The Protection of Working Relationships

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The Protection of Working Relationships

A Comparative Study

Edited by

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Summary of Contents

Chapter 11
Conclusions and Recommendations

Frans Pennings and Claire Bosse

1. GENERAL

The preceding chapters described how countries deal with the problem of disguised employment relationships and the problem of dependent work not covered by an employment contract. In addition the initiatives undertaken by the International Labour Organisation and European Union in these areas were studied. By doing so, the first two questions of our research project, outlined in Chapter 1, were addressed.

In this chapter we will discuss the third question raised in Chapter 1: which conclusions and recommendations follow from these findings?

For this purpose we will consider the proposals, mentioned in Chapter 2, which were made in the literature with the purpose to ensure the protection by labour law. In addition we will refer to Recommendation 198, the Employment Relationship Recommendation (discussed in Chapter 3). The proposals and the recommendation will serve as the framework for discussing both the developments in the various countries and our own recommendations.

We have reordered the proposals and recommendation in order to avoid overlapping discussions and realise a consistent set of proposals to be discussed. This leads to the following order:

(a) The proposal to redefine the subordination criterion.

Frans Pennings & Claire Bosse, *The Protection of Working Relationships*, pp. 173–196.

(b) The recommendations to uncover disguised employment relationships:
  (i) primacy of facts and reclassification of the contract are to be used for determination of the contract of employment;
  (ii) a broad range of means has to be used in order to identify contracts of employment;
  (iii) providing legal presumptions that there is a contract of employment;
  (iv) workers with certain characteristics, in the general or in a particular sector, must be deemed to be either employed or self-employed.
(c) Developing uniform criteria.
(d) The proposal to extend the coverage of labour law.
(e) The proposal to develop a hard core of social rights.

These elements will be discussed in section 2. At the end of that section we will draw conclusions on which approaches seem the most successful given the developments in the studied countries.

In Section 3 we will discuss the role of the international organisations. In this section we will also pay attention to the proposal, mentioned in Chapter 2, to develop an EU definition of employee.

In Section 4 the conclusions on the national and international developments will be drawn and our recommendations will be presented.

2. THE NATIONAL FINDINGS

2.1. Redefinition of the Subordination Criterion

2.1.1. The Contents of the Subordination Relationship

In Chapter 2 we mentioned Perulli's suggestion to redefine the notion of subordinate work by adding other criteria for subordination, in order to have that notion correspond with the changed socioeconomic context.

In the country chapters the authors paid considerable attention to the issue of subordination. They confirmed that the interpretation of the term *subordination* has undergone a major evolution through time. Initially, subordination meant that an employer actually or formally gives or can give detailed instructions to the employee. In the course of time, however, it was acknowledged that employers do not always have the expertise to give such instructions. Sometimes, it is also against the professional code, for example, in the case of medical doctors or researchers (the liberal professions, as they are called in the Belgian chapter) to receive specific instructions.

Gradually it became accepted that also persons with a large freedom in performing their work have a contract of employment. In respect of jobs which have always been performed under a contract of employment, it was acknowledged that supervision by the employer has received a much broader meaning.[1]

1. In Ch. 6 s. 2.2.2, this development is described for France and in Ch. 9 s. 4.1 for Germany.

Another reason why the term *subordination* nowadays does not always mean that employers give detailed instructions to their employees is that more and more work is done outside the workplace. Work has, in other words, become nomadic. This has made supervision often difficult.

These developments mean that a broad interpretation has been given to the term *subordination* in the labour laws of the studied countries. It is the task of the courts to interpret the subordination condition – (sharp) definitions of the employment contract or of subordination are missing and the statutes do not give further criteria. This means that no laws had or have to be changed in order to realise a broader interpretation of the subordination condition.

Thus, where the discussion on subordination concerns the question of the *nature* or *contents* of the instructions that are or can be given, for the large majority of jobs of persons working in dependency there are no principal limits to accept subordination.[2]

2.1.1.1. The Role of the Courts

There can be uncertainty, however, on how the courts will interpret a particular situation when the freedom to do a particular job and the possibility to be replaced are used as arguments by the work providers to deny that the contract is a contract of employment. Thus happens if persons perform work that is to a large extent comparable to that of employees, but when they have considerable freedom to do the job and there are other persons doing the same work who are undeniably self-employed. In such a situation the work provider could come into serious trouble if he is suddenly confronted with claims that persons are employees. An example can be found in the German chapter: teachers at general State schools are employees, whereas teachers at adult educational centres are considered to be self-employed persons. The author added that it is hard to explain this difference. In order not to have to accept a contract of employment it is argued that the owner of the school gives no additional instructions in 'completing' the contract. Such an arbitrary outcome reminds us of the arbitrary 'you know it is one when you see it' test, which was mentioned in the British Chapter.

Uncertainty in this case seems to be mainly due to reticence of the courts to reclassify a particular contract. We see this reticence in particular in the British Chapter. Is it the task of the legislature or of the courts to solve the problem? Traditionally labour law courts have seen a role for themselves, and they can probably find better answers in particular situations than the legislature can by making a general rule. However, the legislature should, if the courts are reticent, make clear – in line with Recommendation 198 – that the courts should indeed take an active role.

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2. Cases where subordination is assumed as inconsistent with the job are the obvious ones, like judges, politicians, director/owner of firms. These positions are not problematic from the view of protection, as they are covered by special protective Acts.

In this respect in particular differences in legal positions for which there are no objective justifications may be fruitful to address in court. An example is a more recent decision mentioned in the German Chapter of teachers in vocational education; initially they were treated differently from State school teachers, but in the recent decision they were considered to be employees (see the German Chapter, section 4.2).

The German Chapter also refers to another source for development: if an alleged self-employed freelance journalist is doing an activity that is also performed by employees, he can ask to be considered as an employee, because it would infringe the general principle of equality to make such a distinction in status without any obvious justification. This equality approach can be an important instrument for approaching the issue of disguised employment relationships.

