonization, the latter “aimed at promoting the Union’s autonomous social values (and not directly targeted at regulating the market)”.

<sup>17</sup> CJEU, Case C-105/84, *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar*, ECLI:EU:C:1985:331.

<sup>18</sup> See Countouris N., (10), 203 who referred to this Court’s approach as to “Danmol Orthodoxy”.

<sup>19</sup> See European Commission, *Commission Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, establishing a European pillar of social rights*,

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:250:FIN>, 2017 (accessed 28 June 2019). It significantly includes the objective of granting to self-employed full access to social protection, covering both social assistance and social security, under conditions comparable to those of employees.

On the development of the EU framework towards the grant of employment rights to vulnerable self-employed see Risak M., Dullinger T., (30), 13-16. Williams C., Lapeyre F., *Dependent self-employment: Trends, challenges and policy responses in the EU*, in *Working Paper ILO*, 2017.

then developed a different approach following two lines<sup>20</sup>: on the one side, extending the application of the EU concept of “worker” over national definition to an increasing number of pieces of EU labour legislation; on the other side, expanding, case after case, the notion of “worker”.

### 3.1. The evolution of the concept and its scope of application.

The adoption of the EU concept of “worker” in the area of employment protection Directives has until recently regarded only those employment protection Directives – a minority – not determining their subjective scope of application by referring to member states definitions of “employee”.

More in detail, in *Danosa*<sup>21</sup>, dealing with the protection afforded to pregnant workers by the Directive 92/85, the Court moved from the findings of the *Lawrie-Blum* case calling for the necessity of a common concept of workers and excluding any relevance of the qualification under national law<sup>22</sup>. As for the concept, after having recalled the “basic” *Lawrie-Blum* definition - “a person performs services for and under the direction of another person, in return for which he receives remuneration” –, the CJEU took the chance for expanding it significantly.

The case concerned the sole member of a capital company’s Board of Directors, responsible for managing the company’s assets, directing and representing it. Under the national legislation at stake (Latvian), as well as under most of the member states law, she was not considered as a “worker”. Nonetheless, the CJEU opened up to the possibility that she was in a relationship of subordination to that company, considering “all the factors and circumstances characterizing the relationship between the parties”<sup>23</sup>. The Court observed that “even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board”<sup>24</sup>. Moreover, under the national law at stake, she could “be removed from his or her duties by a decision of the shareholders, in some circumstances following suspension from those duties by the supervisory board”<sup>25</sup>, as she actually was. In particular, she was dismissed “by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes”<sup>26</sup>.

Similar conclusions were reached in *Holterman*<sup>27</sup>, still dealing with the director and manager of a capital company. The case concerned the establishment of jurisdiction pursuant to Regulation No. 44/2001. In this regard, according to the relevant conflict of law rules

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<sup>20</sup> The development of the EU concept of worker has been deeply analyzed by Countouris N., (29); Risak M., Dullinger T., (18), Giubboni S., (15); Van Peijpe T., *EU limits for the personal scope of employment law*, in *European Labour Law Journal*, 2012, 3, 35.

<sup>21</sup> CJEU, Case C-232/09 *Dita Danosa v LKB Lāzīngs SLA* ECLI:EU:C:2010:674.

<sup>22</sup> *Danosa*, para 41.

<sup>23</sup> Para 46.

<sup>24</sup> Para 49.

<sup>25</sup> Para 50.

<sup>26</sup> Para 50.

<sup>27</sup> CJEU, Case C-47/14 *Holterman Ferbo Exploitatie BV and Others v F.L.F. Spies von Büllersheim* ECLI:EU:C:2015:574.

provided for in section 5 of the Regulation, it was necessary to understand whether the manager could be classified as a “worker”. Even if the decision did not involve the application of employment protections, the Court decided to share the same notion of worker used in *Danosa* provided that “the regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction”<sup>28</sup>.

Two very relevant aspects emerge from the just mentioned cases: common social protection objectives justify the endorsement of a common concept of “worker” within different regulatory contexts; the EU concept of “worker” is broader than that shared by many national employment tests<sup>29</sup>, because of the “light” meaning given to “direction”.

In *Balkaya*<sup>30</sup> and *Commission v. Italy*<sup>31</sup> the common concept of “worker” has involved the interpretation of Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies. Facilitated again by the absence of any reference to the national concepts of “worker”, the Court concluded that it “must be given an autonomous and independent meaning in the EU legal order”<sup>32</sup>, and that “the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law”<sup>33</sup>.

