

The changing concept of subordination

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Abstract

A person may provide her labour either within the employment relationship or within a civil or commercial relationship. The concept of the employment relationship is common to all legal systems and traditions. Yet, it is not easy to determine who is a worker, seen as the person entitled to the rights and guarantees recognised by labour law and social security systems. The main legal criterion used in order to determine the existence of the 'dependent employment' in most European countries is the subordination; thus, subordination is a key-element in labour law, as it determines in the same time its content and its boundaries.

We have mainly analysed the role played by the concept of subordination in establishing the existence of an employment relationship in the Romanian, French, Spanish, Portuguese and Italian Labour Law. As a general rule, subordination supposes the performance of work for and under the authority of the employer, which confers him several prerogatives upon the employee. Subordination is also used by the Court of Justice of the European Union as one of the main elements in order to provide the definition of the worker in the context of freedom of movement.

As a result of the changes in the labour market, as in the social and economical environment, new forms of relationship have developed: the disguised or the objectively ambiguous employment relationships, as the category of economically dependent workers are forcing the limits of the employment contract.

Such changes in the labour market pose the problem of clear, precise criteria in order to determine the existence of an employment relationship. As a result, new features of the concept of subordination were settled by law or developed by case-law, allowing establishing the existence of an employment relationship. Another possible solution would be to create intermediate categories. Essentially, the employment relationship should be reconceptualised so that employment law recognises and offers protection to a wider set of relationships categorised by personal service and economic dependence on the part of those working.

Introduction

Work remains one of the most important sources of income and of social identity in contemporary life¹: one of the main means of production, source of social relations and social conflicts², work is one of the fundamental means for personal fulfilment and common well-being; in the same time, individuals usually rely on paid work to meet their basic material needs. Therefore, elaborated systems were developed in order to protect those performing work on behalf of another. But work can be performed in an

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¹ Michael Doherty, When the Working Day is Through: the End of Work as Identity?, *Work, Employment and Society*, Volume 23. Issue 1. 2009. p. 84; Alain Supiot, L'identité professionnelle, In: *Les tendances sociales du droit contemporain*, Études offertes au Professeur Jean Savatier, Presses Universitaires de France, Paris, 1992, p. 409.

² Maria do Rosário Palma Ramalho, *Direito do trabalho*, Parte I, 2nd ed., Almedina, Coimbra, 2009, p. 15.

employment relationship or in a civil/commercial relationship, as many civil or commercial contracts concern work in exchange of a fee. As a preliminary statement, if a civil or commercial contract is characterised by the equality between the parties, in an employment contract the inequality between the parties (the subordination of the person performing work) led to the enactment of a set of rules protecting the employee.

The concept of the employment relationship is common to all legal systems and traditions³. The difference between an employment relationship and a civil/commercial relationship⁴ (and, therefore, clear criteria allowing to establish the existence of an employment relationship) is fundamental, as there are certain rights and entitlements which exist under labour laws, regulations and collective agreements and which are specific to or linked to workers - persons who work within the framework of an employment relationship. As a general rule, entitlement to yearly holiday, health protection, rights to time off, legal protection against unfair dismissal or unemployment insurance is depending on the existence of an employment relationship. The need to distinguish between a civil and an employment contract is determined by the need to establish to whom the protection should be applied.

Many changes occurred in the legal status of workers, as in the concept of subordination itself. Economic, demographic and sociological changes, as the present context of globalisation, characterised among other elements by the diffusion of new technologies, led to profound changes in the world of work. In this context, we shall analyse to what extent the concept of subordination – as the main criterion used to establish the existence of an employment relationship – and the traditional binary division (subordinate work/independent work) are still adequate or, on the contrary, new classifications are required, able to take in consideration the new, flexible forms of work organisation.

In the first part of our study we'll briefly analyse the changes in the labour market in order to sketch the main variables of the employment relationship. In the second part of our study we shall try to analyse the role played by the concept of subordination in the (legal or case-law) definition of the employment relationship. Alongside with remuneration, subordination is one of the constituent elements of any employment relationship, according to the definition of worker given by the Court of Justice of European Union in the context of freedom of movement.

The new forms of work organisation, the disguised and the objectively ambiguous employment relationships, as the category of economically dependent workers are forcing the limits of the employment contract, generally defined by the bond of subordination. Such changes in the labour market pose the problem of clear, precise criteria in order to determine the existence of an employment relationship. The general tendency is to settle new features of the concept of subordination. Another possible solution would be to create intermediate categories. Furthermore, labour lawyers ask themselves how to classify employment contracts by 'removing the general and abstract definition of subordinate labour'.

I. Labour law in a changing world.

³ International Labour Organization, The employment relationship, Report V (1), International Labour Conference, 95th Session, International Labour Office, Geneva, 2005, § 16, p. 6. Available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> (last visited: 30.08.2012).

⁴ Due to the recent reform in the field of private law in Romania (the New Civil Code has entered into force on the 1st of October 2011), the commercial relationships are governed by the Civil Code (as it is the case in Italy).

Initially, the industrial society focused on free trade and the transformation of work came only later, because work is inherent in trade. Free trade and the development of the industry led to a new perspective on work and to turn nation states into Welfare States⁵. Social insurance “was written into the labour contract”, which covered the regularly employed, “usually white, usually male worker”⁶. As a result of the historical evolution of work and society, at that time, labour law focused mainly on two ideas: the idea of full-time bilateral employment contract with a monolithic employing entity; the idea that women and children were largely depending on ‘the male breadwinner’ (I. 1).

Globalisation and the diffusion of new technologies led to profound changes not only in traditional sectors (such as transport - truck drivers, taxi drivers - construction and clothing), but in new areas as well, such as sales staff in department stores, or certain jobs in wholesale distribution, in private security agencies, in insurance companies or in the banking sector⁷ (I. 2). Under these circumstances, the idea of full-time bilateral employment contract seems to be outdated; new patterns of work organisation have developed, which do not always fit within the parameters of the employment relationship (I. 3).

1.1. Social security and the traditional binary division.

The 20th century employment protection and social security systems were built around the notion of ‘standard employment relationship’ in order to determine their personal scope. Social security was gradually built around a ‘binary divide’ between employment and self-employment, between subordinated labour and independent or autonomous work⁸. This binary division was mainly based on the ‘Fordist model’ (the Ford-Taylor model of production)⁹. The core feature of this model “is the crucial importance of standard full-time non-temporary wage contracts”¹⁰ (particularly for adult man, ‘the male breadwinner’¹¹): on the employer’s side, it shows high levels of subordination and disciplinary control; for the employees, it offers high levels of stability, welfare/insurance compensations and guarantees (extended to family members as a result of the high, homogeneous existence of stable forms of nuclear households). In a conceptual, basic argument, the worker in an open-ended (indeterminate) full-time bilateral employment contract exchanges economic and social stability for subordination and disciplinary control. On the contrary, the independent worker preserves his freedom, but bears the risks of his own activity.

⁵ Alain Supiot, Perspectives on work: Introduction, *International Labour Review*, special issue *Perspectives on the nature and future of work*, Volume 135. Issue 6. 1996. p. 603.

⁶ Jane Lewis, Economic Citizenship: a Comment, *Social Politics*, Volume 10. Issue 2. 2003. p. 177.

⁷ International Labour Organization, 2006, *The employment relationship*, p. 11, para. 41.

⁸ Brenda Daly-Michael Doherty, *Principles of Irish Employment Law*, Clarus Press, Dublin, 2010, p. 40.

⁹ The ‘Fordist’ model or ‘the Fordist regime of employment and welfare’ is “a large industrial business engaging in mass production based on a narrow specialization of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture) – Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, 2001, p. 2.

¹⁰ Supiot, 2001. p. 2. According to Simon Deakin, the modern contract of employment is ‘an invention’ of the late nineteenth and early twentieth centuries, associated with the rise of the integrated enterprise and the beginnings of the welfare or social state - Simon Deakin, *The comparative evolution of the employment relationship*, Centre for Business Research, University of Cambridge, Working Paper No. 317, 2005, p. 10. Available at: <http://www.cbr.cam.ac.uk/pdf/WP317.pdf> (last visited: 31.08.2012).

¹¹ Paul Edwards, *The Employment Relationship and the Field of Industrial Relations*, In: Paul Edwards, *Industrial Relations: Theory and Practice in Britain*, 2nd ed., Blackwell Publishers, Oxford, 2003, p. 2.

In time, both the 'Fordist' model and the 'standardized patterns of social and economic regulation' of employment were losing ground. On the one hand, the model was based on a set of assumptions about male and female contribution at household level, so it depended both on full-male employment and two-parent, stable families¹². The social and demographic changes (such as the ageing of the population, women entering the labour market in large number, mono-parental families or the increasing instability in the household's structure) had their contribution to the development of new forms of work organisation. On the other hand, as a result of the changes in the world of work, the regulatory framework sustaining the binary model of the employment relationship has witnessed a progressive crisis. New, atypical and hybrid working arrangements have emerged, challenging the traditional notions of autonomy and subordination¹³.

1.2. Technology, efficiency, flexibility...

Some changes in the labour market are associated with globalisation¹⁴, technological change and transformations in the organisation and functioning of enterprises, often combined with restructuring in a highly competitive environment. On the one hand, the process of economic cooperation and integration led to economic growth and employment creation in a number of countries; on the other hand, among other consequences, global economic integration has caused many countries and sectors to face high levels of unemployment, poverty and the growth of unprotected work and the informal economy¹⁵. All these aspects had an important impact on the employment relationship and the protections it can offer. In this context, many European countries made efforts to recast the work/welfare relationship by enforcing the responsibilities of those claiming social support (a so-called active rather than passive welfare)¹⁶.

Three other factors have contributed to the development of new patterns of work organisation: the rising level of employee skills and qualifications, the increasing pressure of the competition and the technical progress¹⁷. Changes in the structure of the workforce have been accentuated by migration. Changing lifestyles, education levels and expectations also lead to workers demanding more flexibility¹⁸.

The development of labour law, in the sense that it supports economic growth and the increase of employment, was considered necessary under the pressure of competition¹⁹. In the *Green Paper Modernising Labour Law to meet the Challenges of*

¹² Lewis, p. 177.

¹³ Nicola Countouris, *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context* (Aldershot: Ashgate, 2007), p. XIX.

¹⁴ The present context of globalisation 'is characterised by the diffusion of new technologies, the flow of ideas, the exchange of goods and services, the increase in capital and financial flows, the internationalisation of business and business processes and dialogue as well as the movement of persons, especially working women and men' – International Labour Organization, Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008, p. 5. Available at: http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/publication/wcms_099766.pdf (last visited: 27.08.2012).

¹⁵ *Idem*, p. 5.

¹⁶ Lewis, p. 178.

¹⁷ *Supiot*, 2001. p. 2.

¹⁸ International Labour Organization, The employment relationship, pp. 8-9, paras. 30-32.

¹⁹ The 'classical' employer opposition is that regulation of labour relations imposes costs on the employer that its counterparts in other regions of the world may not incur, making its products and services less competitive - Patrice Jalette, When Labour Relations Deregulation is not an Option: The Alternative Logic

the 21st Century²⁰ of 2006, the European Commission focused on an increase of flexibility of the work force. According to the European Commission, the traditional model of the employment relationship might not prove well-suited to all workers in view of the challenge of adapting to change and seizing the opportunities that globalisation offers. Overly protective terms and conditions can deter employers from hiring during economic upturns. In the context of globalisation, ongoing restructuring and the move towards a knowledge-based economy, European labour markets need to be both more inclusive and more responsive to innovation and change. As a result, new forms of flexible work organisation (alternative models of contractual relations - non-standard as well as flexible standard contractual arrangements) have developed gradually: home-work, telework, part-time work, fixed-term work, temporary agency work²¹.

