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 4

The European Union and the Issue of the Employment Relationship

Frans Pennings

1. INTRODUCTION

In the previous chapters we saw that the coverage by the employment relationship and the protection of the economically dependent are complicated issues. In this chapter, I will investigate whether and to which extent the European Union (EU) has undertaken measures to make the concept of the contract of employment clearer and which policy this organisation follows to realise this objective.

First, I will discuss the meaning of the terms worker and self-employed in EU instruments (Section 2), then I will go into the discussion at the EU level to influence the protection by the employment contract in the Member States (Section 3). Since some EU instruments refer to these national definitions, the relevance of the meaning of workers in national law does not only concern the protection of the workers, but it also concerns the proper application of EU instruments. Therefore, we must also pay attention to this aspect (Section 4).

2. THE TERM WORKER OR EMPLOYEE IN EU INSTRUMENTS

Although EU instruments in the area of labour law frequently use the term worker or employee, these terms do not have a uniform meaning. One area of law where

Frans Pennings & Claire Bosse, *The Protection of Working Relationships*, pp. 29–41.

the term worker is used is that of freedom of movement of workers, that is, Article 45 of the Treaty on the Functioning of the European Union (TFEU) and in particular the instrument based on this article, Regulation 1612/68. In these provisions the term *worker* has a uniform meaning, developed by the Court of Justice. In other EU instruments, to be discussed below, the meaning of this term depends on the national laws in which it has to be implemented. This meaning is based on the criteria for an employment relationship which can also be found in many national systems, as we will see elsewhere in this book too: a person performs work for wages under supervision of another person. An example of this interpretation can be found in the *Blum* judgment,[1] in which the Court of Justice ruled that an employment relationship must be defined in accordance with objective criteria which distinguish it by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker.

Consequently, part-timers are workers for the purpose of these provisions, provided that they perform genuine activities and which are not purely marginal. Also an on-call worker can be a worker for the free movement of workers provisions, although it depends on the actual circumstances whether this is actually the case. In the *Raulin* case the Court considered that in order to decide whether there are genuine and non-ancillary activities during the eight months that Ms Raulin worked as an on-call worker in the Netherlands, the Dutch court must take account of the fact that during this period she only worked a total of sixty hours. Although this fact could be an indication that it was marginal and ancillary work, the court had also to take into account whether Raulin had to be available for work and was obliged to answer a call of her employer to come to work.[2]

The reason that the term *worker* in the free movement provisions was given a Community meaning was that, without such common meaning, the right of free movement of workers would be infringed. Since free movement within the EU context means that at least two Member States are involved, it was to be ensured that this movement is not hindered in the case of a person who, although doing dependent work for another person, is not considered as an employed person according to a particular national system.

In the Equal treatment directives a definition of the term worker or employee can be found, which is to ensure a broad coverage of these instruments. For instance, Chapter 2 of the Recast Directive[3] applies to members of the working

1. Case 66/85, *Blum* [1986] *ECR* 2121.
2. Case C-357/89, *Raulin* [1992] *ECR* I-1027.
3. Directive 2006/54/EC of 5 Jul. 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), (OJ 2006, L 204/23).

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 national law and/or practice.

In other EU directives a different approach is followed. The Directive on Collective Redundancies[4] does not define the term *worker*, but only provides which types of contracts are not included: contracts of employment concluded for limited periods of time or for specific tasks and workers employed by public administrative bodies or by establishments governed by public law. This means that in this case for the interpretation of the term *worker* the national legislation is to be applied.

Another example concerns the Directive on the Transfer of Undertaking.[5] Instead of the term *worker*, the word *employee* is used. This term is to be interpreted in the same way as in the national legislation into which the directive is to be implemented,[6] in which respect the directive requires that it applies to any person who, in the Member State concerned, is protected as an employee under national employment law (Article 2(1)(d)). The directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship, but it does not allow Member States to exclude from the scope of this directive contracts of employment or employment relationships solely because (a) of the number of working hours performed or to be performed; (b) they are employment relationships governed by a fixed-duration contract of employment; or (c) they are temporary employment relationships and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer. Thus this directive mentions some minimum harmonisation criteria for the term worker: some situations or work relationships cannot be excluded.