2.1.2. In Case of Absence of the Power to Give Instructions

Different from the situation in which it is difficult to define the contents of the power to give instructions, is the situation in which the work provider *does not have the power at all* to give instructions. It appeared that the subordination relation was not re-interpreted and could not redefined in order to include such situations as well. As a result, in particular in triangular situations, between the work provider and the worker there is no contract of employment; this is, for example, the case for temporary agency workers.[3]

Thus, if the principal cannot instruct the worker or if the worker has the formal freedom not do obey instructions, there is no subordination relationship with the principal and therefore no contract of employment.

Hence, in considering the proposal for redefining the subordination relation we have to distinguish between uncertainty about the contents of the subordination relation and the absence of a formal subordination relationship.

Making a new definition of the contents of the subordination relation is a very interesting topic for handbooks on the contract of employment, but does not appear to be the major solution to the problem of disguised employment relationships and unprotected workers. In the case of the disguised employment relationships the present criteria are adequate.

The problem rests with the position of workers in situations in which a formal subordination relationship is missing. The question is, however, whether redefinition of the subordination relationship can solve this problem. After all, if the principal cannot give instructions to the worker or if the worker has the freedom to do the work in a way that suits him best, it is very difficult to define this situation as one of subordination. Moreover, it is rather problematic to distinguish such a situation from other types of third party relationships or from work whose performance entails a large freedom (the 'genuine' self-employed). No private person who has hired a plumber for a particular job wants to be confronted with a claim

3. As we will see below, sometimes other ways are used to realise that temporary agency workers have a contract of employment.

that there is a contract of employment with this person. Nor do employers who make incidental use of external workers or consultancy workers want to get into such a position.

However, in the latter situation there may be an increasing scale of mutual dependency, if the number of work providers to this person is one or two, the duration and extent of the work is considerable and he has the obligation to do the work personally. It does not seem, however, that situations in which an employment relationship should be accepted or not, can be distinguished by a redefinition of the subordination relationship. Usually, other factors play a role here than the power to give instructions, for example, the duty to perform the work personally, the dependency on each other, the economic position of the parties and their intentions. We will pay attention to these aspects below. Here we can conclude that it is unlikely that a redefinition of the contract of employment can solve the problem of deficiencies in the scope of the employment relationship.

2.1.3. A Tightening of the Subordination Criterion

The country studies also make clear that in some cases there was a retreat from previous case law, where subordination was given less attention, in that the subordination relation was made a key element for determining a contract of employment.

An example is the French *Société Générale* case of 16 November 1996, in which the Court of Cassation decided that providing work in an organised service is merely an indication of subordination, but essential is that the employer unilaterally determines the conditions under which work is carried out.[4] The German chapter also showed a formal approach to the contract of employment: an employee has to perform his services in a work organisation whose structure has been determined by another person. Therefore, in case of on-call workers, not the degree of dependency of the worker, but the formal question whether he may at any time refuse to conclude a new contract is decisive.

The reason why courts have come to put more emphasis on the subordination criterion was not explicitly discussed in the country chapters. Most probably the courts realised that a too broad inclusion of working relationships into employment relationships may lead to situations where 'obvious' self-employed may be covered. Such a broad interpretation – that is, assuming an employment relationship where the principal does not have the power to give instructions – may lead to legal uncertainty.

2.1.4. Tailor-made Solutions

Instead of redefining the subordination relationship, the countries studied appear to make, in particular, use of 'tailor-made' solutions, by which they bring *certain* professions and/or *clearly specified situations* under a contract of employment.

4. Chapter 6, s. 2.2.2.

An example is the temporary agency worker, who is, in several countries, defined as an employee by an Act. Another instrument used is that of the statutory legal presumptions, which involve that a person is considered to have a contract of employment if certain criteria are fulfilled. If for this purpose refutable presumptions are used, the subordination condition as such is not waived, but the burden of proof that there is no subordination rests on the shoulders of the other party.

It is no longer the worker and/or the judge who have to prove or ascertain that there is a subordination relation. The reversal of proof can even mean that the other party rests his case and accepts that there is a contract of employment; he does not take the trouble to claim before the court that there is a subordination relationship.

If the legal presumption is irrefutable, the subordination condition is waived. This means a deviation from, though not a redefinition of, the subordination condition. We will come back to the legal presumptions in section 2.3.3.

We may conclude that the proposal to extend the notion of subordination will lead to more legal uncertainty and possibly lead to wrong effects. Nor is a redefinition of subordination necessary. Instead, in the countries under study other instruments are being used to extend the coverage of labour law, which will be discussed in more detail below.

2.2. Primacy of Facts and Reclassification of the Contract

2.2.1. Examples and Instruments for Reclassification

One of the recommendations of ILO Recommendation 198 is that the determination of the existence of an employment relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker. Determination of the contract of employment must be done, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties (Article 9 of the Recommendation).

Alain Supiot also recommends that the power of the courts to reclassify a civil law contract as an employment contract must be upheld.[5]

The primacy of the facts and reclassification of a civil law contract are closely connected.

This recommendation means that not the name of the contract is decisive, but the facts of the case. In the countries studied, courts indeed reclassify contracts, although with varying intensity, that is, varying between countries and through time.

If a person engaged under a contract which is not an employment contract proves that he is actually working for another person in a subordination relationship, that he has to do the work personally and the work is performed in return for

5. Chapter 2, s. 3.2.

wages, the judge can conclude that there is a contract of employment, even if it is called a civil law contract, unless the contractual party proves otherwise.

This practice of reclassification, 'lifting the veil', is important for the maintenance and sustainability of labour law. Workers may be forced to accept a non-employment contract because they are dependent on work and income. For this purpose it has traditionally been acknowledged that the intentions of the parties and the name of the contract are not decisive for qualifying the contract, since these data may not reflect the real situation.