All these factors have concurred to the erosion of the 'standard employment model'. The emergence of diverse forms of non-standard work has made the boundaries between labour law and civil/commercial law less clear. As a result, the traditional binary distinction between employees and self-employed cannot depict adequately the economic and social reality of work²².

1.3. Is the 'binary divide' outdated in the 21st century?

The new forms of work organisation do not always fit within the parameters of the employment relationship. The profound changes in the labour market led to more flexibility, but in the same time the global phenomenon of transformation in the nature itself of work, the higher level of autonomy that workers benefit of had resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to the protection provided by labour legislation) did not accord with the realities of working relationships²³.

One of the results of the rapid developments in technology and of the growing demands of competition was the increasingly diversified use of labour by many enterprises, including various kinds of contracts, the decentralisation of activities to subcontractors or self-employed workers or the use of temporary employment agencies. In some European countries, it has become increasingly common for employers to contract out some of their work to subcontractors or recruitment agencies. Employers use self-employed workers, sub-contracting or outsourcing of labour in two ways: as a strategy to reduce costs and to evade labour regulations, with the aim of excluding workers from the protection granted by them, or as a strategy designed to implement an innovative approach, to enhance the impact of human involvement in terms of initiative, competencies and expertise in sectors requiring high levels of expertise²⁴.

Disputes concerning the legal nature of the employment relationship can arise where it has either been disguised or where is a genuine difficulty to fit new and dynamic work arrangements within the traditional framework of the employment

of Building Service Employers in Quebec, *International Journal of Comparative Labour Law and Industrial Relations*, Volume 22. Issue 3. 2006. p. 329.

²⁰ COM(2006) 708 final.

²¹ Fixed term contracts, part-time contracts, on-call contracts, zero-hour contracts, contracts for workers hired through temporary employment agencies, freelance contracts, etc., have become an established feature of the European labour markets.

²² Frans Pennings, The European Union and the Issue of the Employment Relationship, In: Frans Pennings, Claire Bosse, *The Protection of Working Relationships*, Kluwer Law International BV, Alphen aan den Rijn, The Netherlands, 2011, p. 35.

²³ Deakin, p. 3; International Labour Organization, 2006, *The employment relationship*, p. 5, para. 12.

²⁴ Supiot, 2001. pp. 2, 4.

relationship (objectively ambiguous employment relationship). In both cases, uncertainty as to the scope of labour law and social protection systems is created, which results in a lower protection of those performing work.

As a preliminary conclusion, while we tend to consider that the changes of the labour market and in the structure of the workforce are caused by the economic changes and the globalisation, in reality they are determined by a multitude of factors of different nature, such as demographic (ageing of the population, larger access of women in the labour market) and sociological factors (changes in the structure of the families and in the male and female contribution at household level) or changes in the education (high skilled workers).

The development of more flexible forms of work organisation has blurred the boundaries of the traditional, 'standard' employment relationship: home-workers benefit of an illusionary freedom, which seems to conceal the subordination between the employee and his employer; temporary agency work seems to involve two employers of the same person performing work personally; fixed-term contracts are often concluded in order to complete a certain task. There are certain work relations which fall on the 'margins' of the employment category - because they involve casual or part-time work, or work at a distance from the workplace - and have always posed a problem of classification²⁵.

Under these circumstances, we wonder if the concept of subordination is still an adequate criterion in the nowadays work environment or new classifications are required. As a result, a comparative approach of the role played by subordination in establishing the existence of an employment relationship, as well as an analyse of the place and the role played by subordination in the context of the development of more flexible forms of work organisation seems necessary.

II. Lights and shadows of the concept of subordination

Due to the complex changes in the labour market and in the structure of workforce, determining whether or not an employment relationship exists in a specific case has become more and more difficult. The issue is one of high importance as, in many countries, access to employment and social security rights largely depends on the existence and on the type of employment relationship under which a person is engaged²⁶. Thus, defining what forms an employment relationship is fundamental to applying the provisions, rules and principles of labour law²⁷.

Many national labour laws contain provisions on the employment relationship, particularly with regard to its scope. Some provisions deal with the regulation of the employment contract as a specific contract, its definition, the parties and their respective obligations. Other provisions are intended to facilitate recognition of the existence of an employment relationship and prescribe administrative and judicial mechanisms for monitoring compliance and enforcing these laws²⁸. While in some countries there is a definition of the employment relationship given by law, in others case-law plays the relevant role in establishing the existence of such a relationship. As there is a wide range

²⁵ *Deakin*, p. 13.

²⁶ *Countouris*, p.1; Mark Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, p. 3.

²⁷ Bernard Waas, The legal definition of the employment relationship, *European Labour Law Journal*, Volume 1. Issue 1. 2010, p. 45.

²⁸ International Labour Organization, *The employment relationship*, p. 19, para. 71.

of situations in which work is performed for the benefit of another, a clearer definition of the employment relationship is given by law, case-law or both acting together (II. 1.). Special problems arise in the context of new work arrangements, as it is considered that people in disguised employment relationships, in objectively ambiguous relationships and economically dependent workers (II. 2.) should be entitled to a ‘bedrock’ of fundamental rights.

II. 1. The place of subordination in the legal definition of the employment relationship.

The legal definition of the employment relationship is a highly sensitive issue. It is generally accepted that the employment relationship is a legal notion used to refer to the relationship between a person called an employee (frequently referred to as a worker) and an employer for whom the employee performs work under certain conditions in return for remuneration. Through the employment relationship reciprocal rights and obligations are created between the employee and the employer; in the same time, workers gain access to labour law and social security rights and benefits associated with employment. The employment relationship is always a contract-based relationship and is the key point of reference for determining the nature and extent of employers’ rights and obligations towards their workers.

The employment relationship has four main identifying characteristics which are deemed to emerge from the (legal or case-law) definition of the contract of employment: a contract, performance of work on another's behalf, payment of remuneration and subjection to direction and supervision. An employment relationship must be based on some kind of contract concluded between employer and employee, normally a contract of employment; otherwise we are generally speaking of forced labour. The performance of work involves of any kind of human activity that has economic value, provided it is not unlawful or contra bonos mores. The employee always performs work in return for pay or other remuneration, seen as any kind of recompense that has economic value. According to the direction and supervision characteristic, the performance of work takes place under the employer's managerial prerogative (the right to direct and supervise the employee). As the first three characteristics can be also found in civil or commercial contracts, subordination is often the key criterion used to identify an employment relationship and can be used as a test for distinguishing work as an employee within an employment relationship from work done as an independent, self-employed person. Another element, added by law or case-law, is the fact that that work must be performed personally.

As most of the activities can be carried on as an ‘independent’ or as an ‘employee’, the statute of the employee is built around the concept of subordination²⁹, as the main criteria of distinction between the two categories. The legal element of subordination generally reflects the fact that the worker is subject to the management and control of the employer with regard to the way in which the work is carried out.

II.1.1. Subordination and the substantive definition of the employment contract. A comparative overview.

In most European countries, the employment relationship arises traditionally from the employment contract, generally defined by the bond of subordination established

²⁹ Maty Diakhaté-Faye, Un régime pour le travail indépendant : une autre lecture des décisions requalifiant les contrats de location de véhicule équipé taxi (VET), *Jurisprudence Sociale Lamy*, n° 91, 4 décembre 2001, p. 4.

between the person performing work (called employee) and the employer – the party to whom the service is delivered. In many countries, the legislation contains a substantive definition of the employment contract, establishing what factors constitute such a contract and what distinguishes it from other similar contracts³⁰.

Similarly to Portuguese or Spanish law, the Romanian Labour Code³¹ provides that the employment contract is an agreement under which a person (the employee – always an individual) undertakes to carry out work for and under the authority of another person (the employer – a natural or legal person) in exchange for the payment of a remuneration³². In Romania, the term ‘worker’ (‘muncitor’) is rather used to design an unqualified or a low qualified worker. Throughout the Romanian Labour Law the term ‘employee’ (‘salariat’) is used to designate the party of the employment contract who performs work personally, under the authority and in the benefit of another, in exchange of a periodic income, called wage (‘salariu’).

In Spain, article 1.1 of the Workers’ Statute (Estatuto de los Trabajadores) expressly settles the scope of the Act to workers who voluntarily undertake to work, in exchange for payment on another behalf, within the organisation and direction of another person or entity, called employer or entrepreneur³³. There are five elements allowing to distinguish an employment relationship in the Spanish Law: the fact that work is performed voluntarily (voluntariedad - opposed to forced labour), personally (personalidad), on another’s behalf (ajenidad), the fact that work is paid (remunerabilidad) and the employee’s subordination (dependencia). As the employee works within the organisation and under the direction of the employer, obeys his orders and accepts his control; the managerial prerogatives and, correlatively, the employee’s subordination are required by the organisational and technical aspects of the productive process. For example, the lack of control on the employer’s behalf is considered a clear element of the inexistence of an employment relationship. On the other hand, the existence of the employer’s orders and instructions is a typical sign of the employment relationship³⁴.

Similarly, the Labour Code of Portugal provides that work done under an employment contract is performed under the employer’s direction and/or authority³⁵. According to art. 11 of the New Portuguese Labour Code (2009), the employment contract is the one in which an individual undertakes, in exchange for payment, to provide its work to another or others within their organisation and under their

³⁰ International Labour Organization, *The employment relationship*, p. 20, para. 74.

³¹ With elements from the previous Labour Code (Law n° 10/1972) and elements inspired by the French legislation, the Romanian Labour Code (Law n° 53/2003) only settles a general-frame. Yet, the Romanian Labour Code contains the labour law provisions strictly speaking, understood as the part of the legal system regulating the rights and obligations between the employee (the individual worker) and the employer. There are several other laws settling in detail aspects concerning collective bargaining, collective agreements and strike, the Labour Inspectorate, labour safety etc.

³² Article 10 of the Romanian Labour Code. The Romanian definition is similar to the definition of the employment contract given by the French Cour de Cassation.

³³ ‘La presente Ley será de aplicación a los trabajadores que voluntariamente presten sus servicios retribuidos por cuenta ajena y dentro del ámbito de organización y dirección de otra persona, física o jurídica, denominada empleador o empresario’.

³⁴ Ana Isabel Pérez Campos, *Identidad de la relación laboral*, in Antonio V. Sempere Navarro, *El contrato de trabajo. Volumen I. Régimen general del contrato de trabajo*, Arazandi Thomson Reuters, Navarra, 2010, pp. 55-69; Alfredo Montoya Melgar, *Derecho del trabajo*, 24ª ed., Editorial Technos, Madrid, 2004, pp. 35-39.

³⁵ Similarly, in Finland, Bahrain and Qatar, law refers to work done under the employer’s direction and supervision; under the employer’s direction (in Morocco) and control (in Tunisia) - International Labour Organization, *The employment relationship*, p. 20, para. 77.

authority³⁶. The employer's authority takes the form of the managerial power, allowing him to direct and control the work performed on his behalf by another. Subordination is understood a personal, subjective element, allowing the establishment of the worker's legal status in the employment relationship and, thus, the distinction between the employment contract and other forms of work performance³⁷. In fact, this distinction is achieved through the combined effect of two elements: an objective element – remuneration – which distinguishes the employment contract from the voluntary work and a subjective element – subordination – which distinguishes the employee (subject to the employers' authority and direction) from the independent worker³⁸. But the element of subordination means also the fact that the benefits of the human work belong to another, who bears the risk of the activity³⁹.