With regard to the concept, the ECJ had not difficulties in including an “executive” within the meaning of “worker” in *Commission v. Italy*, making application of the usual Lawrie-Blum approach. It went further in *Balkaya*, once again beyond the traditional understanding of the employment relation and once again dealing with a member of the board of directors of a capital company. Even if he was not considered by German case-law an “employee”, the Court concluded otherwise in the light of the same elements considered in *Danosa*: he was appointed by the general meeting of the company shareholders, which “may revoke his mandate at any time, even against his will”; he was subject to the direction and supervision of the same body; he did not hold any shares in the company for which he carried out his functions<sup>34</sup>. Still in *Balkaya*, the Court recognised the status of “worker” also to a person performing under a traineeship scheme, financially supported by the public authority. To this end, the Court recalled its jurisprudence developed for article 45 TFEU, under which bears no relevance the fact that a person “does not carry out full duties”, “works only a small number of hours per week and thus receives limited remuneration”, whose “remuneration comes through public grants”<sup>35</sup>.

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<sup>28</sup> Para 43.

<sup>29</sup> For an overview on the concept of “employee” in different national jurisdictions, see Waas B., Heerma van Voss G. (eds.), *Restatement of Labour Law in Europe*, I, *The Concept of Employee*, Hart, 2017; Nogler L., *The Concept of “Subordination” in European and Comparative Law*, Università degli Studi di Trento, 2009; Perulli A., *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, in Casale G. (ed.), *The Employment Relationship. A Comparative Overview*, Hart Publishing, 2011, 137; Countouris N., *The Employment Relationship: A Comparative Analysis of National Judicial Approaches*, in Casale G. (ed.), *The Employment Relationship. A Comparative Overview*, Oxford, Hart Publishing, 2011, 35.

<sup>30</sup> CJEU, Case C-229/14 *Ender Balkaya contro Kiesel Abbruch- und Recycling Technik GmbH* ECLI:EU:C:2015:455.

<sup>31</sup> CJEU, Case C-596/12 *European Commission v Italian Republic* ECLI:EU:C:2014:77.

<sup>32</sup> *Balkaya*, para 33

<sup>33</sup> Para 35.

<sup>34</sup> Para 40.

<sup>35</sup> Para 50.

Interestingly, these conclusions were based on a purposive interpretation of the Directive 98/59, aimed at granting an “*effet utile*” to it. With this regard, the Court stated that its objective of affording a “greater protection to workers in the event of collective redundancies” would be undermined by a narrow definition of “worker”<sup>36</sup>.

An autonomous EU concept of worker has been put forward also in *Union Syndicale Solidaires Isère* for the purpose of the application of the Directive 2003/88, concerning certain aspects of the organisation of working time<sup>37</sup>. The case involved atypical workers, employed under a quite peculiar “educational commitment contracts” related to casual and seasonal activities for a maximum of 80 days a year, and their claim for the right to the minimum daily rest period granted to workers by the French Labour Code. According to the essential feature of an employment relationship, as elucidated in the *Laurie Blum* doctrine, the Court concluded that these working activities were to be considered within the scope of the working time Directive.

A broader concept of “worker” was endorsed by the CJEU also in *Fenoll*<sup>38</sup>, dealing with another entitlement recognised by the Directive 2003/88, that is to say the right to annual paid holidays. The decision concerned people admitted to special Work Rehabilitation Centre, aimed at granting personal fulfilment of seriously disabled persons – who cannot work in ordinary undertaking - by offering them opportunities for various work activities, medico-social and educational support, living arrangements. According to the Court, they could be classified as workers within the meaning of the Directive at stake, despite the peculiar characteristic of their work activity, the reduced level of productivity of the individuals concerned, and the limited amount of the remuneration they were paid.

The Court’s decisions so far were related to labour law Directives not determining their scope by referring to the national concept of “employee”. Missing the referral, it was not difficult for the CJEU to overcome the *Danmol* “minimalist” approach and put forward an autonomous European concept of “worker”. However, even when recently the Court had to deal with Directives, whose application is linked to national definitions, it decided to give little importance to the referral, going beyond the wording of the legislative text.

This was partially done in *O’Brein*<sup>39</sup>, concerning the application of the principle of equal treatment between part-time workers and comparable full-time workers set forth by Directive 97/81, implementing the relevant Framework Agreement. Article 2 of the Framework Agreement identifies the scope of the right through an unequivocal referral to workers “who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”.

Apparently, the Court maintained the *Danmol* “minimalist” approach, already endorsed with regard to the same Directive in the preceding *Wippel* case<sup>40</sup>. In its opinion, the part-time Agreement, just like the transfer of undertaking Directive, does not aim at a full harmonization of national legislation, but at merely “setting out the general principles and

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<sup>36</sup> *Balkaya* para 44; *Commission v. Italy* para 47.