We see examples of this approach in the country studies. For instance, the Polish Labour Code provides that all remunerated work carried out in Poland under the supervision of an employer should, regardless of the type of legal contract, be regarded as employment based on a contract of employment.[6] The Act also provides that if the execution of the labour relation provides enough elements that are incompatible with the qualification given by the parties, there will be a re-qualification of the labour relation and a corresponding social security system will be applied, without prejudice to the existing rules and regulations. Another example is the French law which provides that the courts are responsible for 'determining the precise classification of the disputed facts and actions, irrespective of the terminology used by the parties'. Irrespective of the will of the parties and the principle of freedom of contract, the decisive factors are the actual conditions under which the work is performed.[7] The Belgian Law provides that if the factual execution excludes the legal qualification chosen by the parties, the qualification which appears from the factual execution should prevail.[8]

The UK situation is to a considerable extent different from those described in the other chapters. On the one hand the common law approach, which leaves it to the judges to decide whether there is a contract of employment, also allows judges here to adjust their 'tests' for deciding whether there is such a contract to changing working relationships. On the other hand it can be seen that judges seem to be much more reticent than those on the European continent to interpret the law in such a way that those who are in a position similar to employed persons are treated in the same way. Judges consider a solution as the task of the legislature, but this party is not really active in realising objectives as such of Recommendation 198.

2.2.2. Limits to Reclassification as Appearing from the Country Studies

Some country studies show that recently some limits have been set to reclassification of contracts as contracts of employment. In Belgium, for instance, the Court ruled that if the parties have characterised their agreement as a contract for

6. In the past judges had some problems with this rule, as can be seen in a 1996 decision of the Polish Supreme Court. Currently, in Polish case law, it is an established presumption that if personal work is performed under supervision for wage there is a contract of employment.
7. Chapter 6, s. 2.2.1.
8. Chapter 5, s. 5.1.

services, the judge may not change that characterisation ex officio. The party who in such a case asserts that there is an employment contract must furnish proof that the contract of services contains elements incompatible with the existence of an independent collaboration relationship.[9] Thus, where earlier the judge had to examine whether or not there was authority or subordination (and thus an employment contract), now a more restricted approach is followed. As is mentioned in the Belgian Chapter, in the Belgian literature the question was raised whether this approach by the Court of Cassation conflicts with ILO Recommendation 198.

Also in the Dutch case law the Court set limits to reclassification of a contract. In the *Groen-Schoevers* judgment, the plaintiff initially claimed he was self-employed. Later he invoked labour law, when this suited him better. The Supreme Court ruled that the intention of the parties when they concluded the contract is decisive, including the way in which they elaborated the agreement. The intention can, however, be contradicted by the existence of a subordination relationship of such a form and extent that, despite the earlier findings of the case, it has to be concluded that there is a contract of employment. In this respect, the Court ruled, the social position of the worker is relevant. The Court found it insufficient that Mr Groen had to be present at fixed times and that he had to follow the guidelines of the training institute he worked for. After all, in case of a contract for services (a contract governed by civil law) the principal can give instructions as well.

Although the actual circumstances of Mr Groen were decisive, the relevance of the judgment is much wider: in later judgments the Supreme Court again referred to the criteria developed in this judgment.

We have to keep in mind, in assessing the *Groen-Schoevers* judgment, that Mr Groen presented himself as a self-employed person, had more than one principal and benefited from his position by having a higher net income (he was not subject to employee insurance contributions). Only when he needed labour law protection (against dismissal), he claimed to be an employee. Thus Mr Groen was far from a person who was forced by an employer into a disguised employment relationship. We can conclude that the Dutch court appeared to be reluctant to accept the opportunistic use of labour law. Instead, its criteria still allow classification in case the intention of the parties is not supported by the form of their relationship and/or parties are not in an equal position.

Another retreat from reclassification, this time initiated by the legislature, was the French Act which introduced a legal regime for managing agents, which was done in order to put an end to reclassifications of their contracts as employment contracts. The new provision introduced more protection for managing agents, but did not include labour law elements which were found inappropriate (i.e., in this case dismissal protection).

9. Chapter 5, s. 4.2.

2.2.3. Assessment of the Limits to Reclassification

At first sight, the retreat from reclassification and the statutory measures meant to reduce reclassification appear not to be in line with the ILO Recommendation. However, this conclusion seems to be too hastily drawn. After all, the facts of the case are still important for the classification of the contract. Thus reclassification of a civil law contract into a contract of employment is still possible.

The case law rather shows the problems which may arise if on the basis of the facts of the case it *always* has to be decided that there is a contract of employment. This is because the criteria for adopting such a contract are not that sharp. If all situations in which there is a certain form of subordination are considered as an employment relationship (i.e., a person works in an organisation and has to follow certain schedules), this does not always lead to a right outcome, since in that case also genuine self-employed situations may have to be treated as employment relationships.. This is not intended by the Recommendation, which focuses on the situation of persons who are really dependent on their employer.

In the Dutch and Belgian cases the intention of the parties is an important element and can even be called a starting point in the consideration of the case. The importance of the intentions can be overruled by the facts of the case, for which the Dutch court mentions several criteria. Relevant here is *inter alia* the position of the parties.

This approach takes into account the difference in positions of the parties and also the complications to which the borderline cases of self-employed and employed activities could give rise.

Thus, if the recommendation that the qualification of a contract is to be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised, is interpreted as that the intentions of the parties must not play a role at all, this interpretation needs a refinement. The intentions of the parties may be relevant in so far as it can be ascertained that they are nor in an unequal position and the other facts of the case do not support the assumption that there is a contract of employment.

2.3. A Broad Range of Means Has to Be Used

The Recommendation further recommends that Members should consider the possibility of allowing a broad range of means for determining the existence of an employment relationship (Article 11). It is not exactly clear under which circumstances this recommendation is deemed satisfied.

It is interesting to read in Section 6 of the Belgian Chapter that the Council of State was quite critical in its comments on the draft of the Belgian Employment Relationship Act. This Act bases itself on the agreement between the parties for the characterisation of their legal relationship, which, in view of the Council, runs contrary to Article 9 of ILO Recommendation 198 that gives priority to the factual situation and strong emphasis is placed on the legal relationship of authority alone.