Article 2(2) of the Posting Directive[7] provides that for the purposes of this Directive, the term *posted worker* means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works. Consequently, persons who are not workers according to the national criteria of the State of employment (host country) are not covered. It can thus happen that a person is considered an employed person in the sending State and a self-employed person in the host State, or the other way around.

It is remarkable that the Posting Directive does not give a uniform interpretation, since, as in the case of free movement, here also cross-border situations are involved. We will come back to this issue in section 3.2.

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4. Directive 98/59/EC of 20 Jul. 1998 on the approximation of the laws of the Member States relating to collective redundancies, (*OJ* 1998, *L* 225/16).
5. Directive 2001/23/EC of 12 Mar. 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (*OJ* 2001, *L* 82/16).
6. See Case 105/84, *Mikkelsen* [1985] *ECR* 2639.
7. Directive 96/71/EC of the European Parliament and of the Council of 16 Dec. 1996 concerning the posting of workers in the framework of the provision of services (*OJ* 1997, *L* 18/1).

3. EU INITIATIVES AND THE SCOPE OF THE PROTECTION BY LABOUR LAW

3.1. Studies Initiated by the European Commission

An important milestone in the discussion on the employment contract was the report by a group of experts presided by Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (1999).[8] This report was prepared for the European Commission (EC) and we mentioned it in Chapter 2. The report noted increasing personal insecurity as a result of changes in the supervision relation, which can result, for instance, in false self-employment. The second effect is the coming into existence of a grey area between dependent employment and self-employment. The Supiot Report proposed a reassertion of the essential principle whereby the parties to an employment relationship are not vested with the power to establish the legal status of that relationship; and a desire (with an eye to the future) to expand the scope of labour law to cover all kinds of contracts involving the performance of work for others, not only to strict worker subordination. It also suggested the adoption of a Community definition of the notion of employee; upholding the power of the courts to redefine an employment contract; consolidation of a specific status for temporary employment agencies; and the application of certain aspects of labour law to workers who are neither employees nor employers.

In 2002, the EC published a study by Adalberto Perulli, in which the developments in respect of the employment relationship in the Member States were compared.[9] The Perulli Report concluded that new forms of work organisation, such as outsourcing and contracting out, lead to the emergence of a new category of economically dependent work, which represents a form of work falling within a grey zone between dependent work and self-employment. In line with the earlier proposal by Supiot, Perulli was in favour of 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. Currently, as for contractual terms and conditions applicable to economically dependent work, regulation is lacking. The study suggests that in this field there should be a greater determination to remodel existing protection. This presupposes legislative intervention at national level. This intervention should concern, for instance, the form of the contract (it should be in writing); the object of the contract (the contract should state the professional objective, indicate the characteristics of the autonomy of the performance); rules on remuneration (the contract should indicate the criteria for determining the remuneration). It should also mention the time when

8. Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*, (Oxford: Oxford University Press, 2005). The original report was published in French in 1999, *Au-delà de l'emploi.*
9. Adalberto Perulli, *Study on Economically Dependent Work/Parasubordinate (Quasi-subordinate) work* (Brussels: European Commission, 2002), DV/47999.

payments are due (sanctions for late payments); it should regulate the effects of maternity, sickness, accident, serious family reasons (the contract should include a right to suspension of contract in these cases); it has to regulate the termination of the contract (the contract should regulate this and provide for a obligatory notice); deal with training and the right to organise and to participate in trade union activities.

As we saw in Chapter 2, Perulli proposed some solutions. One of them was 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. This prospect is increasingly acquiring credit in the European doctrine.

The *Perulli Report* was discussed in the European Parliament in June 2003. This did not lead to particular choices for the solutions to be followed. After this report several studies were initiated by the Commission on the development of labour law in EU Member States,[10] whose purpose was mainly to make an inventory of the developments. In section 4 the most recent study will be discussed.

3.2. The EU and the ILO Recommendation on the Employment Relationship

In Chapter 2 the Recommendation on the employment relationship was introduced. Some Member States of the EU participated actively in this discussion and were the driving force behind the insertion of Article 7 of this recommendation. This article reads that in the context of the transnational movement of workers, in framing national policy, a Member should, after consulting the most representative organisations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship. Where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

This provision was made in view of the Posting Directive of the EU (mentioned in Section 2 *supra*), which guarantees some minimum labour rights of the State of employment for workers who are covered by this directive, that is, 'posted' to another EU Member State. Examples of these minimum rights are maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; health, safety and hygiene at work; protection of pregnant women, children and young people; and equal

10. See, for instance, the conference *Labour Law in Europe: Steps towards 2010* which was organised by the Dutch Presidency of the EU, Leiden, 2004.

treatment between men and women. This protection is given to those who are considered worker by the law of the host State.