As we shall see, the performance of work within the organisation and authority/direction of another person is used both in Common law and by the International Labour Organization in order to establish the existence of an employment relationship and to extend the protection attached to such a relationship also to those who fall traditionally outside its scope.

In Italy, the legislative provision for the identification of subordinate labour is article 2094 of the Civil Code, which specifies that “a subordinate worker is one who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur”⁴⁰. Unlike the analysed Labour Codes, the Italian Codice civile chooses not to provide a definition of the employment relationship, but of the subordinate worker. The vision of the Italian Codice Civile is more appropriate to the general tendency to focus more on the person performing work than on a specific contract.

According to the Italian case law⁴¹, the subordinated or autonomous nature of work is strictly related to the existence of subordination. There are two crucial elements necessary to verify the relationship of subordination: the specificity of the assignment given to the worker and the correspondence of the performance of the worker to the needs of the entrepreneur. Some other elements are: the personal performance of work, the absence of risks for the worker, the continuity in the performance of the work and the worker's obedience to the employer's managerial prerogatives⁴². The criterion that work is done on another's behalf underlines the fact that the results of the work performance belong directly to the employer.

³⁶ ‘Contrato de trabalho é aquele pelo qual uma pessoa singular se obriga, mediante retribuição, a prestar a sua actividade a outra ou outras pessoas, no âmbito de organização e sob a autoridade destas’.

³⁷ Maria do Rosário Palma Ramalho, *Direito do trabalho*, Parte I, 2ª ed., Almedina, Coimbra, 2009, pp. 23-24; Maria Malta Fernandes, *Os limites à subordinação jurídica do trabalhador*, Quid Juris, Lisboa, 2008, p. 14.

³⁸ *Ramalho*, pp. 313-314.

³⁹ António Monteiro Fernandes, *Direito do trabalho*, 14ª ed., Almedina, Coimbra, 2009, pp. 16-17.

⁴⁰ ‘È prestatore di lavoro subordinato chi si obbliga mediante retribuzione a collaborare nell'impresa, prestando il proprio lavoro intellettuale o manuale alle dipendenze e sotto la direzione dell'imprenditore’. Article 2222 of the Italian Civil Code defines the self-employed worker as a person “who agrees to carry out work or services for remuneration, mainly by means of his own labour and without a relationship of subordination in relation to the client.” Self-employed work is therefore characterised essentially by the fact that it is carried out without a relationship of subordination.

⁴¹ Cassazione civile, sezione lavoro, sentenza 28.07.2008 n° 20532, available at: <http://www.altalex.com/index.php?idnot=43209&idstr=20> (last visited: 18.08.2012).

⁴² Oronzo Mazzotta, *Diritto del lavoro*, Giuffrè Editore, Milano, 2005, pp. 48-49.

In the Italian Law, subordination is a technical and functional notion: the employee undertakes the obligation to work under the authority of the employer, who has the right to direct and control the work, as well as to inflict disciplinary sanctions⁴³.

In France, even if there is a regulation of the employment contract, the employment contract itself has no legal definition, but it is identified by three constitutive elements⁴⁴: performance of work (as the main purpose of the contract), a remuneration (in money or in kind) and subordination of the employee. The employee's subordination is considered more than an element; it is "the soul of the employment contract"⁴⁵.

In an employment contract, work must be performed personally, effectively and the results of the work performance belong directly to the employer. Occasional or residual activities are not covered by the French Labour Code, nor does work done on own account fall within the scope of labour legislation⁴⁶. There is a legal presumption of subordination in the case of professional journalists, models or artists who perform in spectacles⁴⁷.

In France, case law in this field is important and has established that there is an employment contract when work is performed in conditions of subordination to an employer⁴⁸: this is the case of taxi drivers, but also of those who hire a car fully equipped for transport activities, of professional journalists, occasional suppliers of a free newspaper, of persons who take part in a reality-show⁴⁹, of franchisees⁵⁰ or oil (gas) pump attendants, for example. One of the most controversial decisions concerned the persons taking part in a reality show called «L'Île de la tentation»⁵¹; in the show, four non-married couples spent 12 days in a hotel in Thailand, in order to prove their feelings for each-other; they were filmed during all their activities, but there was no winner or no prize. The participants were considered by the Court to be employees, as they were subordinated to the production company (the living conditions, the daily programme and the rules were determined exclusively by the production company; the participants were not allowed to change their look or use any means of communication during the show, nor to wear other clothes or accessories than those agreed with the production company)⁵². The main argument against the existence of an employment contract in this case concerned the lack of work performance, as testing someone's feelings cannot be assimilated to work. In order to work, someone must do something different than being himself; otherwise the worker's personality is confounded with his work⁵³. On the other

⁴³ Ivana Marimpietri, *Il lavoro subordinato*, in Antonio Vallebona (a cura di), *I contratti di lavoro*, Tomo primo, Utet, Torino, 2009, pp. 30-31.

⁴⁴ Emanuel Dockès, *Notion de contrat de travail*, *Droit social*, 2001, p. 546; Jean Pélissier, Alain Supiot, Antoine Jeammaud, *Droit du travail*, 24^{ème} éd., Dalloz, Paris, 2008, p. 387, para. 287; Bernard Bossu, François Dumont, Pierre-Yves Verkindt, *Droit du travail*, Montchrestien, Paris, 2011, p. 74, para. 187; Elsa Peskine, Cyril Wolmark, *Droit du travail*, Daloz, Paris, 2011, p. 31, para. 28.

⁴⁵ Françoise Favenc-Henry, Pierre-Yves Verkindt, *Droit du travail*, L.G.D.J., Paris, 2011, p. 392, para. 481.

⁴⁶ Franck Héas, *Droit du travail*, Larcier, Bruxelles, 2012, pp. 168 - 169.

⁴⁷ Art. L. 7111-1 (professional journalists), art. L. 7123-3 (models) and art. L. 7121-3 Code du travail (artists who perform in spectacles).

⁴⁸ *Diakhaté-Faye*, p. 4.

⁴⁹ Héas, p. 168; Françoise Champeaux, *La tentation du contrat de travail*, *Semaine sociale Lamy*, Issue 1403. 8 juin 2009. p. 2.

⁵⁰ Antoine Jeammaud, *L'assimilation de franchisés aux salariés*, *Droit social*, 2002, p. 158.

⁵¹ 'The Temptation Island'.

⁵² *Champeaux*, p. 2.

⁵³ Patrick Morvan, *Le contrat de télé-réalité. À propos des arrêts «Île de la tentation»*, *Semaine sociale Lamy*, Issue 1357. 9 juin 2008. p. 8; J. Barthélémy, *Qualification de l'activité de participant à une*

hand, it was underlined that the performance of work involves of any kind of human activity that has economic value, provided it is not unlawful or contra bonos mores; the element which determines the existence of an employment relationship is not the nature of work (of the human activity) itself, but the conditions under which it is performed. Or, in the show, the permanent availability required of the participants, as well as their obligations to take part in the activities and to answer a series of interviews which ended only when the participants' answers were corresponding to the previously established policy of the show were considered elements of an employment contract⁵⁴.

In the French Law, subordination is the determining, but in the same time constant and flexible, element of an employment relationship; the case-law has developed a series of indicators of the existence of subordination, such as the employer's managerial prerogatives, his right to inflict disciplinary sanctions, the performance of work within the employer's premises, his organisation or at a workplace established by him and with the use of tools, materials and machinery provided by the employer⁵⁵. These indicators are not required simultaneously, but according to the specific conditions of each situation⁵⁶. In the French Law, the nature of the employment contract must be determined according to the facts, having regard to all the factors and circumstances concerning the way in which work is performed, regardless of how the parties name or describe the contract.

As we could see, in the analysed countries the legal subordination confers the employer several prerogatives upon the employee: the right to direct the performance of the work, to control the employee's work and to inflict disciplinary sanctions⁵⁷. The employer is entitled to establish unilaterally the conditions and the way in which work is performed: working hours, working place etc. The right vested in the employer to direct and supervise is called the employer's managerial prerogative. The criterion of subordination supposes the performance of work for and under the authority of the employer⁵⁸; work must be performed personally and cannot be separated from the person performing it. The legal subordination is normally accompanied by the economic dependence of the worker, whose survival depends on the remuneration of his work.

For an employment relationship to exist, it is essential that the employee performs his or her work in a position of subordination, under the employer's direction and supervision; to fulfil this characteristic, mere possession (rather than actual exercise by the employer) of these rights is sufficient⁵⁹. Thus, subordination can be technical or just potential⁶⁰; but the employer's possibility to control the performance of work is essential in

émission de télé-réalité, *Semaine sociale Lamy*, Issue 1382. 12 janvier 2009, p. 8 ('it is not the criterion of the employment contract who makes an employment contract, but the work performed and which generates search of the criterion of the employment contract'); Jean-Emmanuel Ray, Sea, sex... and contrat de travail, *Semaine sociale Lamy*, Issue 1403. 8 juin 2009. p. 11.

⁵⁴ Cour de Cassation, chambre sociale, décision du 3 juin 2009, n° 08-40.981, *Semaine sociale Lamy*, Issue 1403. 8 juin 2009. p. 10.

⁵⁵ Angès Fossaert, Télé-réalité et contrat de travail, *Semaine sociale Lamy*, Issue 1403. 8 juin 2009. pp. 3-4.

⁵⁶ François Gaudu, Raymonde Vatinet, *Les contrats du travail*, L.G.D.J., Paris, 2001, pp. 28-32.

⁵⁷ Article 40 of the Romanian Labour Code; see also: I. T. Ștefănescu, *Tratat de dreptul muncii*, Editura Universul Juridic, București, 2012, pp. 222-223; T. Țiclea, Dependența economică și dreptul muncii – probleme actuale și perspective, *Revista română de dreptul muncii*, Issue 7. 2010, p. 67.

⁵⁸ Antoine Mazeaud, *Droit du travail*, Montchrestien, Paris, 2004, p. 273, para. 397; Henry - Verkindt, p. 392, para. 481.

⁵⁹ Héas, p. 174.

⁶⁰ Monteiro Fernandes, p. 137.

order to establish a legal – or juridical – subordination⁶¹. Occasional or residual activities normally don't fall within the scope of the employment relationship.

Various factors are used in many countries to determine the existence of an employment relationship. These factors vary, but the most commonly used elements⁶² for determining whether work is being performed under an employment contract are dependency and subordination, or work done under the direction, authority, supervision or control of the employer or on the latter's orders or instructions, for the employer's account or benefit. Some legal systems use the terms dependency and subordination as alternatives⁶³ or together⁶⁴, either with different meanings or as synonyms. In Spain, Portugal and Italy, subjecting the worker to the directorial/managerial powers of the employer - subordination - expresses a structural element of the relationship, called 'heterodirezione' (heteronomy, which is the opposite of autonomy). Whereas an autonomous person is one whose will is self-determined, a heteronomous person is one whose will is determined by something outside of the person⁶⁵.

Subordination is the main legal criterion used in order to determine the existence of the 'dependent employment' in most European countries (Austria, Belgium, Denmark, Finland, France, Greece, Italy, Luxembourg, Portugal, Romania, and Spain⁶⁶). Thus, subordination is a key-element in labour law, as it determines in the same time its content and its boundaries.