It argued that the Recommendation also allows other criteria, including economic dependency and the indicia criteria.

The Recommendation appears useful since it emphasises the need of different methods to determine whether there is a contract of employment.

Related to this topic is the need to inform the worker on the contents of his contract. Council Directive 91/533/EEC of 14 October 1991 is relevant to this purpose within the EU context, as it contains the obligation of the employer to inform *paid employees having a contract or employment relationship* (our italics) of certain specified elements.[10] For our purpose the title, grade, nature or category of the work for which the employee is employed, or a brief specification or description of the work may be relevant, as these data provides for information useful in disputes on the nature of the contract. If there is no written contract, other means must be admitted by the courts to prove the existence of an employment relationship, such as testimonies or expert-reports.

Although the personal scope of the directive is limited to employees, this directive can still be relevant to disguised employment relationships, as by asking the information required by the directive, the worker can get more certainty on his legal position.[11]

The recommendation can also be read in another way: are there bodies or institutes other than courts which can be addressed in order to decide that a particular agreement is a contract of employment? In most countries it is the court which is asked to decide whether there is a contract of employment or not.

This is a weak element in the protection of workers, since after all, exactly the most vulnerable workers are the ones who work in non-employment relationships. They will often be afraid of losing any further prospect of work when they go to court and often they do not have the funds for paying the costs of the legal proceedings.

Only a few country studies mention alternatives to the courts for determining the nature of the working relationship. In particular, the German report mentions alternatives, but the author of this chapter concludes that these alternatives are not really forceful.

In Belgium the administrative chambers of the Administrative Division Commission for the regulation of the employment relationship have the task of taking preventive decisions concerning the characterisation of an employment relationship (the so-called 'social ruling'); the parties to an agreement – principal and performer – can individually or jointly turn to these chambers and ask for a decision on the qualification of the contract. This decision remains in force for a period of three years. This commission is, however, still in the stage of a proposal; it has not been established yet.[12]

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10. OJ L 288, 18 Oct. 1991, 32– 35.
11. From the personal scope are exempted contracts: (a) with a total duration not exceeding one month, and/or – with a working week not exceeding eight hours; or (b) of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations.
12. Chapter 5, s. 5.2.1.

Thus, there are, in practice, at present hardly any alternatives for the courts for deciding on the issue of the employment relationship.

Such alternatives are really worthwhile investigating, although, of course, for them to function well it is also necessary to develop criteria according to which these bodies have to decide. A commission like the Belgian one offers the most accessible prospects, but the main question will be whether decisions of such a condition will be acceptable for both parties.

2.4. Legal Presumptions That There Is a Contract of Employment

2.4.1. Refutable and Irrefutable Presumptions

Article 11 of the Recommendation recommends, as a second method for facilitating the determination of the existence of an employment relationship, the introduction of a legal presumption that an employment relationship exists where one or more relevant indicators is present.

Refutable presumptions are useful, in particular to fight border-line cases, including the bogus self-employed. They may also help persons who are in a dependent situation (e.g., on-call workers) to relieve them from the proof that they work in subordination to the work provider: it is the principal who has to prove that there is not an employment relationship.

The country reports also mention *irrefutable* presumptions. These are – we assume[13] – not different from statutory provisions that a person in a particular situation or profession is deemed to have a contract of employment. For this reason we will discuss these two issues together.

Examples of legal presumptions were given in several of the country chapters.

A presumption based on a particular *situation* can be found in the Netherlands, where the Civil Code contains a general legal presumption that there is a contract of employment if a person is performing work for the benefit of another person against remuneration for at least three consecutive months, on a weekly basis, or for no less than twenty hours per month. This presumption is refutable. Another (refutable) legal presumption provides that, where a contract of employment has continued for at least three months, the contracted work in any month is presumed to amount to the average working period per month over the three preceding months. Thus, these presumptions do not refer to a particular profession nor do they have any conditions related to subordination or doing the work personally. Instead, they refer to circumstances which are not difficult to determine; it is then up to the other party to prove that the criteria for the employment relationship are not satisfied.

13. There may be a difference if a court decides that, despite the fact that the presumption is not refutable, it still does not apply because of the circumstances of the case or because of inconsistency with other standards. Whether this can happen depends on the legal system in question and we have not been informed of such decisions yet.

The objectives of the Dutch presumptions are to avoid uncertain provisions and fake constructions; to solve disputes and to improve the position of persons working under marginal contracts.

In the evaluation studies of the effects of these presumptions (discussed in the Dutch Chapter) it was found that in only a few court cases presumptions are invoked. This may be reassuring for employers (and employees). Thus the presumptions have neither led to difficult and cumbersome (and expensive) procedures, nor did self-employed persons without staff invoke the presumptions. Instead, it appeared that employers have become more precise in defining the conditions of the contract and that the number of on-call contracts was reduced. The latter type of contract was replaced by temporary agency contracts and contracts for a definite period.

Although one might not be too enthusiastic on the finding that one type of flexible contract was replaced by another, this replacement is not without meaning, as there can be important differences between the respective types of contract. In the Dutch system, temporary agency workers often have more protection than on-call workers. Temporary agency workers have a contract of employment with the agency, which means that their social security coverage is clear.

The effect of the legal presumptions is thus a compromise between realising more certainty for the employees while still allowing flexibility for employers. In any case, the effect of the presumptions fits well with the objectives of the Dutch Act concerned and of the Recommendation.

In Belgium, refutable presumptions on the contract of employment were introduced for *particular professions*, that is, commercial travellers, pharmacists, students and sales representatives. For example, a pharmacist working in a pharmacy, which is open to the public, is deemed to be bound by an employment contract with the owner or the lessee of the pharmacy, unless the opposite is proven.

In France persons *in specified professions* are considered as employees: professional journalists, performing artists, fashion models and sales representatives (under certain conditions). The legal presumption places the burden of proof that no employment contract exists on the other party of the relationship (i.e., the employer or client).