<sup>37</sup> CJEU, Case C- 428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* ECLI:EU:C:2010:612.

<sup>38</sup> CJEU, Case C-316/13 *Gérard Fenoll v Centre d'aide par le travail "La Jouvène" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, ECLI:EU:C:2015:200.

<sup>39</sup> CJEU, C-393/10 *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs*, ECLI:EU:C:2012:110.

<sup>40</sup> CJEU, Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, ECLI:EU:C:2004:607.

minimum requirements for part-time working, to establish a general framework for eliminating discrimination against part-time workers”<sup>41</sup>. However, the Court did not stop here. It went on saying that, in any case, “the discretion granted to the Member States by Directive 97/81 in order to define the concepts used in the Framework Agreement on part-time work is not unlimited”<sup>42</sup>. The referral to national law and practices cannot jeopardise “the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness ... In particular, a Member State cannot remove at will, in violation of the effectiveness of Directive 97/81, certain categories of persons from the protection offered by that directive”<sup>43</sup>. In short, exclusions provided by national laws may be permitted, only if they are not to be regarded “as arbitrary”<sup>44</sup> and the Court of Justice will watch over these exclusions.

In the following *Betriebsrat der Rubrandklinik* decision<sup>45</sup> the Court went even further. The case involved a not-for-profit association member, who worked as a nurse in a clinic, in return for a remuneration, under a secondment of staff agreement between her association and the clinic. Since she did not have the status of “worker” under national law, the Court was asked whether it was also the case under EU law for the purpose of the application of the Directive 2008/104 on temporary agency work. Interestingly the Directive at stake not only determines its scope referring to the national definition of “worker”; it reinforces the referral by adding that its rules shall not affect “national law as regards the definition of pay, contract of employment, employment relationship or worker”. Exactly the same wording of the Directive on transfer of undertaking, which gave birth to the *Danmol* “minimalist” approach. Nevertheless, the Court clearly changed its mind, sentencing that the referral to the national concept of “worker” cannot “be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104”<sup>46</sup>. On the contrary, it has to be linked to “any person who has an employment relationship” in the sense set out by the Court itself in its jurisprudence<sup>47</sup>.

The conclusion is expressly supported by a purposive interpretation of the Directive. In the Court view, the objectives of the directives to “ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied” would be undermined if the concept of worker was restricted to persons falling within the scope of that concept under national law<sup>48</sup>. If in *O’Brein* the safeguard of the EU legislation effects led the Court to put some limits to the discretion of national laws, in *Betriebsrat der Rubrandklinik* that discretion has been excluded at all.

It is not much of a leap to say that the Court has inaugurated a new approach, opposite to the *Danmol* “minimalism”, potentially applicable to all Directives dealing with employment protections, no matter whether they refer the scope of application to national concepts of

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<sup>41</sup> Para 31.

<sup>42</sup> *O’Brein*, Para 34.

<sup>43</sup> Para 36.

<sup>44</sup> That is to say, “if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of ‘workers’ under national law” (para 42).

<sup>45</sup> CJEU, Case C-216/15 *Betriebsrat der Rubrandklinik gGmbH v Rubrandklinik gGmbH*, ECLI:EU:C:2016:883.

<sup>46</sup> Para 32.

<sup>47</sup> Para 33.

<sup>48</sup> Para 35.



worker or not. Since they are all equally aimed, as well as the Directive on temporary agency work, at establishing “a protective framework for ... workers”, the *Betriebsrat der Ruhrlandklinik* conclusions on the necessity of linking the scope of the labour law Directives to an EU autonomous concept of workers looks suitable for them all, even beyond their wording.

#### 4. The consecration of the single EU concept of “worker”.

The concept of worker developed by the CJEU case-law has been crystalized in *FNV Kunsten*<sup>49</sup>. The decision dealt with the boundaries of the so-called labour exception to antitrust law. More precisely, Article 101 of the TFEU prohibits “agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”. However, as stated by the Court in *Albany*<sup>50</sup>, collective negotiation aimed at “the improvement of conditions of work and employment” does not fall under the scope of limitations imposed by article 101, although they provide certain restrictions of competition; otherwise the social policy objectives pursued by such agreements would be seriously compromised.

The case at stake considered a collective agreement granting minimum fees for self-employed musicians, substituting for members of an orchestra. The Court pointed out that service providers, even performing activities similar to those performed by employees, are in principle “undertakings” within the meaning of EU law<sup>51</sup>; therefore, an organisation carrying out negotiations in their name or on their behalf does not act as a trade union but as an association of undertakings, falling under the scope of Article 101 (1) TFEU<sup>52</sup>. The labour exception can apply instead in case service providers turn out to be “false self-employed”, in actual fact behaving as “workers”.