II.1.2. Case-law definition of the employment relationship.

Mainly in common-law countries, the employment contract is simply described⁶⁷, without referring to the factors characterising it as an employment contract. As a general rule, courts are entitled to establish the existence of an employment relationship. In some countries, given the lack of precision with which the legislature has defined a 'contract of employment' it has fallen to the courts to determine the concept⁶⁸. The courts have developed a number of tests to use in deciding whether a contract of employment exists (control, integration, economic reality and mutuality of obligations test). While these tests provide a useful framework and are helpful as reference points, often cases tend to 'turn on their overall factual matrix'⁶⁹, with no clear conceptual distinction between employment and self-employment.

⁶¹ Héas, p. 174.

⁶² International Labour Organization, The employment relationship, p. 8, para. 27 and p. 20, para. 78.

⁶³ As Argentina, Panama, Nicaragua, Mexico, Peru and El Salvador, for example.

⁶⁴ Chile, Colombia, Costa Rica.

⁶⁵ Adalberto Perulli, Study on Economically Dependent Work/Parasubordinate (Quasisubordinate) work (Brussels: European Commission, 2003), p. 6-7. Available at: http://www.europarl.europa.eu/hearings/20030619/empl/study_en.pdf, (last visited: 31.08.2012).

⁶⁶ Roberto Pedersini, 'Economically dependent workers', *employment law and industrial relations*, in European Industrial Relations Observatory On-line (Eironline). Available at <http://www.eurofound.europa.eu/eiro/2002/05/study/tn0205101s.htm>, (last visited: 30.08.2012); see also Luca Nogler, *The concept of «subordination» in European and comparative law*, Quaderni del Dipartimento, Università degli Studi di Trento, 2009, pp. 21-49; *Marimpietri*, p. 25.

⁶⁷ As a contract under which a person undertakes to work for remuneration; a contract between a worker and an employer through which an employment relationship is established; a contract of service is defined as an agreement whereby one person agrees to employ another as an employee and that other agrees to serve his employer (Malaysia) - International Labour Organization, The employment relationship, p. 21, para. 82.

⁶⁸ See, for example, the Irish law.

⁶⁹ *Daly-Doherty*, p. 44.

One of the first tests developed by the courts (the control test) focused on the extent to which, under the terms of the contract, the employer has control over the employee, including the extent to which a person is subject to the command of another as to the manner in which he shall do his work⁷⁰ ('in a master-servant relationship, the master must have right to tell the servant what to do and how to do it, whether or not he exercises that right'⁷¹). Especially in the case of skilled professionals, the employer may exercise very little actual control over the work done, but the relationship can still be considered as one of employment (as it has been the case, for example, for journalists, hospital doctors or university lecturers). The control test is rarely used as a standalone test⁷².

An alternative test – integration - looks at the extent to which an individual is employed as an integral part of the business. The integration test concerns less the actual exercise of the employer's powers upon the employees, but the way in which the activity is organised, the employee's duty to perform certain activities and the employer's possibility to inflict disciplinary sanctions⁷³. For example, a freelance journalist who got commission in advance but was under no obligation to the newspaper to publish her work was held to be employed under a contract for services, but a 'staff' journalist working 50 weeks per year for the newspaper was an integral part of the newspaper and therefore had a contract of service. As a conclusion, the nature of the work itself is not always significant (as both journalists were writing columns for the newspaper), but each had a different employment status⁷⁴. The problem with the integration test is that while it applies well to professionals over whom the employer does not have direct control, it is not so adequate for others, such as outworkers or sub-contractors, who may be highly "integral" to the employer's business without necessarily being employees⁷⁵.

The economic reality test (sometimes referred to as the 'enterprise test') seeks to determine if the worker has engaged him or herself to perform the services, performing them as a person in business on his or her own account. A range of factors are taken in account: whether the worker has helpers, whether he or she bears the financial risk, pays the social security contributions and taxes, provides the tools, materials and machinery etc.⁷⁶. This test encourages the courts to examine the features of the work relationship, the conditions under which work is performed and come to a conclusion as to how it should be categorised⁷⁷.

The last test used is the one of the mutuality of obligations. The test examines the duration and regularity of work performed, but especially the employer's duty to provide work and the employee's duty to perform the activities demanded by the employer⁷⁸. If there's a possibility of the person performing work to refuse to comply with the orders of the other (the work required), there's no mutuality of obligations. However, the test

⁷⁰ See case *Yewens v Noakes* (1880).

⁷¹ See case *Roche v Kelly* (1969), but also *Dacas v. Brook Street Bureau (UK) Ltd* (2004) where, contrary to the parties' categorization, an implied employment contract has been recognised between a local Council and a person working as a temporary agent for six years.

⁷² *Daly-Doherty*, p. 44.

⁷³ Emmanuelle Mazuyer, *Les mutations de la figure du «travailleur» dans le droit de l'Union européenne*, *Semaine Sociale Lamy*, Issue. 1494. 30 mai 2011. p. 64.

⁷⁴ *Daly-Doherty*, p. 45.

⁷⁵ *Ibidem*.

⁷⁶ *Mazuyer*, p. 64.

⁷⁷ *Minister of Agriculture and Food v Barry* [2008]; see also *Daly-Doherty*, p. 45.

⁷⁸ *Mazuyer*, p. 65; see also case *O'Kelly v. Trusthouse Forte* (1963)

excludes many casual workers⁷⁹ and agency workers, as there is no mutuality in triangular relationships.

In reality, the question of whether or not a person is an employee is a mixed question of fact and law⁸⁰; as a conclusion: “a contract *of* service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. ... The servant must be obliged to provide his own work and skill. Freedom to do a job by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be...”⁸¹.

An important role in offering indicators of the existence of an employment relationship is played in the Irish Law by the social partners. Under the 2000-2003 social partnership agreement (the Programme for Prosperity and Fairness) an Employment Status Group was set up and it produced a code of practice⁸² which lists criteria that the courts have indicated as useful in reaching a conclusion as to a party’s employment status, such as: profit and loss; opportunity and risk; equipment and materials; the parties’ categorisation⁸³. However, according to the recent case-law, the courts must look at the substance of the contract (the parties conduct during the course of the contract, the inequality between the parties, the bargaining positions of the parties) and not at the label, as the reality might be that the employer dictates the content of the contract and the person performing work must take it or leave it⁸⁴.

As a conclusion, we can note that the concept of subordination – the main criterion used to distinguish the existence on an employment relationship – has rarely a clear legal definition. Simply stated by law, the concept itself is often ‘built’ with the help of case-law. This is also the case of the Court of Justice of the European Union, who seems to use the concept of subordination in order to provide a European definition of the worker.

II.1.3. Subordination in the Court of Justice of the European Union’s definition of the worker.

The term ‘worker’ is not expressly defined in the Treaty; in a similar way, the terms ‘worker’ and ‘employee’ are used in different directives without always being defined.

⁷⁹ See cases: Carmichael v. National Power plc (2000), Stevedoring & Haulage Services Ltdv. Fuller (2001) and Stevenson Delphi Diesel Systems Ltd (2003).

⁸⁰ Maeve Regan, *The Contract and Relationship of Employment*, In: Maeve Regan (general editor), *Employment Law*, Tottel, Dublin, 2009, pp. 41-42.

⁸¹ *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* (1968): in the case, the question was whether an owner-driver of a vehicle used exclusively for the delivery of the company’s concrete was engaged under a contract of service. The worker entered into a hire purchase agreement to purchase a lorry, but the mixing equipment on the lorry was the company’s property, the truck was painted in company colours and he wore a company uniform; he was also obliged to carry out the company’s orders and was paid on a mileage basis, but the contract described him as an independent contractor. The Court concluded that he looked more like a small independent business than an employee (see *Daly-Doherty*, p. 46).

⁸² Updated in 2007 by the Hidden Economy Monitoring Group, set up under the Towards 2016 agreement.

⁸³ *Daly-Doherty*, pp. 50 – 51.

⁸⁴ See case *Autoclenz v. Belcer* (2011).

Although European instruments in the area of labour law frequently use the term worker or employee, these terms do not have a uniform meaning⁸⁵

Therefore, the Court of Justice of the European Union has considered necessary to adopt a Community meaning of the term ‘worker’, which cannot be defined by reference to the legislation of the Member States⁸⁶. In order to determine its meaning, the European Court of Justice has considered necessary to apply the generally recognised principles of interpretation, beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty. Moreover, the concept of worker cannot be interpreted restrictively⁸⁷.

Yet, at European level, there is not a single definition of worker, but different concepts, according to the area in which the definition is to be applied⁸⁸ and to the different purposes. First, there is a ‘labour law’ concept of worker used in the context of freedom of movement and related to the principle of non-discrimination and a ‘social security’ definition of worker⁸⁹. In the present paper we shall only analyse the first definition of worker (in the context of freedom of movement and of the principle of equal treatment), definition in which the criterion of subordination plays an important role.

In the context of freedom of movement and of the principle of equal treatment, must be considered to be a worker a person who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration⁹⁰. In the established European case-law, the term ‘worker’ has a Community meaning, inasmuch as the concepts of ‘worker’ and ‘activity as an employed person’ define the scope of one of the fundamental freedoms guaranteed by the Treaty⁹¹. A limited definition would be inadequate in order to secure the common market objective of free movement of workers, for the wider policy goal of creating a single market; therefore, the term ‘worker’ cannot be interpreted restrictively⁹².

⁸⁵ *Pennings*, p. 29. A definition of the term worker or employee can be found in the Equal treatment directives, which is to ensure a broad coverage of these instruments. Chapter 2 of Directive 2006/54/EC of the of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) applies to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers and to those claiming under them, in accordance with the national law and/or practice. Similarly, some ILO Conventions and Recommendations cover all workers without distinction, while others refer specifically to independent workers or self-employed persons and others apply only to persons in an employment relationship.

⁸⁶ ECJ, *Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, Case 75/63, para. 1; ECJ, *Deborah Lawrie-Blum v Land Baden-Württemberg*, Case 66/85, para. 16; ECJ, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*, Case C-94/07, para. 33.

⁸⁷ ECJ, *Kempf v Staatssecretaris van Justitie*, Case 139/85, para. 13; ECJ, *Debra Allonby and Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional*, Case C-256/01, paras 64, 66.

⁸⁸ ECJ, *María Martínez Sala v Freistaat Bayern*, Case C-85/96, para. 31.

⁸⁹ Sylvie Hennion, Muriel Le Barbier-Le Bris, Marion Del Sol, *Droit social européen et international*, Presses Universitaires de France, Paris, 2011, p. 105.

⁹⁰ ECJ, *Debra Allonby*, para. 67; ECJ, *Deborah Lawrie-Blum*, para. 17.

⁹¹ ECJ, *D.M. Levin v Staatssecretaris van Justitie*, Case 53/81, para. 9; ECJ, *Bettray v Staatssecretaris van Justitie*, Case 344/87, para. 11.

⁹² ECJ, *Kempf*, para. 13; ECJ, *Debra Allonby*, paras. 64, 66. The broad definition of worker is important, as it allows the full application of rights related to the free movement of workers, without necessarily having to use the criterion of citizenship - *Hennion - Le Barbier-Le Bris - Del Sol*, p. 105.

According to the European case-law, the concept of worker is defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned; among these, subordination is a key-element.