In Belgium also *irrefutable* presumptions were introduced. These state that a person cannot do additional services for his employer on a self-employed basis when they are bound by an employment contract for similar services. This rule is a measure to prevent evading labour law (rules on the maximum number of working hours) and social security contributions by both parties rather than to protect workers who are deprived of the protection of a contract of employment. In addition there are irrefutable presumptions on the status of temporary agency workers: they are employees.[14] This is an example of a rule which amounts to the same as a statutory provision as 'Temporary workers work under a contract of employment'. As we have already noticed the Dutch law defines the contract of a temporary

14. Chapter 5, s. 3.2.

agency worker as a contract of employment. This amounts to an irrefutable presumption.

We can conclude that refutable presumptions can have a general character or be related to particular professions. The latter presumptions may be easier to implement, as it is easier to oversee the effects of these presumptions. Such presumptions, however, do not improve the situation of persons outside such professions, even though they need the most protection, for example, home workers and on-call workers, since they may be involved in all kinds of work. General presumptions such as found in the Dutch legislation cover such workers.

2.4.2. Legal Presumptions of Self-employment

A related issue concerns legal presumptions that a person is self-employed. In the French Law of 1994 it was provided that individuals registered in some specified registers are presumed not to be parties to an employment contract for the business activity for which they are so registered. This legal presumption was revoked later, but reintroduced in the same terms by the Act on Economic Initiative of 1 August 2003. It is interesting that initially the presumption caused confusion since it was feared that it would lead to an increase of fake self-employment or outsourcing. However, this did not actually happen, since the legal provision was accompanied by safety nets, among others that a person unsure of his/her precise legal situation could ask the social security organisation for clarification.

In the German system the presumptions are mainly relevant to social security obligations; see below.

The presumptions are both in the interest of workers and employers and enable the authorities to supervise the situation involved. From the facts presented in the application of a person to be considered self-employed it can sometimes be deduced that it is an employment relationship and this can thus help to discover disguised unemployment relationships.

2.4.3. Legal Presumptions in Social Security

German *social security law* contains a refutable presumption that freelancers have a contract of employment. If a person does not employ other persons as employees, works essentially for one single customer, is performing work which is typically done by employees and does not offer his services or his products at the market, the principal has to prove that the person is not an employed person for social security. The first draft of this law was controversial, as small enterprises feared to be too much affected by it. In 2000 the Law was amended by reducing the number of criteria and by introducing the possibility for the employer to ask the benefit administration whether a person was self-employed or an employee. Thus this system of declarations ensured that there is now more legal certainty. As a result, the situation rapidly calmed down and the problem of 'fictitious self-employment' disappeared. As in the case of legal presumptions discussed in the previous section, it is assumed that in some cases the work is now

organised in such a way that nobody can pretend that the person concerned is in fact an employee.

The presumptions have led, as in the Dutch case, to contracts which are more clearly drafted. As in the Dutch case, there was a shift to temporary agency contracts. They took over the function of the supposed freelancers.

Also in French law a legal presumption of self-employment was introduced that is mainly relevant for social security reasons. A person who is unsure of his/her precise legal situation can ask the social security organisation for clarification. In the French chapter we can also read that, despite the worries at the time of the introduction of these presumptions, these worked out in the way they were intended.

2.5. Presumption to Be Either Employed or Self-employed

Article 11 of the ILO Recommendation recommends as the third method that Members consider the possibility of determining that workers with certain characteristics, in the general or in a particular sector, must be deemed to be either employed or self-employed. According to Legal Experts in the field of labour law, 'provisions according to which certain persons are legally deemed to be employees are few and far between in the countries covered by the report. They do play a certain role, however, merely with regard to small groups of working persons, for example travelling salesmen'.[15] In the countries studied in this book we can find several examples of such provisions.

One example is, as we already mentioned in the previous section, that in several countries temporary agency workers are considered as employees. For instance, in Belgium the agreement between the temporary agency and the worker is, according to an irrefutable presumption, a contract of employment. In Poland, temporary workers are explicitly deemed to be employees. The same is true for the Netherlands. The Flexibility and Security Act provides that a temporary work agency agreement is qualified as a contract of employment. In other areas there are refutable presumptions, which give less certainty.

2.5.1. The Declaration that a Person is Self-employed

In the previous section we mentioned the legal presumptions assisting workers to assert that they have a contract of employment. However, there is also a group of self-employed persons who wish that their status as self-employed is ascertained. Otherwise it can happen that a person working and treated as self-employed is at a later moment treated as employee. As a result this person is, among other things, subject to social security contributions and fines. Thus it is in his interest that it is clear from the beginning whether he is either an employee or self-employed.

15. *Thematic Report on the Characteristics of the Employment Relationship* (Leiden: Leiden, University, 2009), vi,, (<www.labourlawnetwork.eu/frontend/file.php?id=165&dl=1>).

In several of the country studies we saw measures meant to improve the position of self-employed persons in borderline cases. In the Netherlands, for instance, the Declaration on the Working Relationship (VAR) was introduced. In various Dutch Acts this declaration has been given important legal consequences for the principal who can show such a declaration.

The French Law also introduced a provision for a legal presumption that a person is, in certain circumstances, self-employed.[16]

In Germany, persons can ask the administration for a declaration whether they are employed or self-employed. As a result the problem of fictitious self-employment disappeared.

These declarations can be helpful to ensure legal certainty on whether one is employed or self-employed.

2.6. Developing Uniform Criteria

From the description of the legislation and case law in the countries it appears that it is difficult to make uniform criteria for the employment relationship. The reasons for this have been explained throughout the chapters: a main reason is that the borderline between self-employed and employed persons has become more diffuse through time due to changes in the work to be done and changes in the economy.

Therefore, in order to assess the legal status of a worker, it seems necessary to take all the relevant facts and circumstances into account to assess a particular case: is there really a dependent relationship, are there other principals, how was the use of instruments, materials and the payments arranged?