Article 7 was written, in particular, with a view to this directive, as one problem with its implementation is that its scope depends on the interpretation of the term *worker*. A limited interpretation of the term *worker* in the host country can thus limit the effect of the directive. Moreover, a difference between the term *worker* in the sending State and the host State can cause problematic situations, as a person who is a worker in the sending State may not have labour law protection in the host State on the basis of the directive. The reversed situation is also possible. Moreover, there may be complicated differences with the scope of the coordination regulation for social security if the meaning of the term *worker* differs from country to country.

The proposal to include this issue in the recommendation was accepted, but the issue as such was seen as a typical EU issue. Although migrant workers occur also in other regions of the world, their legal position is very different, since the EU concern was directly related to the Posting Directive.

For the EU this is an important issue, as it is related to the problem of social dumping, which may arise if the Posting Directive is not applicable to a particular situation. In discussions on the Posting Directive at several occasions reference is made to the Recommendation on the employment relationship, particularly by the European Parliament.

An example is the motion of the European Parliament on the application of Directive 96/7 of 28 September 2006.[11] In the Motion it is concluded from reports based on actual practice that sham self-employment (in Chapter 2 we used the term *bogus self-employment*, which has the same meaning) is a strategy commonly used to circumvent the minimum standards of Article 3(1) of the Posting of Workers Directive. It calls on the Member States, with reference to the Perulli Study on *Economically dependent/quasi-subordinate (parasubordinate employment: Legal, social and economic aspects)*, to adjust their definitions of *employees* so that a clear distinction can be made between the status of entrepreneurs, comprising economically independent businesses working for several mutually independent undertakings on the one hand, and employees, working in an organisationally and economically dependent manner under supervision and for remuneration on the other. It also asked the EC to initiate negotiations with the Member States as a matter of urgency, with the aim of establishing transparent and consistent criteria for determining the status of workers and self-employed persons with regard to employment law. The Parliament pointed out that proving that a sham self-employed person is a de facto employee, is at present a difficult and lengthy process. The posted worker may have completed the job and returned home by the time the necessary evidence has been established. For this reason it asked for exchanges between the employment inspection services to enable a joint campaign against sham self-employment.

11. P6_TA(2006)0463.

So far this has not led to an initiative for a more convergent approach of the terms of the Posting Directive.[12] Still, it is an interesting example of the interaction of the Recommendation on the employment relationship with EU instruments.

3.3. The Green Paper

In the Green Paper *Modernising Labour Law to meet the Challenges of the 21st Century*[13] of 2006, the EC discussed, among several other issues, the protection by the employment relationship and the distinction between employed and self-employed persons.

First, however, we have to clarify the context of the Green Paper as this context is not the same as that of the studies[14] mentioned in Section 3.1 *supra*. The objective of the Green Paper was to encourage the development of labour law, in the sense that it supports economic growth and the increase of employment. The Paper mentions that 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. Alternative models of contractual relations could enhance the capacity of enterprises to foster the creativity of their whole workforce for increased competitive advantage. Thus the Paper focused on an increase of flexibility of the work force and approached the difference between those who are protected by labour law and those who are not protected from that angle.

The Paper argues that the emergence of diverse forms of non-standard work has made the boundaries between labour law and commercial law less clear. As a result, the traditional binary distinction between employees and self-employed is no longer an adequate depiction of the economic and social reality of work.

The Commission also mentioned the problem of disguised employment and noted that action at national level to combat the phenomenon of disguised employment has ranged from the introduction of mandatory legal presumption rules[15] to improving enforcement mechanisms including targeted campaigns and special information and awareness initiatives. Unclear legal definitions of the status of self-employment in national legal and administrative frameworks may result in situations in which persons, believing they are self-employed, subsequently find themselves to be classified by social security agencies or tax institutions as a dependent employee. This can result in an obligation for the self-employed/employee and his main client/employer to pay additional social security contributions. The Commission stressed that the problem of persons posing falsely as