The concept of subordination is strictly related to the definition of worker by the European case-law, as the worker is considered to be a person involved in an employment relationship. The objective criteria for defining the term 'worker' are the existence of a subordination relationship vis-à-vis the employer (irrespective of the nature of that relationship), the actual provision of services and the payment of remuneration⁹³. The essential characteristic of an employment relationship is the existence of subordination: the fact that, for a certain period, a person performs services for and under the direction of another person, in return for which he receives remuneration⁹⁴. In this context, the nature of the legal relationship between the employee and the employer is not decisive⁹⁵. The fact that the employer is determining the activities carried out by the worker, the working conditions and conditions of remuneration is a sign of subordination (and thus of an employment relationship)⁹⁶. The existence of a relationship of subordination is a matter which it is for the national court to verify⁹⁷.

In order to be regarded as a worker, a person must perform effective and genuine activities to the exclusion of activities on such a small scale as to be purely marginal and ancillary⁹⁸. According to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration under these conditions must be regarded as an economic activity⁹⁹.

The conditions of employment of a person employed under a contract which provides no guarantee as to the number of hours to be worked, with the result that the person concerned works only a very limited number of days per week or hours per day or the fact that employment is of short duration, do not prevent the employed person in question from being regarded as a worker¹⁰⁰. National courts may, when assessing the effective and genuine nature of the activity pursued by the worker, take account of the irregular nature and limited duration of the services actually performed under an on-call contract, for example. The fact that the person concerned worked only a very limited

⁹³ ECJ, Lawrie-Blum, para. 15.

⁹⁴ ECJ, Steven Malcolm Brown v Secretary of State for Scotland, Case 197/86, para. 21; ECJ, Lawrie-Blum, paras. 16, 17; ECJ, Bettray, para. 14; ECJ, Brian Francis Collins v Secretary of State for Work and Pensions, Case C-138/02, para. 26; ECJ, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS), Case C-456/02, para. 15); ECJ, V. J. M. Raulin v Minister van Onderwijs en Wetenschappen, Case C-375/89, para. 10; Ms. Raulin has concluded a contract of employment known under Netherlands law as an "oproepcontract" ("on-call contract"), under which she worked for 60 hours as a waitress in the period between 5 and 21 March 1986.

⁹⁵ ECJ, Sotgiu v Deutsches Bundespost, Case 152/73, para. 6; ECJ, Bettray, para. 16: a person is regarded as a worker even if her employment relationship is of a *sui generis* nature in national law.

⁹⁶ ECJ, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, Case C-268/99, para 70.

⁹⁷ ECJ, C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep, Case C-337/97, para. 16.

⁹⁸ Work cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and if the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life - ECJ, Bettray, para. 17.

⁹⁹ ECJ, Jany, para. 33; ECJ, Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée, Joined Cases C-51/96 and C-191/97, paras. 53, 54.

¹⁰⁰ ECJ, M. J. E. Bernini v Minister van Onderwijs en Wetenschappen, Case C-3/90, para. 16; ECJ, Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst Case C-413/01, para. 25.

number of hours in a labour relationship may be an indication that the activities exercised are purely marginal and ancillary. The national court may also take account, if appropriate, of the fact that the person must remain available to work if called upon to do so by the employer¹⁰¹.

It is also considered to be a worker a person performing part-time work¹⁰² or performing work under an on-call contract¹⁰³, a person who receives pay lower than that for full-time employment, provided that the activities performed are effective and genuine¹⁰⁴, a person whose productivity is low and, consequently, her remuneration is largely provided by subsidies from public funds¹⁰⁵, a person engaged in preparatory training in the course of occupational training, whose productivity is low, works only a small number of hours per week and receives limited remuneration¹⁰⁶, a person who is related by marriage to the director and sole shareholder of the company for which he pursues an effective and genuine activity¹⁰⁷ or a person who is genuinely seeking work¹⁰⁸ a researcher preparing a doctoral thesis on the basis of a grant contract¹⁰⁹. “It is of no interest whether a worker is engaged as a workman (ouvrier), a clerk (employé) or an official (fonctionnaire) or even whether the terms on which he is employed come under public or private law”¹¹⁰. The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a ‘worker’¹¹¹, even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides¹¹². Neither the origin of the funds from which the remuneration is paid, nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a ‘worker’ for the purposes of Community law¹¹³.

Sometimes, the concept of worker is defined per deductionem, by the exclusion of certain categories of workers performing work. According to the Court of Justice of the European Union’s case law, the authors of the Treaty did not intend that the term ‘worker’, within the meaning of the Treaty, “should include independent providers of services who are not in a relationship of subordination with the person who receives the

¹⁰¹ ECJ, Raulin, paras. 9, 11, 14.

¹⁰² ECJ, Levin, para. 17; ECJ, Raulin, para. 13.

¹⁰³ ECJ, Raulin, para. 9.

¹⁰⁴ ECJ, Lawrie-Blum, para. 21.

¹⁰⁵ ECJ, Bettray, para. 15: neither the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker

¹⁰⁶ ECJ, Bernini, paras. 15, 16.

¹⁰⁷ ECJ, Meeusen, para. 15: the personal and property relations between spouses who result from marriage do not rule out the existence, in the context of the organisation of an undertaking, of a relationship of subordination characteristic of an employment relationship.

¹⁰⁸ ECJ, Lawrie-Blum, para. 17; ECJ, Sylvie Lair v Universität Hannover, Case 39/86, paras. 31 - 36; ECJ, R. v. Immigration Appeal Tribunal, ex parte Antonissen, Case C-292/89, paras. 12, 13.

¹⁰⁹ With the condition that his/her activities are performed for a certain period of time under the direction of an institute forming part of an organisation operating in the public interest and he/she receives remuneration, in return for those activities – ECJ, Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, Case C-94/07, para. 33.

¹¹⁰ ECJ, Sotgiu, para. 5

¹¹¹ ECJ, Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900, Joined Cases C-22/08 and C-23/08, para. 28; ECJ, Levin, paras. 15, 16; ECJ, Inge Nolte v Landesversicherungsanstalt Hannover, Case C-317/93, para. 19.

¹¹² ECJ, Kempf, para. 14.

¹¹³ ECJ, Bettray, para. 15; ECJ, Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l’Emploi, Case C-10/05, para. 22; ECJ, Vatsouras and Koupatantze, para. 27.

services”¹¹⁴. Since the essential characteristic of an employment relationship is the fact 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, any activity which a person performs outside a subordination relationship must be classified as an activity pursued in a self-employed capacity¹¹⁵.

As a general rule, the European definition of worker given in the context of freedom of movement and of the principle of equal treatment corresponds, to some extents, to the definition given in many European countries to the employment contract/employment relationship, as it supposes three features: performance of work, subordination, remuneration¹¹⁶. On the other hand, the case law of the Court of Justice of the European Union has refused to accept Member State definitions that would limit the definition of a ‘worker’ to those with a contract of employment and has favoured a meaning of ‘worker’ covering all persons engaged in economic activity, even without a contract of employment, and including even those without a contract at all, but who are seeking work¹¹⁷. Thus, in the Court’s case law, the meaning of ‘worker’ in extended beyond that of the ‘employee’¹¹⁸. The definition of a worker according to the European case-law goes far beyond a ‘classical’ definition of a person involved in an employment contract: first, a private law contract is not required in order to be considered a worker¹¹⁹; there is no condition regarding a minimum duration of the performance of work, neither a minimum level of remuneration. In a relatively recent case, the Court of Justice of the European Union considered unnecessary another ‘traditional’ condition of the existence of an employment relationship, fundamental, for example, in Spanish, Portuguese, Romanian or Italian law; the condition that work must be performed for the benefit of another (the employer); thus, the Court stated that the constituent elements of any paid employment relationship are subordination and the payment of remuneration¹²⁰.

II. 2. Subordination and the transformations of the employment relationship.

The changes of the world of work, and particularly in the labour market, have given rise to new forms of work organisation which do not always fit within the parameters of the employment relationship. The transformations in the nature of work itself led to situations in which the legal scope of the employment relationship (which usually determines whether or not those who work are entitled to be protected by labour legislation) did not accord with the realities of working relationships¹²¹. Globalisation, the new technologies and the highly competitive environment led in some countries to the growth of the informal economy and undeclared employment. The decentralisation

¹¹⁴ ECJ, Meeusen, para. 15; ECJ, Debra Allonby, para. 68.

¹¹⁵ ECJ, P. H. Asscher v Staatssecretaris van Financiën, Case C-107/94, paras. 25, 26; ECJ, Jany, para. 34.

¹¹⁶ Mélanie Schmitt, *Droit du travail de l’Union Européenne*, Larcier, Bruxelles, 2012, p. 41; *Hennion - Le Barbier-Le Bris - Del Sol*, p. 106; ECJ, Lawrie-Blum para. 18.

¹¹⁷ ECJ, Antonissen, para. 9.

¹¹⁸ However, within specific directives, such as the 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, the definition of a ‘worker’ is significantly narrower, such as ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’ - article 3(a).

¹¹⁹ As we could see, a person seeking work could also be considered a worker.

¹²⁰ ECJ, Andrea Raccanelli, para. 34.

¹²¹ International Labour Organisation, *Report of the Meeting of Experts on Workers in Situations Needing Protection*, 279th Session, Geneva, November 2000, para. 107. Available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-2.pdf> (last visited: 30.09.2012).

of some activities to subcontractors¹²² or self-employed workers or the use of temporary employment agencies become more and more used by many enterprises.

Traditionally, the distinction between a civil (or commercial) contract and the ‘standard’ employment contract was rather clear¹²³. Civil contracts are concluded for a definite task and for a fixed term; remuneration is usually paid at the end of a contract (usually when receiving the result of the work) and for this result (the ‘piece of work’). This is why civil (commercial) contracts are supposed to involve work performed *uno actu*. On the contrary, the ‘standard’ employment contract is open-ended (indeterminate); the contract is concluded for the performance of work itself and not for a certain piece of work and remuneration is paid with a certain periodicity. The distinction between the independent contractor – employee is based on the traditional distinction between the ‘*louage d’ouvrage*’ (hire of work, in the sense of a piece of work or completed task) and the ‘*louage de services*’ (hire of services) distinction which can be found also in Romanian, French or English law¹²⁴.

The development of new, non-standard, flexible work forms made this distinction a lot less clear: fixed-term contracts and temporary agency work contracts are concluded for a fixed term and, quite often, for a specific task. The worker beneficiates sometimes of a high autonomy in the performance of work or as to his working hours; there are also situations in which the initial conditions of performance of the contract change so much that determine, *de facto*, a change of the nature of the contract.

Under these circumstances, sometimes the employment relationship is objectively ambiguous, some other times is deliberately disguised. These situations, as the “triangular” employment relationships and the category of economically dependent workers create uncertainty as to the scope of the law and can nullify its protection.

II. 2. 1. Disguised employment relationships.

Disguised employment occurs when the true legal status of a person who is an employee is hidden so as to avoid the costs of an employment relationship (such as taxes and social security contributions). The most radical way to disguise the employment relationship consists of giving it the appearance of a different legal nature, whether civil, commercial, cooperative, family-related or other, which often give the semblance of self-employment (an illegal practice, also called ‘bogus self-employment’). The second way to disguise the employment relationship is through the form in which it is established: this is the case, for example, of contracts concluded for a fixed term or for a specific task, but which are then repeatedly renewed, with or without a break¹²⁵.