There were some proposals for checklists, such as the Belgian Unizo formula. In the United Kingdom tests are used by labour judges to determine the existence of an employment relationship.[17] There is no general agreement on the best test to be used, let alone one single test applicable to all cases.

None of the proposals or judiciary tests have received a statutory status. Applying checklists as such may lead to unsatisfactory results in borderline cases. It can also mean that situations are construed to escape the effects of the checklist. Moreover, so far it has not been possible to reach agreement on the exact elements of the checklists or definitions for the elements of the contract of element.

2.7. The Proposal to Expand the Scope of Labour Law

This proposal was made by Supiot.[18] It appears, however, that in none of the countries the existence of economic dependence is sufficient to accept a contract of employment. Instead, the subordination criterion is predominant. In deciding

16. Chapter 5, s. 2.3.2.
17. Chapter 10, s. 4.
18. Chapter 2, s. 3.2.

whether there is an employment relationship or not, the main criterion for the courts is whether the worker is subjected to the supervisory power (the power to give instructions and to control the work) by the presumed employer.

The country studies do not give examples to show that labour law is expanded to cover *all* kinds of contracts. There are some examples, however, that particular contracts are included by labour law, for instance, the temporary agency workers in some countries. However, this is done by means of qualifying these workers as employees by law, and not by extending labour law to contracts other than labour law. The only areas where labour law is indeed expanded to all types of working relationships are health and safety and sometimes the area of working times, exactly those areas where this is demanded by EU directives. In other areas there is little progress in extending the protection by labour law.

Some countries have categories of workers who are assimilated with employees. This is an interesting phenomenon, but although the category was already created a long time ago, it was not considerably extended (see the German Chapter, section 6.5). In order to be included in such a category it has to be possible to define the type of situation which is to be covered. The problem with the workers who are currently not covered by labour law is that they do not fit into specific professions but work in particular situations which are not so easy to define. Therefore it is difficult for the Law to treat them as *arbeitnehmeränhlig*.

2.8. Extension of Protection of Labour Law

This proposal was also made by Supiot,[19] which is in fact a more modest extension of labour law than the previous one. As was discussed in the preceding section, examples can be found of an extension of labour law for workers who are not employees.

In the EU Green Paper, *Modernising labour law to meet the challenges of the twenty-first century*, it was proposed to make rules on a new category of economically-dependent workers, who are neither employees nor self-employed. This was also suggested by Perulli.[20]

Although formally 'self-employed', these persons are economically dependent on a single principal or client/employer for their source of income.

In this view categories of workers must legally be treated in the same way as employees, without reclassifying the work relationship as an employment contract, and disconnecting the work relationship from any legal subordination.

This proposal has not received very much support. To some extent the British category of workers is a third category (see British Chapter), but this group is not really self-employed, but rather resembles that of employed persons. Moreover, in the British context there is even a third category of dependent workers, alongside employees and workers. As was pointed out in the British system, there are no clear

19. Chapter 2, s. 3.2.
20. See Ch. 2, s. 3.3.

cut distinguishing criteria for the separate categories. Therefore this phenomenon cannot be said to be meant to extend the protection of labour law to persons other than employees,

Examples of expansion of labour law to other contracts are the following. Under French law, certain provisions of the Labour Code are applied to professions which are not entitled to an employment contract, but whose business activity is subject to legal conditions. The professions concerned are self-employed managers, distributors, and service providers. These professions are partly covered by labour law and partly by civil or commercial law. Thus independent managers of service stations, other exclusive distributors and franchisees may benefit from this law, as they depend exclusively on a single principal who has an indirect but strong influence on their working conditions and controls the prices of the goods or services they supply to their customers.

Also Germany has a category of persons assimilated with employees (*arbeitnehmerähnliche Personen*); these are regarded as needing protection similar to that of employees. Although labour law is, in principle, not applicable to them, part of the legal protection afforded to employees is extended to these employee-like persons (e.g., the right to annual holiday, prevention of discrimination and collective bargaining).[21]

In the Netherlands chapter the extension of dismissal protection and possibility of making collective agreements to some categories of persons having a contract of services was discussed. In practice, however, very little use is made of this possibility.

Some countries extend parts of social security protection to persons who are not employees, for instance, social security for work-related accidents. Several social security schemes (Netherlands, France) cover categories of workers who do not have a contract of employment. The purpose is both to protect these persons and to prevent them from escaping the contribution for these insurance schemes.

Given the limited scope of our study we will not go into this further, but it is good to keep in mind that social security can compensate some, but not all, deficiencies of the lack of a contract of employment.

2.8.1. Self-employed

A related approach is to develop better protection for particular categories of the self-employed. An example was discussed in the French Chapter, the French amendment to introduce a legal regime for managing agents. This measure introduced more protection for managing agents except from those labour law elements which were found inappropriate (i.e., in this case dismissal protection).[22]

Other countries show similar developments. A country can apply particular parts of labour law to non-employees or it can choose to make a special law for a category of the self-employed. The formal difference between the two approaches

21. See also *Thematic Report, supra* n. 15, 34.
22. See Ch. 6, s. 3.1.2.

does not prevent us from considering this as a (material) extension of labour law. An example is the obligation to pay compensation when a service contract is dissolved.

2.9. The Hard Core of Social Rights

The idea of introducing a hard core of social rights was launched by several authors. One of them was Perulli, who proposed to create 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.[23] The creation of a minimum floor of rights was also supported by Guy Davidov during the Labour Network Conference. He suggested that 'when the relationship is characterised by dependency but no subordination, it is useful to call the worker a 'dependent contractor' and apply at least some labour laws. In other words, dependency alone should be sufficient to justify a floor of basic labour-related rights, with additional rights (which are tied to subordination) granted only to 'employees'.[24]

In the country chapters we can see that the first initiatives have been taken to introduce a hard core of social rights. Still, these are not given to all workers (including the self-employed) yet; therefore these examples fit better in the proposal to expand part of labour law to all workers.