The Court took therefore the opportunity to recap the concept of worker in the light of its established case-law, referring it to a person (a) acting “under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work”; (b) who “does not share in the employer’s commercial risks and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking”<sup>53</sup>. As for this last requirement, a service provider has not to be considered an independent contractor “if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking”<sup>54</sup>.

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<sup>49</sup> CJEU, Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2411.

<sup>50</sup> CJEU, Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430.

<sup>51</sup> Para 27.

<sup>52</sup> Para 30.

<sup>53</sup> Para 36.

<sup>54</sup> Para 33.

Looking back from this last approach to the path undertaken by the CJEU, one can see that there is no distinction between the concept of ‘worker’ elaborated for the different pieces of EU legislations. From the initial purpose of granting uniformity of rules and practices under article 45 and article 157 TFEU, to the labour exception to antitrust law, passing through the overcoming of the *Danmol* “minimal” approach, the expansion of the concept does not present any leap of logic from one decision to another, regardless of the fact they deal with different regulatory purposes. The glue between the various decisions is always the Lawrie-Blum concept of “worker”, on which the Court has added the adjustments elaborated for the different cases.

The idea of a single definition of “worker” for the different purposes of EU law seems expressly confirmed by the mentioned recent decisions, referring to “the term ‘employee’ for the purpose of EU law”<sup>55</sup>, so breaking away from a former approach, which, on the contrary, pointed out that “there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied”<sup>56</sup>; opinion, the latter, shared by some commentators<sup>57</sup>.

## 5. The implications of the ECJ elaboration on the concept of “Worker”: Employment protection beyond traditional employment contracts.

Taking a closer look at the concept of ‘worker’, it can be summarized, recalling the just considered *FNV Kunsten* case, on three traditional employment tests.

- (a) Direction: the employer dictates the manner of work (including the time and place of work).
- (b) Integration into the employer’s business organisation.
- (c) Economic reality: the worker does not bear any risk of loss, does not employ anyone, does not have any direct access to the market.

Even if this concept seems very similar to that of “employee” as shared by many different national jurisdictions, it differs from the latter in two very important elements: “direction” has been significantly watered down by the Court of Justice so as to coincide with that of “coordination”, expressed for example by a duty to report and cooperate with corporate bodies in *Danosa* and *Balkaya*; the commitment to ongoing engagement – namely, the

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<sup>55</sup> *FNV Kunsten* para 34, *Union Syndicale Solidaires Isère* para 28, *Betriebsrat der Ruhrlandklinik* para 32. It seems implicitly shared also by *Danosa*, *Balkaya*, *Commission v. Italy*.

<sup>56</sup> *Martinex Sala*, para 31; *Allonby* para 63; CJEU, Case C-543/03, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, ECLI:EU:C:2005:364 para 27.

<sup>57</sup> This is the opinion of Giubboni S., (15), 12 according to who “it is impossible to identify – in the framework of EU law – an organic and unitary employee/worker status that is actually comparable, not only in terms of scope, with those defined in the national legal systems”. On the contrary, Risak M., Dullinger T., (30), 18-20 believe, as we do, that there is a “tendency to unify the concept of ‘worker’ not only with regard to primary law but also in the field of secondary law”.

mutuality of obligations test developed by English Courts<sup>58</sup> or the legal continuity of the employment relationship in civil law countries<sup>59</sup> - bears little relevance or no relevance at all.

These differences make the EU notion of ‘worker’ much broader to that of “employee” commonly endorsed by national judiciaries, to the point of including intermediate categories workers - variously referred by some legislations to as dependent contractors, economically dependent, “parasubordinate” workers, employee-like persons<sup>60</sup> - and, more in general, all those workers engaged in effective and genuine activities, economically, functionally and/or operationally dependent from a client/principal, receiving in exchange some kind of remuneration. At the end of the day, the large “box” represented by the single EU concept of worker can be referred to workers without adjectives, with the only exclusion of ‘purely’ self-employed workers and entrepreneurs; that is to say, those having a “direct” access to the markets, where they normally operate in favour of a plurality of clients, out of any functional and operational subordination to someone else’s business, possibly employing other workers.