Sometimes, workers in disguised employment relationships have difficulties in acceding to social security systems and bear the costs of health insurance, unemployment insurance and pensions’ schemes. But another visible effect of this type of contract manipulation is that the worker does not acquire the rights the benefits provided to employees by labour legislation or collective bargaining (such as working time, right to paid leave etc.). Workers in a disguised employment relationship not only lose their rights under labour law, receive less favourable benefits than those recognised as employees, but also have difficulties in securing the protection of the inspection

¹²² In France, outsourcing is seen as one of the factors which create a higher risk of bogus self employment - Antoine Mazeaud, *Droit du travail*, Montchrestien, Paris, 2004, p. 272, para. 395.

¹²³ As it is the case in France or in Romania.

¹²⁴ In this distinction ‘it is possible to see the essence of the division between independent contractors and servants in English law’ - *Deakin*, p. 11.

¹²⁵ International Labour Organization, *The employment relationship*, pp. 12-13, paras. 47-48.

services or seeking redress through the labour courts. There are also other consequences of the bogus self-employment, having as a result the lack of labour protection of workers: it distorts competition between enterprises (at national and sectoral or international level), often to the detriment of those who comply with the law; training of workers is neglected, including training for work in environments where there are inherent risks and might impact on the health and safety of third parties and society in general¹²⁶; lack of protection might have a considerable financial impact, in terms of unpaid social security contributions and taxes (misclassification of dependent workers (employees) as independent workers results in a loss in unpaid contributions to social security, the healthcare system and the unemployment insurance scheme)¹²⁷.

Disguised employment relationships may also involve masking the identity of the employer, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility towards the workers.

II. 2. 2. “Triangular” employment relationships.

A “triangular” employment relationship occurs when employees of a person (the ‘provider’) work for another person (the ‘user’). It normally presupposes a civil or commercial contract between a user and a provider¹²⁸. In such cases, there is a relationship between an agency, an end user and the supplied workers. The agency pays a pivotal role¹²⁹, as it takes part both in the commercial contract with the user and in the peculiar contract with the worker (an employment contract, in the Romanian, Italian or French law). A wide variety of contracts can be used for this purpose; one of the best known forms is the use of contractors and private employment agencies or franchising. In appearance, temporary agency workers also seem to have two employers.

Such contracts can have beneficial effects for the provider’s employees in terms of employment opportunities, experience and professional challenges¹³⁰. But from a legal standpoint, such contracts may present technical difficulties, as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer. In a standard employment

¹²⁶ The link between accident risks and the lack of workers’ protection has been observed in situations where there is an extensive use of subcontracting. That was the case of the explosion in the AZF chemical complex in Toulouse, France, on 21 September 2001, which killed 30 and injured hundreds, devastating thousands of homes. A commission of inquiry cited “cascade subcontracting” (the use of subcontracting by an enterprise which is already itself subcontracting) as a factor aggravating the risk of a major industrial accident. The issue was not subcontracting itself but its improper use, which can create or aggravate risks. The commission of inquiry proposed, inter alia, that the practice be prohibited in high-risk industrial complexes and that the working conditions and protection of external employees be improved (report prepared by the Assemblée Nationale for the commission of inquiry into the safety of industrial plant and research centres and protection of persons and the environment in the event of a major industrial accident, No. 3559, 29 Jan. 2002, Vol. I, available at <http://www.assemblee-nationale.fr/Rap-eng/r3559/r3559-01.asp>, last visited: 29.08.2012). In response to the accident, a law on the prevention of technological and natural risks and compensation was adopted in 2003 (Act No. 2003-699 of 30 July 2003), amending the Labour Code).

¹²⁷ International Labour Organization, 2006, *The employment relationship*, pp. 10-11, paras. 35-38.

¹²⁸ In cases of objectively ambiguous or disguised ‘triangular’ employment relationships it is possible that no civil or commercial contract exists; this is especially the case when the provider is just an intermediary of the supposed user and not a proper enterprise, with the intention to conceal the user’s identity as the real employer.

¹²⁹ Luca Ratti, Agency Work and the Idea of Dual Employership: a Comparative Perspective, *Comparative Labor Law & Policy Journal*, Volume 30. Issue 4. 2009. p. 849-850.

¹³⁰ International Labour Organization, 2006, *The employment relationship*, pp. 13-14, paras. 50-57.

relationship, the employer is the person who hires the worker, assigns tasks, provides the means in order to perform them, gives instructions and supervises, pays wages, takes risks, makes profits and terminates the employment relationship. Often ‘core business’ management exercises exactly the same powers and prerogatives on ‘core’ workers as it does on agency workers, but these powers and prerogatives are legally exercised without any typical contract of employment¹³¹. As a result, the main difficulty in a ‘triangular’ employment relationship is generated by the fact that the employer’s powers are assumed separately or jointly by more than one person; in such cases, there is the image of a ‘doubled’ employer. Identifying the ‘real employer’ beyond formal structures and corporate combinations¹³² is one of the key issues in labour law. The ‘dual employership’ might appear in those situations in which two different employing entities exercise synchronically, exclusively or in cooperation some of the typical prerogatives of the employer, each fulfilling its own economic purpose¹³³.

Employers are primarily responsible for the rights of their employees, whether they are a contractor, an employment agency, a cooperative or any other employing enterprise or entity. But the user plays also a crucial role with respect to ensuring respect of the employee’s rights (such as limits on working hours, rest breaks, paid leave etc.)¹³⁴. In some countries, the laws assign a measure of responsibility of the user; in some cases, the employer (or provider) and the user may bear joint¹³⁵ and several liability, so that the worker can claim against both or either of them without distinction; in other cases, the user bears subsidiary liability, in the sense that a claim may only be brought against the user in the event of non-compliance by the provider¹³⁶.

In such cases, the concept of subordination proves its limits: while subordination is useful in order to determine who is a worker/an employee, it might not always be so useful when determining who is the employer. Thus, the use of subordination as a criterion to determine the existence of an employment relationship might not always be accurate, as it doesn’t always reflect the real situation between the parties (in the case of temporary agency work or sub-contracting, for example). In particular, workers may not know from whom exactly to claim payment of remuneration or compensation for an accident at work, and whether they can file a claim against the user when the direct employer disappears or becomes insolvent¹³⁷.

II. 2. 3. Objectively ambiguous employment relationships

As a result of the transformations in the nature itself of work, a person may have in some employment relationships a wide margin of autonomy in the performance of work, as a

¹³¹ Ratti, p. 839.

¹³² Hugh Collins, Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws, *Oxford Journal of Legal Studies*, Volume 10. Issue 3. 1990. p. 353.

¹³³ Ratti, p. 836.

¹³⁴ For example, the Italian labor market reform of 2003 set an analytical regulatory regime for agency work and introduced a detailed distribution of duties, powers, and prerogatives upon the three parties of the arrangement. Also in Romania, after the labour market of 2011, the Labour Code settles in detail the rights and duties of all the persons involved in temporary agency work.

¹³⁵ This is the case in Italy for remuneration payment.

¹³⁶ This is the case in Romania.

¹³⁷ International Labour Organization, 2006, *The employment relationship*, p. 14, para. 53. However, in Romania, in a case where there was an attempt to hide the real identity of the employer (‘Realitatea TV’, a news network), the courts have decided that the person who exercises in fact the prerogatives of an employer is the one responsible for the payment of remuneration, paid leave and other employees’ rights.

strategy used by the enterprise to enhance the value of work¹³⁸; there are also situations where the main factors that characterise the employment relationship are not apparent¹³⁹. A person may be recruited and work at a distance, without fixed hours or days of work, with special payment arrangements and full autonomy as to how to organise his work; sometimes he might have been recruited and work via the Internet and paid through a bank, but use equipment supplied by the enterprise and follow its instructions.

In such cases, there is a genuine doubt as to the existence of an employment relationship and the use of features of subordination, as developed by case-law, becomes extremely important.

Midway between the employment relationship and self-employment, there are the economically dependent workers, who are formally self-employed but depend on one or a few clients for their income. They form a sort of a 'grey zone', as economically dependent workers are not easy to describe.

II. 2. 4. Grey zone: Economic dependency and economically dependent worker.

In labour law, either the total independence, or the complete subordination doesn't exist. The strict point (or dividing line) which generates labour law protection is very difficult to determine¹⁴⁰: when are we sufficiently subordinated to benefit of labour protection and when are we sufficiently independent to fall outside the scope of labour law?

The new forms of work organisation, such as outsourcing and contracting out, led to the emergence of the new category of economically dependent work, which represents a form of work falling within a grey zone between dependent work and self-employment. Built on the traditional binary division, labour law seems unable to provide a proper definition of those persons who fall between these two - opposite - categories. 'Economically dependent workers' are 'midway' between the traditional categories, as they are formally self-employed, but they depend on a single employer for all their income or large part of it¹⁴¹.

Numerous activities that used to be carried out in a firm by workers with subordinate status (employees) are entrusted through outsourcing or contracting out to self-employed workers and such arrangements tend to lead to the emergence of economic dependence. The workers engaged in connection with contracted-out work customarily work in the same undertaking, establishment or department as workers who have continued to be employed by that undertaking and are frequently engaged on work comparable to that done by such employees. However, the remuneration which they receive may be considerably lower and their status may also differ in the sense that in the performance of individual services they carry on their activities as self-employed persons instead of as employees¹⁴². Unfavourable consequences may be attached to that difference in status for persons performing contracted-out activities as self-employed persons.

Economically dependent work is most common in the service sector and in activities such as restaurant business, catering, media (newspapers, journals, TV, radio,

¹³⁸ Supiot, 2001. p. 2.

¹³⁹ International Labour Organization, 2006, *The employment relationship*, pp. 11-12, paras. 42-43.

¹⁴⁰ *Peskine-Wolmark*, p. 15.

¹⁴¹ *Pedersini*, p. 1.

¹⁴² Opinion of Advocate general Geelhoed, ECJ, *Debra Allonby v. Accrington & Rossendale College and Education Lecturing Services, trading as Protocol Professional (formerly Education Lecturing Services) and Secretary of State for Education and Employment*, C -256/01, para. 23.

editing, teaching and training, marketing, telemarketing, advertising, entertainment, administration, accounting and social services. The phenomenon is, however, also present in more traditional sectors, such as transport, building industry and domestic work¹⁴³.

There is deemed to be economic dependency where the sums received by the worker constitute his or her only or main source of income, where such sums are paid by a person or enterprise as a result of the worker's activity and where the worker does not enjoy economic autonomy, being economically linked to the sphere of activity in which the person or enterprise that may be considered as the employer operates¹⁴⁴. 'Economically dependent workers' are those workers who are formally self-employed but depend on a single employer for their income. They do not generally benefit from the protection granted to employees by law and collective bargaining (such as health and safety, information and consultation, working time, vocational training and social protection) and they generally fall outside the traditional reach of trade union representation¹⁴⁵.

There is a certain degree of uncertainty surrounding the definition of economically dependent work, mainly because the legal framework is fragmented, as workers in such a situation belong to different professions, often with specific statutes¹⁴⁶ and there is a certain amount of confusion as regards both the actual designation of the phenomenon and the overlap with the different problem of false self-employed workers. Some states have legal concepts of an economically dependent worker, while in many others it is a phenomenon that is discussed. As a general rule, there are three criteria used to define this type of work: primarily personal work, continuity over time, single client¹⁴⁷.

In most European countries, economically dependent work falls within the framework of self-employment, but it is a self-employment which has some peculiar features. In those countries which recognise an intermediate category between employee and self-employed status, economic dependency is the basis for specific rights not recognised for other types of self-employed workers, but less extensive than the rights accorded to employees¹⁴⁸. In order to protect the economically dependent workers, creating a 'hard core' of social rights, which are applicable to all work contracts irrespective of their formal qualification in terms of autonomy (self-employment) or subordination was considered necessary¹⁴⁹.