12. Resolution 2006/2038(INI), Text P6_TA(2006)0463, adopted 26 Oct. 2006.
13. COM (2006) 708 final.
14. See studies mentioned in fns 8 and 9.
15. The Commission mentions in a footnote the example of the Dutch Flexibility and Security Act (1999), that introduced a mandatory legal presumption whereby an employment contract exists when work has been carried out for another person in return for pay on a weekly basis, or for at least twenty hours per month during three consecutive months (see also Ch. 6).

self-employed workers to circumvent national law should be dealt with primarily by Member States. Accordingly, the Commission noted in a footnote to welcome the adoption in June 2006 of the ILO Recommendation on the Employment Relationship. This promotes the formulation and adoption by Member States, in consultation with the social partners, of national policies for regularly reviewing the scope of their laws, and where necessary clarifying and adapting them, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.[16] This non-binding instrument takes a strategic approach, it adds, leaving the nature and extent of protection given to workers in an employment relationship to be defined by national law and practice.

The Commission added that the concept of economically dependent work covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment and may not be covered by labour law since they occupy a 'grey area' between labour law and commercial law. Although formally 'self-employed', they remain economically dependent on a single principal or client/employer for their source of income. The Commission distinguished this phenomenon from the deliberate misclassification of self-employment. The Commission mentioned some examples of legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers: the concept of employee-like workers corresponding to the civil law notion of *parasubordination* in Italy and Germany. The Commission admits that these approaches have been somewhat tentative and partial, but they reflect efforts on the part of legislators, the courts and the social partners to tackle problems in this complex area.

The Commission concluded this section of the Green Paper by mentioning several questions to be discussed. The first is whether greater clarity is needed in the legal definitions of employment and self-employment in national legislation in order to facilitate bona fide transitions from employment to self-employment and *vice versa*.

The second is whether there is a need for a floor of rights dealing with the working conditions of all workers regardless of the form of their work contract.

Further, in the Green Paper the Commission addressed the issue of the Three Way Relationships, notably that of temporary agency workers.

3.4. Reactions to the Green Paper

The reactions to the Green Paper were laid down in the *Outcome of the Public Consultation on the Commission's Green Paper 'Modernising labour law to meet the challenges of the 21st century'*.[17] The EC received over 450 responses, which showed a large divergence of views and opinions among Member States and other actors involved. The EU Ministers for Employment and Social Affairs had a

16. See also Ch. 2.
17. COM (2007) 627 final.

preliminary discussion of the Green Paper; in their conclusions they stressed the value of the standard full-time, open-ended contract as the cornerstone of employment relationships in the EU, while allowing for other more flexible forms to cater for specific needs and individual situations.[18]

3.4.1. Flexicurity

In the meantime the Commission had published the *Communication Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, which was adopted on 27 June 2007.[19] This 'flexicurity' approach, which was already hinted at in the Green Paper, had a large impact on the discussion of the Green Paper, for which reason it is mentioned here as an intermezzo. In the communication the Commission mentions some principles of 'flexicurity': which concept basically is meant to introduce more flexibility, and at the same time to introduce more security, in particular by a better training so that persons who have to leave their job are prepared for a new job.

3.4.2. The Political Context

In the *Outcome* Paper the Commission concluded that trade union stakeholders, a number of Member States and academic experts warned against viewing the standard indefinite employment contract as somehow obsolete, or as an obstacle to the creation of jobs. In their view, the Green Paper could be interpreted as expressing a preference for more diverse contractual forms and for the introduction of weaker employment laws. Many respondents, including the EP, EESC and Member States stressed the stability and security offered by the standard work contract. Conversely, employer stakeholders, together with some Member States, considered that flexible work contracts had not been treated in a sufficiently positive light.

The Commission concluded that there was no agreement on the application of the concept of 'insiders' and 'outsiders' to segmented labour markets. In the view of employers, the only real 'outsiders' are the unemployed and the 'insiders' are all those legally employed. Trade unions maintained that the gap between 'insiders' and 'outsiders' can only be eliminated by improving the protection of precarious workers.

Many business submissions, recalling the limitation of EU competences, called for labour law reform to be pursued exclusively within a *national* context.