An example of a social right which has been generally extended is liability of the employer in case of industrial accidents and his obligation to create safe and healthy working conditions. There is certainly not a general social core of social rights yet.

For discussing the core of social rights it may be relevant to look at the Posting Directive, which mentions the following rights which the host country has to apply in case of persons posted to its territory. The hard core of social rights applicable to posted workers consists of: (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and (g) equality of treatment between men and women and other provisions on non-discrimination.

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23. Chapter 2, s. 3.3.
24. Guy Davidov, 'Making Sense of Intermediate Groups in Labour Law: The Distinction between Subordination and Dependency', *Seminar Report of 2nd Annual Legal Seminar of European Labour Law Network*, 24 et seq., (<www.labourlawnetwork.eu/news_and_events/conferences/prm/69/size__1/index.html>).

These rights are selected as being in particular relevant to posted workers, who are by definition only temporarily employed in the host State. For this reason essential elements of labour law, such as dismissal law, are missing.

The example of the Posted Workers Directive in fact involves expansion of part of labour law.

The idea of core rights could also be realised by introducing a *new content* of existing rights, or by introducing a version of an existing right adapted to the special position of the target group. There were no reports of the introduction of a minimum floor of rights for all workers in the countries under study. We found, however, examples of rights adjusted to particular categories. In the French chapter proposals were discussed in which it was argued that some rights may be common to all workers.[25] The authors of these proposals describe that particular developments are already taking place in this area and they make suggestions for their generalisation. An example is the practice to strike which has (in France) become common among self-employed workers. The authors of the proposals propose that these workers should have a recognised right to collective action, which would, in particular, make it possible to maintain the contract in case of a strike and prevent the client from replacing a self-employed worker who was on strike. So here we see an important fundamental right, derived from labour law, but adjusted to the target group. Similarly, the right to collective bargaining is mentioned and has, according to the French report, already been used to negotiate the status of general insurance agents.[26] Also the right to professional training is mentioned. The authors furthermore envisage applying the legal provisions already adopted for sales agents and agency managers concerning notice for termination and severance pay, possibly calculated as a percentage on the order of 10% of the turnover achieved during the contract. In the report it was even discussed whether grounds should be required for unilateral termination by the parent company, which would make the system similar to the law on dismissal. This idea was rejected as it would lead to a too close similarity to the situation of employees; instead it was suggested to adopt a standard for the penalties to be paid for wrongful breach of contract. This is an interesting discussion even though the ideas have not been adopted yet.

An example can also be found in Belgium, where a number of structures have been created which are analogous to those of employees. For example, since 1 July 1997 a bankrupt self-employed person is covered by bankruptcy insurance. He thus maintains his rights to specific benefits and enjoys, during a maximum of six months, a benefit which is equal to the minimum pension of the self-employed.[27]

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25. Ch. 6, s. 3
26. In France, apparently such collective bargaining by the self-employed is not seen as problematic in view of competition law; see for the Dutch discussion Ch. 7, s. 6.
27. Chapter 5, s. 6.

2.10. Conclusions

From the developments and the arguments mentioned in the preceding sections we may conclude that a general redefinition or waiving of the subordination criterion for adopting an employment relationship is not feasible, since it will be impossible to distinguish the genuine self-employed from employees if subordination is no longer a decisive criterion.

The countries under study continue to work with the dichotomy of employee and non-employee for persons performing work personally. They take piecemeal measures to increase the protection of the employment contract, such as the introduction of legal presumptions or by defining a particular profession or situation as being under a contract of employment.

The measures which were taken, like in the situation of the temporary agency workers in several countries, had favourable effects since for the group in question the legal uncertainty was taken away. Also small measures may thus improve the fate of many persons.

The drawback of that approach is, of course, that progress is slow and the legislature keeps lagging behind developments. This approach seems not really satisfactory if we wish a rapid expansion of labour law and a general protection of workers. In case of piecemeal expansion of labour law there will always be groups that remain unprotected. However, it seems that the piecemeal expansion fits best with the nature of the problem, that is, the continuing tension between labour law protection and the need for a flexible workforce.

In several countries there are discussions on whether particular distinctions between legal positions are still justified and whether there are objective justifications for the differences. This may mean that a gradual improvement of the position of a particular category may have effects also for other categories of workers, since the distinctions between these categories can no longer be justified. Thus in light of this possibility gradual improvements for particular professions also have an important potential.

Of the instruments mentioned, in particular the legal presumptions seem promising. Remarkable is that in the countries where they were introduced, in particular Germany and France, initially there were confusion and fear about the introduction of the presumptions, since it was feared that the presumptions would include too many situations. This fear existed for the presumptions for employed persons, self-employed persons and for social security. In both countries the presumptions were repealed and reintroduced while some additional safeguards were introduced. After thos there appeared to be no problems.

Also in the Netherlands the presumptions became an accepted instrument. Since their introduction employers tend to draft clearer contracts. In addition they began to make use of other types of contracts, which were still flexible but provide for more certainty for the worker concerned. It is therefore interesting to explore this method further.

Finally, it is good to keep in mind that also employers can benefit from the effect of the presumptions; when they use clearer contracts, the result is more

certainty, fewer disputes arise and still the used agreements allow flexibility. Of course, the form and the effect of the presumptions depend on the national context, but these findings are worthwhile to explore.

In addition, the position of the self-employed has also received attention: in several countries there is now a clearer definition to determine when a person is self-employed. Also legal presumptions or declarations that a person is self-employed were introduced.

The discussion on a minimum floor of rights is going on slowly. More progress seems to be reached by gradually extending more rights to particular professions. This is a not an unimportant development.

Although there are some developments in the countries studied, and these developments provide useful materials for further developing instruments to increase the protection by labour law, we cannot conclude that they have all actively investigated all means recommended by the ILO Recommendation. There are also countries where very little progress has been made. For this reason it is useful to look at the role international organisations can play in order to support developments in this field.