In Romania, there is no relevant legislation or case law recognising and/or granting rights for the economically dependent workers. The Romanian law uses the

¹⁴³ Pedersini, p. 17-18.

¹⁴⁴ International Labour Organization, 2006, The employment relationship, p. 21, para. 79.

¹⁴⁵ Pedersini, p. 2.

¹⁴⁶ Elsa Peskine, Entre subordination et indépendance : en quête d'une troisième voie, *Revue de droit du travail*, Issue 6. Juin 2008. p. 371; Alain Supiot, Les nouveaux visages de la subordination, in *Droit social*. Issue 2. 2000, p. 136.

¹⁴⁷ Perulli, p. 3. For example, in Germany there's the concept of the 'employee-like person' ('arbeitnehmerähnliche Person'). This category of workers designates those who, under a commercial or service contract, perform the work concerned personally and directly, without hiring employees, and who are reliant on a single client for over 50 % of their income. Spain has the most recent definition of economically dependent work: the Self-Employed Workers' Statute, adopted in 2007, sets out a number of criteria for defining economically dependent workers, being those who usually carry out, personally and directly, an economic or professional activity for lucrative purposes and only for one client, from whom they receive at least 75 % of their income; this status is incompatible with civil or commercial companies.

¹⁴⁸ Opinion of the European Economic and Social Committee on 'New trends in self-employed work: the specific case of economically dependent self-employed work' (own-initiative opinion), rapporteur: Mr Zufiaur Narvaiza, 2011/C 18/08, Official Journal of the European Union, 19.01.2011, p. 44.

¹⁴⁹ Perulli, p. 11.

traditional binary division (employment/self-employment), without a clear recognition of the 'grey zones' or the intermediate categories. Yet, the social security system is opened for all those persons who gain their income as a result of a professional activity or who voluntarily accede to these systems. Persons who obtain a certain annual income must pay social contributions to unemployment, health and pensions schemes. As a result, economically dependent workers are protected in Romania in terms of social security, but totally unprotected in terms of labour rights.

III. Determining the existence of an employment relationship or identifying workers who need protection?

The concept of subordination is traditionally used in order to identify the beneficiary of labour law and social security protection. Subordination is a constant criterion used to determine the existence of an employment contract¹⁵⁰, but its content, as the concept itself have undergone major changes. Under these circumstances, one of the contemporary goals is to update, clarify and adapt the laws governing the employment relationship so as to facilitate recognition of the existence of an employment relationship and fight against attempts to disguise it. Granting effective protection for those who perform work in the context of an employment relationship, effective access to labour courts and labour inspection services and the possibility to obtain a judicial decision reclassifying bogus 'self-employed' workers as employees is one of the main concerns in labour law.

There's also a need to clarify the situation of dependent employment and the grey areas between self-employment and employees with a dependent employment relationship in order to combat the phenomenon of disguised employment and grant effective protection.

Different tendencies¹⁵¹ were manifested under the changes in labour law and in connection with the insufficient protection of economically dependent workers. The first one suggested maintaining the status quo: it is mainly a question of flexible boundaries between labour and civil law. As a result, the general contractual principles of civil law and in particular the general clause on good faith and correctness could be applied to economically dependent workers. But the problem with a flexible boundary is that it has only two ends, so there's no place for intermediate categories¹⁵². The legal status of employees is built by opposition with the self-employed and a 'midway' category doesn't seem to fit the traditional scope of labour law.

The second tendency, manifested in some European states, aims to redefining (enlarging) the notion of subordinate work: up-dating the notion of subordinate work (by adding other criteria for subordination) so that the notion corresponds with the changed socio-economic context. This would mean basically an extension of labour law, with the help of the traditional category of subordination (III. 1).

The third tendency suggests creating an intermediate category (a new legal category) in-between subordinate work and self-employment (III. 2). Certain forms of protection would be extended through legislation and/or jurisprudence to cover this new type of work.

¹⁵⁰ *Henry - Verkindt*, p. 392, para. 481.

¹⁵¹ *Perulli*, p. 11.

¹⁵² *Supiot*, 2000, p. 139.

The fourth tendency pleads for the creation of a 'hard core' of social rights which are applicable to all work contracts, irrespective of their formal qualification in terms of autonomy (self-employment) or subordination. This prospect is increasingly acquiring credit in the European doctrine.

III. 1. Extending labour law by up-dating the notion of subordinate work

As a result of the changes in the labour market, law and case-law developed a series of indicators of subordination in order to provide a clearer concept and to facilitate the recognition of those persons performing work under the new, flexible relationships who need protection (1). Several features of the employment relationship are also contained in international instruments¹⁵³.

The 'economic dependence' cannot be used alone as a criterion to define an employment relationship as 'subordinate'; subordination implies economic dependence, but the reverse is not always true. 'Economic dependence' is mainly a socially important criterion which raises the question of the protection of such workers¹⁵⁴. Yet, it must not be confounded with 'bogus self-employment', which refers basically to the state's capacity of detecting and punishing violations. For this purpose, two main methods can be found in most European states: the principle of the primacy of facts (2), accompanied sometimes by legal presumptions meant to ease the burden of proof and the legal possibility of labour courts, labour inspection services or tax collecting authorities to reclassify 'bogus self-employment', for example, in an employment relationship.

III. 1. 1. Up-dating the features of subordination.

The activity provided in a contract, whether intellectual or manual, may take the form either of self-employment or of subordinate employment. Therefore, the essential factor of the distinction between subordinate and self-employment is not the type of work to be carried out, but the way in which it is carried out.

Legal subordination is understood to mean that the employer or his/her representatives direct or are likely to direct the performance of the work. In practice, case law has identified a series of characteristic features of subordinate labour; these circumstances are normally referred to with the term 'indicators of subordinate employment'. In some countries (such as Portugal, Germany or Romania), there is also a legal presumption of the existence of an employment relationship when one or several features or indicators of subordinate employment can be identified in a specific case.

Among the various indicators of subordination provided by case law or legislation, mention should be made of the following¹⁵⁵: the technical and functional integration of the worker into the productive and organisational structure of the entrepreneur (these feature is very common in common-law, but also in France¹⁵⁶, Spain and Portugal); the fact that the materials, equipment and tools usually belong to the enterprise in the case of

¹⁵³ Such is the case of the International Labour Organization's Recommendation R 198 concerning the employment relationship, Geneva, 2006.

¹⁵⁴ Pedersini, p. 3.

¹⁵⁵ Henry-Verkindt, p. 394-396, para. 484; Michele Tiraboschi, Maurizio Del Conte, Employment Contract: Disputes on Definition in the Changing Italian Labour Law, p. 155. Available at: http://www.jil.go.jp/english/events_and_information/documents/clls04_delconte2.pdf (last visited: 24.08.2012); Paul-Henri Antonmattei, Les éléments du contrat de travail, *Droit social*, 1999, p. 330; Antoine Jeanmeaud, L'avenir sauvegardé de la qualification du contrat de travail, *Droit social*, 2001, p. 227; Waas, pp. 46-47.

¹⁵⁶ Mazeaud, p. 273, para. 397. By opposition, a self-employed make use of his organisational resources.

subordinate labour¹⁵⁷ (one of the features expressly stated by law in Portugal or Romania) and to the worker in the case of self-employment. Another sign of subordination consists in the fact that the premises where the work is carried out were made available by the employer (this feature is settled in the German, Portuguese and Romanian legislation).

The fact that the employer bears the commercial risk related to the productive activity is an indicator of subordination, whereas the subordinate worker is subject to obligations relating to the work itself rather than the final result and the proper execution of the work depends on the degree of diligence observed. This criterion is used mainly in common law countries. Additionally, subordination is evidenced and economically dependent workers who need protection are identified if work is performed personally (a criterion also used in Germany¹⁵⁸ or France). The form of payment is another indicator: remuneration tends to be fixed and paid at regular intervals¹⁵⁹ for subordinate workers, whereas it is variable and depends on the results achieved and the deadlines laid down for completion of work in the case of self-employed (France, Romania, Portugal).

The exercise of managerial and disciplinary powers is to be found only in subordinate employment. With regard in particular to disciplinary powers, they must be of a structural nature, presupposing a position of supremacy by one party to the employment contract over the other¹⁶⁰; they must be distinguished from the civil law sanctions that may be applied in the case of self-employed labour, such as penalty clauses, provisions relating to non-compliance, termination of the contract for non-compliance and so on. Subordinate employees are usually required to comply with working hours laid down by the employer¹⁶¹, whereas self-employed workers are free to decide when the work is to be carried out. The power to establish the working hours is one of the 'classical' features of subordination, used in many countries (among them: France, Portugal, and Romania).

To these features, the International Labour Organization has added some others specific indicators of the existence of an employment relationship, such as the fact that the work is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is of a particular duration, has a certain continuity and requires the worker's availability. Some other indicators tend mainly to tackle bogus self-employment, but also to bring some of the economically dependent workers under the scope of labour law: there is subordination when the periodic remuneration constitutes the worker's sole or principal source of income; but also in case of provision of payment in kind, such as food, lodging or transport, recognition of entitlements such

¹⁵⁷ In France this is also one of the indicators of an employment relationship: *Héas*, p. 170.

¹⁵⁸ In Germany, the Gesetz zur Förderung der Selbständigkeit, instead of providing for a presumption of subordination in certain circumstances, has introduced a general assessment procedure to distinguish between employees and self-employed workers. If at least three of the following five criteria them are present, a person is being considered to be an employee: the worker does not employ other employees who are subject to social security obligations; the worker usually works for only one contractor; the same job is also performed by regular employees; prior to this job, the worker concerned carried out the same work as an employee and there are no signs of entrepreneurial activities (*unternehmerisches Handeln*) by the worker (*Pedersini*, p. 8).

¹⁵⁹ In France, this criterion was used to consider that football or basket-ball players are involved in an employment relationship. A modest, almost inexistent or of a compensatory nature remuneration excludes an employment contract: *Héas*, p. 171.

¹⁶⁰ *Tiraboschi-Del Conte*, p. 155; *Henry-Verkindt*, p. 394-396, para. 484; *Antonmattei*, p. 330.

¹⁶¹ Catherine Puigelier, *Salariat. Définition*, *JurisClasseur Travail Traité*, Fasc. 17-1, p. 2, para. 2.

as weekly rest and annual holidays or payment by the party requesting the work for travel undertaken by the worker in order to carry out the work¹⁶².

In some cases, the use of these indicators also serves to bring economically dependent workers under the scope of labour law. This is especially the case when there's a lack of a clear organisational separation (for example, economically dependent workers work on the employer's premises and/or use his equipment); there's no clear distinction of task (for example they perform the same tasks as some of the existing employees, or tasks which were formerly carried out by employees and later contracted out to 'collaborators'); and the 'service' they sell individually to employers falls outside the traditional scope of 'professional services' (this is especially the case when the tasks are simple, do not require specific skills and no professional knowledge or competence is needed)¹⁶³. In such cases, there's a very thin dividing line between economically dependent workers and bogus self-employment and workers are often protected through the general means of tackling bogus self-employment or disguised employment relationships. This technique is useful, in the sense that it provides protection for some economically dependent workers, yet totally imprecise, as such workers are not strictly speaking employees.

To the tendency of updating the features of subordination are often associated means to ease the burden of proof and the principle that we can find in the case-law of most European countries to determine the civil or employment nature of a relationship according to the facts (the primacy of facts).