Most Member States, the EP and the EESC, national parliaments and the EU social partners recalled, the *Outcome* Paper continues, the division of

18. Presidency Conclusions, Informal Meeting of Ministers for Employment and Social Affairs, Berlin, 19 Jan. 2007.
19. Brussels, 27 Jun. 2007, COM (2007) 359 final; Communication from the Commission, towards Common Principles of Flexicurity: More and better jobs through flexibility and security (Brussels: European Commission 2007).

responsibilities between EU and Member States. The development of labour law within the EU is generally viewed as falling within the competence of the Member States and the social partners, with the role of the Community *acquis* being to complement the actions of the Member States.

EU level activity on key issues of employment rights should not be confined to the Open Method of Coordination (OMC), in the view of trade union stakeholders, academics, and several other Member States. Trade unions emphasised that emerging European labour markets can no longer be managed by relying on national rules in the social sphere as internal market and competition rules are being accorded primacy over national social policy provisions.

3.4.3. Uncertainty with regard to the Definition of the Employment Relationship

Many stakeholders, in their reaction to the *Green Paper*, acknowledged that it was complex to define 'workers' and 'self-employed persons' under Community law. This complexity was acknowledged to have increased as a consequence of the cross-border provision of services. Most Member States wanted to rely upon national law and well-tested legal procedures to resolve such problems. Together with many social partner organisations they favour the position whereby the definition of worker under most labour law directives remains at the discretion of the Member States. While employer interests at EU and national levels generally dismissed the need for more convergent national definitions, social partner interests in the service, entertainment, media and retail sectors considered that the definitions used in different Member States to define the status of those referred to as *freelancers, casual or independent workers* might be listed and explained to facilitate a better understanding of the employment status of the persons concerned.

The EP called for an initiative towards convergence in the national definitions of worker status to ensure a more coherent and efficient implementation of the Community *acquis.* It urged the Member States to promote the implementation of the 2006 ILO Recommendation on the employment relationship.

Some Member States also suggested that the Recommendation be used as a basis for discussion among the Member States and social partners about how to cope better at a European level with the phenomenon of concealed employment relationships.

Most Member States and social partners were opposed to the introduction of any third intermediary category, such as the so-called 'economically dependent worker', alongside those of dependent workers and independent self-employed workers. Even in Member States where such a concept already exists in national law, such as Italy, there were reservations about whether an unequivocal definition could be devised at European level. However, BusinessEurope accepted that some added value could be gained by sharing experience on the impact of such measures, so that Member States might learn from each other. Trade unions favour re-focusing the scope of labour law through national reforms to extend the protection associated with the standard employment contract to all workers.

The ETUC called upon the EU Institutions, together with the Social Partners at EU level, to develop an EU-wide supportive legal framework, consisting of a combination of EU 'rules of the game' and certain EU minimum standards to establish a 'core of rights' while ensuring respect for national social policies and industrial relations. Social NGOs also supported the idea of a common set of rights, linked to a commonly agreed definition of 'worker' established under Community law, in order to underpin the principle of freedom of movement.

On the basis of these findings the Commission announced that it will continue working with the Member States with a view to reach conclusions on common principles of 'flexicurity'. One of the announced measures was the clarification of the nature of the employment relationship to promote greater understanding and facilitate cooperation across the EU.

3.5. Conclusions on Green Paper Discussions

From the document that summarised the reactions on the Green Paper, discussed in Section 3.4, we can conclude that the political views on the employment contract vary largely. There is no consensus that the formulation of a Community definition of the contract of employment is desirable. A definition of employee is left as a matter of the Member States, even though the Commission wishes to clarify the nature of the employment relationship. The employees' and employers' organisations (the so-called social partners) at the EU level are largely divided. Employers are averse to extend the scope of labour law, as this may decrease flexibility and competitiveness. Trade unions fear that changes in labour law, for instance to give protection to the persons in the grey area, may introduce 'flexicurity' elements, and these are seen as weakening the position of the workers. Although they would support proposals to extend the traditional protection of labour law, they are reluctant to discuss any compromise strategies. This leaves very little political room for activities at the EU level, even where the European Parliament asks for initiatives. Legal activities are therefore to be expected from Member States only; the EC will only encourage discussions and comparative studies.

In 2009 EP member Mr Jan Cremers referred to the need for a proper application of the Posting Directive to have a European definition of self-employment; he also referred to ILO Recommendation 198 and the report by Adalberto Perulli, which suggested a new form of work category: 'a form of work falling within the grey zone between subordinate work and self-employment'. He asked whether the Commission takes the view that introducing such a category at European level would be a useful instrument for tackling the problem of disguised employment.[20]

The EC answered that it was aware of the uncertainty in the definition of an employment relationship and the consequences on certain categories, such as the 'economically dependent workers' and 'bogus' self-employed workers.