Eventually, the CJEU jurisprudence has entitled dependent contractors, including those casually engaged, to a fair share of employment protections provided by EU primary and secondary law, so far expressly identified by the Court in pay, equality between male and female workers, protections for pregnant workers, certain aspects of the organisation of working time, regulation of collective dismissals procedures, protection of temporary agency workers, and the right to collective bargaining, possibly as a derogation to antitrust law; with the addition, by the express will of the EU legislature, of some rights related to maternity (Directive 2010/41), the equality rights provided by the second generation’ directives on discriminations (Dir 2006/54, Dir 2000/78, 2000/43, Dir 2010/41).

## 6. Conclusions.

By shaping the concept of worker, the CJEU has managed to extend the employment rights considered beyond the traditional scope given by national laws, still narrowed in the majority of the member states to traditional employment relations. Behind the attitude of the Court lies an extensive use of a purposive method of interpretation, supported by the increasing relevance acquired by the social objectives of the Union, lastly boosted by the entry into force of the CFREU after Lisbon Treaty.

This might lead to believe that the process of extension of EU employment rights to non-subordinate workers is probably not over yet. On the one side, the CJEU attitude towards the interpretation of the scope of employment protection Directives is likely to extend the use of the EU concept of worker beyond their wording, as recently occurred in *Betriebsrat der Ruhrlandklinik*. On the other side, it can be expected that in parallel more and more often national courts will have to conform their interpretation to that of the CJEU, giving access to the mentioned employment protections on the basis of the EU concept of “worker”.

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<sup>58</sup> Deakin S., Wilkinson F., *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, 2005, 306-307.

<sup>59</sup> Perulli A., (29), 146.

<sup>60</sup> See Razzolini O., *The Need to Go Beyond the Contract: 'Economic' and 'Bureaucratic' Dependence in Personal Work Relations*, in *Comparative Labor Law & Policy Journal*, 2010, 31 (2), 289-301.

In this respect, many member states will probably be forced to move beyond the rigid dichotomy “employee”/“self-employed” and the attached outmoded approach to employment rights of “all or nothing”. This could improve the situation of an increasing number of under protected workers not fitting into the “employment” category. It could at the same time be beneficial for national Courts, who have frequently found themselves called to provide a remedy against workers’ exploitation, making use of the often inadequate instruments of traditional employment tests. They would be finally exempted from the necessity to stretch the “employee” category beyond its reasonable borders in order to provide non-subordinate workers with the necessary employment protections.

### Bibliography

- Ales E., *Protecting Work in the Digital Transformation: Rethinking the Typological Approach in the Intrinsically Triangular Relationship Perspective*, in Aa.Vv., *Working in Digital and Smart Organizations Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave, 2018, 11.
- Barnard C., *EU Employment Law*, Oxford University Press, 2012.
- Cherry M.A., Aloisi A., *Dependent contractors in the gig economy: a comparative approach*, in *American University Law Review*, 66, 2017, 636.
- Countouris N., *The concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2017, 47, 202.
- Countouris N., *The Employment Relationship: A Comparative Analysis of National Judicial Approaches*, in Casale G. (ed.), *The Employment Relationship. A Comparative Overview*, Oxford, Hart Publishing, 2011, 35.
- D’Antona M., *Sistema giuridico comunitario*, in Caruso B., Sciarra S. (eds.), *Scritti sul metodo e sulla evoluzione del diritto del lavoro—Scritti sul diritto del lavoro comparato e comunitario*, Milano, Giuffrè, 2000, 1, 377.
- De Stefano V., *The rise of the «just-in-time workforces»: On-Demand Work, Crowdswork and Labour Protection in the «Gig-Economy»*, in *ILO Paper Series*, 71, 2016.
- Deakin S., Wilkinson F., *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, 2005.
- Giubboni S., *Being a worker*, in *European Labour Law Journal*, 2018, 1.
- Nogler L., *The Concept of “Subordination” in European and Comparative Law*, Università degli Studi di Trento, 2009.
- Perulli A., *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, in Casale G. (ed.), *The Employment Relationship. A Comparative Overview*, Hart Publishing, 2011, 137.
- Prassl J., *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, 2018.
- Razzolini O., *The Need to Go Beyond the Contract: ‘Economic’ and ‘Bureaucratic’ Dependence in Personal Work Relations*, in *Comparative Labor Law & Policy Journal*, 2010, 31 (2), 289.
- Van Peijpe T., *EU limits for the personal scope of employment law*, in *European Labour Law Journal*, 2012, 3, 35.

Waas B., Heerma van Voss G. (eds.), *Restatement of Labour Law in Europe, I, The Concept of Employee*, Hart, 2017.

Williams C., Lapeyre F., *Dependent self-employment: Trends, challenges and policy responses in the EU*, in *Working Paper ILO*, 2017.

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