III. 1. 2. The primacy of facts.

The question whether an employment relationship exists, as the nature of the contract, must be determined according to the facts, having regard to all the factors and circumstances concerning the way in which work is performed¹⁶⁴, regardless of the nature of the worker's legal relationship with the other party to the employment relationship¹⁶⁵ and of how the parties name or describe the contract¹⁶⁶. The principle of the primacy of facts can be found in Portugal, France or Romania, for example¹⁶⁷.

The formal classification of a self-employed person does not exclude the possibility that a person must be classified as a worker if his independence is merely notional¹⁶⁸.

There are also various alternative means of easing the burden of proof on the worker and facilitating the judge's task of determining the existence of an employment relationship. According to the legislation in many countries, employment relationship may be proved by any of the usual means, or by any means permitted by law. The law may provide that such contracts are consensual (as it was the case in Romania); however, the law may require that the contract be in writing for various reasons relating to compliance or to evidence (as it is now the case in Romania). In cases when it has

¹⁶² International Labour Organization's Recommendation R 198 concerning the employment relationship, Geneva, 2006.

¹⁶³ *Pedersini*, p. 1.

¹⁶⁴ *Debra-Allonby*, para. 69.

¹⁶⁵ Case 344/87 *Betray*, para. 16, ECJ, *Raulin*, para. 10; ECJ, *Debra-Allonby*, para. 70.

¹⁶⁶ Assemblée plénière, 4.03.1983: « l'existence d'une relation de travail ne dépend ni de la volonté exprimée par les parties, ni de la dénomination qu'elles ont donnée à leur convention, mais des conditions de fait dans lesquelles est exercée l'activité des travailleurs »; see also: *Henry-Verkindt*, p. 389, para. 477; *Waas*, p. 48.

¹⁶⁷ This is also the tendency in the recent case law in UK: see case *Autoclenz v. Belcer* (2011).

¹⁶⁸ *Debra-Allonby*, para. 71.

been judicially determined that a civil contract actually regulates labour relations between an employee and an employer, the provisions of labour legislation shall be applied to such relations (as it is the case in the Russian Federation or in Romania).

With the same aim of easing the burden of proof, some laws provide for a presumption of the existence of an employment relationship or contract. These presumptions are related to the features of subordination; if one or several of them exist in a given case, sometimes law settles the legal possibility of labour courts, labour inspection services or tax collecting authorities to reclassify the contract in an employment relationship. In a strange way, in Romania, such presumptions are settled in the Tax Code and the legal possibility for reclassifying the contract is given to tax collecting authorities. If the contract is reclassified in an employment contract, the beneficiary of the service has to pay all the taxes and social contributions (taxes for social security schemes) and if there's a disguised employment relationship, the law settles a joint liability of the two parties.

III. 2. Creating new, intermediary categories.

The existence of the economically dependent workers led to the creation of an intermediate category of workers, between self-employed and employee (as it is the case in Austria, Germany, Italy, Portugal, Spain and the United Kingdom). In these cases, the status of economically dependent self-employed worker does not depend on the existence of a legal relation of subordination. The scope and the content of this category differ from one country to another, but in all cases there is an entirely new category, distinct both from employee and self-employed status, entitled to a specific protection on the basis of their economic dependency.

In Italy, for example, economically dependent work are protected with regard to following subject matters: form of the contract (written); duration of the relationship; working hours and mode of carrying out the duties; remuneration and the method of payment; health and safety at work; suspension of the relationship (sickness, accidents, family reasons); training; annulment of the contract; duties of the worker; trade union rights.

In France, economically dependent workers are often deemed to work in an 'independent employment contract'¹⁶⁹. On the other hand, in France, the assimilation of some workers to employees had allowed the total or partial application of the Labour Code to people who are not bound by a contract of employment, but economically dependent or para-subordinated (as managing directors of subsidiaries or home-workers)¹⁷⁰.

Art. 10 of the Labour Code of Portugal expressly settles rights to dignity, equal treatment and non-discrimination and rights to health and safety to those persons who perform work for another, without legal subordination, if the person performing work is economically dependent of the beneficiary of his activity.

In Spain, protection of the economically dependent workers is especially related to form of the contract (written); working hours, justified interruptions of professional activity (for example in case of a need to attend to urgent, unexpected or unforeseeable family responsibilities; a serious and imminent danger to the life or health of the economically dependent autonomous worker; temporary incapacity, maternity or paternity; a situation of gender violence, for which the economically dependent

¹⁶⁹ *Supiot*, 2000, p. 131.

¹⁷⁰ *Henry - Verkindt*, p. 393, para. 482; *Puigelier*, p. 12, para. 47.

autonomous worker pursues her protection or her right to complete social assistance or force majeure), termination of the contract and legal competence given to the Labour Courts.

In Romania there's no specific protection of economically dependent workers. They are protected in terms of social security, as the social security system is opened for all those persons who gain their income as a result of a professional activity or who voluntarily accede. Economically dependent workers are totally unprotected in Romania as a distinctive category, in terms of labour rights or collective bargaining. However, in the case of economically dependent workers who are entrusted, through outsourcing or contracting out, activities that used to be carried out in a firm by workers with subordinate status (employees), labour inspectorates and tax authorities reclassify the contract in an employment relationship. As a result, economically dependent workers are assimilated in these cases with employees and benefit of a complete labour law protection. This technique is useful, in the sense that it provides protection for some economically dependent workers, yet totally imprecise, as not always such workers are not strictly speaking employees.

IV. CONCLUSIONS

If there is a certain similarity between different European states in what the 'standard employment contract' is concerned, the new forms of work organisation and the situation of workers situated in the so-called 'grey area' is a rather different problem in each state. The concept of subordination itself became insufficiently precise with regard to the new forms of work organisation and, in many countries, it leaves a considerable margin of discretion for the courts to provide a clear definition of employment relations¹⁷¹. The dividing line between the two types of contract (subordinate or self-employment) is sometimes narrow, not clear, but represents a vast area of uncertainty; in many cases it is extremely difficult to establish the exact nature of the employment relationship, and therefore the applicable legal provisions. Remuneration, which used to characterise only employment relationships, is irresistibly gaining ground among previously unremunerated forms of work¹⁷².

The consequence is that the traditional distinction between subordinated and self-employment appears outdated; the current trend proposed is to identify a set of fundamental rights for every worker, a 'bedrock of fundamental and inalienable rights, providing the basis for a modern Statute of Labour'¹⁷³, a fundamental protection for all forms of work where a service is provided for another person, irrespective of the legal framework within which the work is performed¹⁷⁴. In other words, the differentiation between employees and independent contractors would be easier if not the application of labour law is the issue, but the application of some of its specific rules only¹⁷⁵. Labour law must be extended such as to offer some rights to all the persons performing work under conditions of dependency – legal or economical, not only employees with an employment contract¹⁷⁶. These rights are to be safeguarded both at individual and collective level. First, the additional variable rights would reflect the degree of economic

¹⁷¹ *Waas*, p. 47.

¹⁷² *Supiot*, 1996, p. 5.

¹⁷³ *Tiraboschi-Del Conte*, p. 156; *Perulli*, p. 11.

¹⁷⁴ *Pedersini*, p. 10.

¹⁷⁵ *Waas*, p. 52.

¹⁷⁶ *Pedersini*, p. 10; *Supiot*, 2000, pp. 139-140.

dependence of the worker. With regard to these additional rights, a further option is the definition of a series of semi-negotiable rights to be determined by collective bargaining¹⁷⁷.

Another solution – adopted in some states - is to create intermediate categories. Thus, instead of the binary divide between ‘employees’ (who are entitled to all labour rights) and independent contractors (who have no labour-related rights), another group (or two groups) of people who are entitled to some rights could be added. This may be the concept of a ‘dependent contractor’ or an ‘employee-like’ contractor, which refers to persons who have some characteristics of independent workers, but also some of the vulnerabilities of employees, in particular the fact that they depend entirely or mostly on a single supervisor. The technical means to extend the scope of labour law to intermediate categories could be by stating in different laws that they apply not only to employees, but also to dependent contractors, or that, for the purpose of the specific law, the term employee also includes dependent contractors¹⁷⁸. Such technique is called the ‘wilful fragmentation’ of labour law, considering specific legal sub-regimes for different categories of people performing work¹⁷⁹.

But in practice there’s is the problem if there is some discernible difference between different groups of workers that can justify the application of some labour rules to some of them but not to the others. Would it be reasonable to consider, among self-employed persons, that one of them is inside the scope of a labour protection rule and another is outside? This problem is connected to the difficulty to define a so-called ‘in-between-group’ of workers (the intermediate category) who should need only part of the protection of employees, also taking in consideration the fact that the criterion ‘economically dependent workers’ is hard to define. In the second place, it is very difficult to determine which rights should be part of the floor of rights dealing with the working conditions of all workers regardless of the form of their work contract¹⁸⁰.

Essentially, there’s a need to reconceptualise the employment relationship, so that employment law recognises and offers protection to a wider set of relationships categorised by personal service and economic dependence on the part of those working. Even if this ‘new’ concept of employment relationship would not conform to the traditional model of contractual arrangement, the expansion of the idea of the traditional ‘employer’ to include tri-lateral or multi-lateral arrangements is necessary (as different ‘employing entities’ may have different and overlapping obligations to the same worker)¹⁸¹. It is generally accepted that the recognition of fundamental rights for all workers engaged in productive activities for third parties (employers, entrepreneurs, public bodies, clients and so on) is not only based on considerations of social justice (the need to safeguard the contractual position and person of the worker), but it also aims to safeguard fair competition, combating ‘social dumping’ practices (that may take various forms, such as black-market labour, the exploitation of under-age labour etc.)¹⁸².

In the current context of labour law, the ‘strict legal dichotomy’ between the employed and self-employed is criticised¹⁸³ and a conceptual shift away from the

¹⁷⁷ *Tiraboschi-Del Conte*, p. 156; *Pedersini*, p. 28.

¹⁷⁸ *Pennings*, p. 40.

¹⁷⁹ *Waas*, p. 51

¹⁸⁰ *Pennings*, p. 41.

¹⁸¹ M. R. Freedland, From the Contract of Employment to the Personal Work Nexus, *Industrial Law Journal*. Volume 35. Issue.1. 2006, p. 41; *Waas*, p. 45; *Daly-Doherty*, p. 41.

¹⁸² *Tiraboschi - Del Conte*, p. 154.

¹⁸³ M. R. Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, p. 22. One of the main questions is how to classify employment contracts by ‘removing the general and abstract definition of subordinate labour’: *Tiraboschi-Del Conte*, p. 153. According to some authors, abandoning

contract of employment model to a model based on a 'personal work nexus' was powerfully advocated. This refers to the 'connection or connections, link or links between a person providing a service personally and the persons, organisations or enterprises who or which are involved in the arrangements for, or incidental to, the personal work in question'¹⁸⁴.

the traditional employment contract – as the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security – is not an obstacle per se. The contract of employment is considered to be an 'artificial' model imposed on a more complex 'reality' of labour relations: *Deakin*, p. 13.

¹⁸⁴ *Freeland*, 2006. p 16. According to the author, there is an enormous variety of factual patterns of work arrangements in the realm of personal work contracts. Therefore, he suggests that employment relationships must be considered from five dimensions: (i) that of the worker; (ii) that of the employing enterprise; (iii) that of the duration and continuity; (iv) that of personality and substitutability; and (v) that of purpose and motivation.