20. Question of 14 Jan. 2009, E-0019/9.

Furthermore, acknowledging the complexity of attempting to define workers and self-employed persons under Community law, it stressed the 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. The Commission therefore envisaged to focus the follow-up actions planned in 2009 on obtaining a more comprehensive overview of the legal concept, the main characteristics, the trends and problems encountered in the regulation of the employment relationship in the different Member States, and drawing up an inventory of the main measures taken, including indicators to determine the existence of an employment relationship. The Commission added that the outcome of the public consultation on the Green Paper indicated that most Member States and many social partners were of the view that national law and well-tested legal procedures at national level should be relied upon to resolve problems and uncertainty in the definition of an employment relationship and were opposed to the introduction of an intermediate category. On the basis of the above, the Commission did not envisage, at this stage, introducing a European definition of self-employment or specific indicators at European level.

4. THE PRESENT STATE OF AFFAIRS

As we saw in the previous section, given the little support that exists in the EU Member States and among the social partners for making a Community definition of employee or extending the scope of employment law, the EC limits itself to investigations of the concept of the employment contract in the Member States. For this purpose the academic European Labour Law Network was given the task to write a report on the developments in the Member States. This report was published under the title *Characteristics of the Employment Relationship*.[21]

On 12 and 13 November 2009 a seminar took place based on this report. A main result of the seminar was that most participants were reluctant to make a uniform European definition of employee. The report includes some interesting presentations, including the one by Guy Davidov. Davidov discussed the possibility to create one or two intermediate categories, that is, instead of a binary divide between 'employees' who are entitled to *all* labour rights and independent contractors who have no labour-related rights, to add another group (or two groups) of people who are entitled to *some* rights. This may be the concept of a dependent contractor or an employee-like one. This refers to persons who have some characteristics of independent workers, but at the same time some of the vulnerabilities of employees, in particular that they depend entirely or mostly on a single supervisor. Technically, this can be achieved by stating in specific 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 contractors.

21. European Network of Legal Experts in the field of Labour Law, *Characteristics of the Employment Relationship* (s.l. [Leiden] 2009); <www.labourlawnetwork.eu> (under Publications).

He remarks that a similar result can be achieved by the introduction of a term broader than the regular employee. For example, in the UK some labour laws apply to all workers. As a result, there is the group of employees who enjoy all labour laws, and those who are workers but not employees who enjoy only some labour laws. The technique is slightly different, but the result is the same. He concludes that the question still remains whether in practice there is some discernible difference between different groups of workers that can justify the application of some labour laws but not others.

A second working group of the conference, engaged in the theme 'Specific labour rights for special groups, but a floor of rights for all dependent persons?', concluded that it is very complicated to define a so-called 'in-between-group' of workers who should need only part of the protection of employees. The criterion 'economically dependent workers' is hard to define; there is also a lack of consensus relative to which rights should be part of the floor.

The working group on 'tackling bogus self-employment' discussed that many countries have means to tackle bogus self-employment. Also tax and social security legislation can be used for this. The problems with bogus self-employment are quite different per Member State and the solutions should in first instance be found on the national level.

Thus, the value of this report is that it gives a good insight in the various labour law systems of the Member States and the problems in finding consensus in making proposals for improving protection by labour law. The lack of recommendations also shows that there is a strong need for further in-depth research, which is undertaken by the present study.

5. CONCLUSIONS

Although several studies showed the need for a modernised concept of the contract of employment, there is no consensus among social partners and in Member States on how to proceed. Social partners take strongly differing positions, i.e., refusal of any measures to broaden protection to workers (employers' organisations) and refusal to seek any compromise other than by means of the contract of employment, since otherwise the latter may be weakened (workers' organisations).

As a result the EC limits itself to investigations of the concept of the employment contract in the Member States, but this is unlikely to lead to EU legislative initiatives. It is up to the Member States to undertake actions.

In order to contribute to this discussion this in depth study of systems of some EU Member States was undertaken. In Chapter 11 we will make suggestions, on the basis of the outcomes of these studies, what the tasks of the ILO and the EU must be in order to realise the protection by the contract of employment and the protection of the economically dependent.