3. THE ROLE OF THE INTERNATIONAL ORGANISATIONS

3.1. General

The Chapters on the international organisations showed that there is very little support for making a uniform definition of the contract of employment or to make a binding instrument which decides when a contract of employment exists or not. The employers' organisations have not even supported the adoption of the ILO Recommendation out of fear that the room to manoeuvre for employers would be restricted. This attitude affected later developments, such as discussion on the EU Green Paper on the modernisation of labour law. Employees' organisations in turn have now become reticent to adopt, or even discuss, proposals which might affect the position of the tradition employees, for instance by introducing a third type of contract, by introducing more flexibility in return for more work certainty (*flexicurity*) or by making a hard core of social rights, out of fear that this may lead to a general deterioration for employees.

This situation will most probably not change in the coming years. Changes in this area may only occur when they are necessary to enforce EU instruments. At present, these instruments have to deal with the different definitions of the personal scope in the Member States, while their objective is to be implemented in the same way.[28]

We can thus conclude that the primary responsibility for realising the uncovering of disguised employment relationships and extending labour law to

28. See also the case law described in the Ch. 10.

non-protected workers lies with the national authorities, rather than with international organisations. Therefore we will pay some attention to how the international organisations studied here can make their Members more active in this area.

3.2. The EU

A modern EU instrument to realise social policy aims where there are no powers at EU level and where Member States have the sole power to take the decisions is the Open Method of Coordination (OMC). This instrument was developed in the 1990s in the area of employment policy. Later it was also applied in other areas: social inclusion; pensions; immigration; education and culture; and asylum.

In short, the OMC is an instrument meant to meet certain objectives defined by the Council of Ministers. It requires Member States to submit reports on the national state of affairs in the policy area concerned. Subsequently they are given guidelines to improve the situation and then they have to report again. This policy cycle leaves the competences of the Member States intact, but at the same time the States are put under pressure to undertake the desired activities, as their results are subject to 'peer review' in the Council of Ministers.

Initially, it was feared that the OMC would not have much effect. However, in the area of the OMC on employment policy, the Council issued detailed and specific recommendations, which had effect in the actual national policies. Thus, Member States have to consider the recommendations when developing their policies and this makes them quite influential.

It is therefore appropriate to propose that also in relation to the measures they take on unveiling disguised employment relationships, bogus self-employed and persons performing work while not protected by labour law, Member States can be required to make OMC reports. On the basis of these reports, the Council can require from the Member States that they improve the situation. Moreover, the reports can also show best practices, which are useful for other Member States.

Secondly, within the framework of this OMC procedure, Member States can be asked to report which rules and/or principles of labour law can be extended to particular categories of non-employees. They could also be asked to give justifications where such extension is not possible within their system, and what alternatives exist.

3.3. The ILO

At present the ILO instrument on the employment relationship has the form of a recommendation. This is a rather weak instrument and it is hard to oversee to which extent it is really followed. The reporting procedures on recommendations are also (very) weak.

In order to make this instrument more powerful, we proposed some elements for an ILO Convention on disguised employment relationships (in Chapter 3).

A convention is not only a stronger instrument, but also more focused on particular issues. After all, there is consensus on the unveiling of disguised employment relationships. This Convention will require periodical reports and thus contribute to activities at the national level. An important advantage of this convention is that it is not limited to EU Member States.

4. CONCLUSIONS

From the country studies we can conclude that various measures were undertaken to bring disguised contracts of employment under labour law and to reduce the phenomenon of bogus self-employment. In any case, the need is felt to undertake such actions, but the way they are undertaken vary from country to country, and depends on the structure of the labour law, the civil law system and the economic situation. There are also countries where little has been undertaken by the legislature, even though judges expressed concern at the widespread practice of drafting terms which seek explicitly to circumvent established notions of the scope of employment protection by reference to 'employee status'.

At present there seems to be very little room for initiatives on the part of the European Union and/or International Labour Organisation. They can, however, support and encourage the Members to undertake action and they should do so, since the extent to which national States undertake action varies considerably. The positive effects of best practices should be shared more enthusiastically and the Member States should be pressed to explain the reasons better if they do not undertake action or when the reasons for differences of treatment of groups in comparable situations are unclear.

Since the global approach to this issue is even more complicated than at the EU level, the ILO Convention proposed by us concerns disguised employment relationship only. This convention requires Members to improve the application and enforcement of national laws and regulations in the field of labour law to ensure that persons with an employment relationship have access to the protection they are due at the national level. Member States must develop effective measures, in consultation with employers' and workers' organisations, to unveil disguised employment relationships. For this purpose the suggestions made *supra* are useful to refer to. Member States must also improve the capacity of the labour administration, labour inspection and judiciary to recognise and effectively combat disguised employment. They must inform employers and workers on the negative effects of disguised employment and promote national alternatives which are in the interest of all the parties concerned. Finally, they must maintain a clear distinction between employment relationships and independent contracting.

The EU could go further and ask, within the framework of the Employment OMC, Member States to report their activities to unveil disguised employment relationships and to protect dependent personal workers. For these purposes the Member States should pay special attention to the suggestions made in the preceding paragraph.

From the country reports it follows that in particular the following instruments should be explored:

- the introduction of statutory provisions that qualify particular working relationships as employment relationships;
- the introduction of presumptions that there is a contract of employment if certain conditions are fulfilled;
- refutable presumptions that persons working in a particular profession have a contract of employment;
- creating legal presumptions that a person is self-employed if he satisfies certain conditions;
- extend particular rules and/or principles of labour law to particular categories of non-employees and define these in the Act relevant to them;
- discussions on core social fundamental rights which should apply to all workers.

Given the different position of the ILO and the different nature of the instrument, our suggested contents for the Convention are different from what we suggest for the OMC within the EU context. The principles are the same, however, in that the focus remains on the Member States, and reporting on their efforts is an attempt to realise the objectives underlying the Conventions. For the Member States the findings in this book may at the same time remain useful to take into consideration.