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THE BROADENING INTERPRETATION OF 'WORKER' IN THE EUROPEAN UNION[1]

1. Starting points

1.1. Free movement as a fundamental freedom

The right of workers to free movement in the Single Market is enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). Paragraph 1 of the article states: 'Freedom of movement for workers shall be secured within the Union'[2]. This encapsulates the right of every EU citizen to move freely within the Union for work and to work and reside in another Member State without being discriminated against on the basis of nationality[3]. This right, set out in primary legislation, is elaborated in a number of secondary norms, such as Directive 2014/54/EU on measures facilitating the exercise of right conferred on

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[1] This article is based on a presentation given at the conference of the Labour Law Education Society held in Krakow, Poland, in May 2014.

[2] Consolidated version of the Treaty on the Functioning of the European Union (TFEU). Article 45 TFEU corresponds to Article 39 of the Treaty Establishing the European Community.

[3] COM(2010) 373 final. COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. Reaffirming the free movement of workers: rights and major developments.

Presents an overall picture of the legislation and case-law enhancing the free movement of workers and of the more important advances in that area.

workers in the context of freedom of movement for workers[4], Directive 2004/38/EC[5] on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and Directive 2005/36/EC on the recognition of professional qualifications.

The right of workers to move freely hinges largely on the scope of the term 'worker'[6]. The term is not defined in Article 45 TFEU, nor are any definitions to be found in the treaties preceding it. The Court of Justice of the European Union (CJEU) has handed down a number of judgments in this matter and thus contributed to the meaning the term 'worker' has acquired and the concept has developed. The judgments of the Court primarily considered what activity is required in the practice of 'work' for the performer of that activity to be deemed a worker in the meaning of Article 45 TFEU.

The interpretation of the concept of 'worker' in Article 45 TFEU may also result in ambiguities 'temporally', that is, as regards when the right commences and how long it applies. The CJEU summarised the criteria for determining this in a recent decision in *Saint-Prix* (Case C–507/12).

The case involved the status of a woman who had stopped working due to pregnancy. The Court held that Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or is seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

The grounds for the decision note the following: 'According to the settled case-law of the Court of Justice, the concept of "worker", within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the Treaty, must be interpreted broadly. Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence

[4] The Directive lays down provisions which facilitate the uniform application and enforcement of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) No. 492/2011.

[5] Article 7 (1,2) of Regulation (EU) No. 492/2011 of the Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification) state the following:

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

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

[6] In Finland at least, this question was deliberated already back in the early 1990s. See: M. Äimälä, *Suomen työoikeus ja EY*, Jyväskylä 1993, p. 48–54. See: R. Blanpain, B. Nyström, *EG/EU arbetsrätt och arbetsmarknad*, Göteborg 1994, p. 102–118.

falls within the scope of Article 45 TFEU –. The Court has thus also held that, in the context of Article 45 TFEU, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker –. Freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment –. It follows that classification as a worker under Article 45 TFEU, and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship'.

The CJEU has given a broad interpretation to the term 'worker' in the context of the principle of free movement[7]. The definition of the term in Community law is deemed to have been set out in *Lawrie-Blum* (Case 66/85). The essential criteria for the status of 'worker' are the performance of services for and under the direction and supervision of another person in return for which a person receives remuneration.

The case involved a citizen of Great Britain resident in Germany, Deborah Lawrie-Blum, who applied for a period of preparatory service leading to the second state examination after first completing the examination for the profession of middle school teacher. According to the Court, the concept of 'worker' 'must be defined in accordance with objective criteria which distinguish the employment relationship 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'. The Court took the view that all of the essential criteria of employment relationship were met in the case and that trainee teacher Ms. Lawrie-Blum was to be considered a worker.

The Court noted that the concept of worker in Community law is independent of the national definitions of 'worker' in the different Member States. The content of the concept may vary in different member States, but when considering the right to freedom of movement, it has an autonomous meaning specific to European Union law[8]. According to Article 45 TFEU, in deciding on matters relating

[7] *Levin* (Case 53/81).

[8] See: *Lehtonen* (Case C-176/96): "As to the concept of worker, it must be borne in mind that, according to settled case-law, it may not be interpreted differently according to each national law but has a Community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship 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---".

to free movement of workers any national definition of the term must be ignored and the rights based on freedom of movement granted to all persons who fulfil the EU criteria for 'worker'[9].

1.2. Content and interpretation of the directives

The purpose of directives is to harmonise the legislation of the Member States. Directives in the area of employment law are designed to protect the weaker party, the one performing work and, on the other hand, to prevent distortion of competition between undertakings and Member States by laying down uniform minimum requirements for the terms of employment and working conditions. The significance and impact in the Member States of the legislative guidelines included in the directives naturally depend on the content and 'calibre' of each state's legislation vis-à-vis each directive. No changes are required if the national legislation already complies with the content of a directive.

The starting-point in implementing directives at the national level and in applying the provisions based on them is to adhere to the national definition of 'worker' in each Member State[10]. A directive may guide a state in this direction: for example, Article 3, paragraph 1, point a of the Directive on temporary agency work (2008/104/EC) defines 'worker' as 'any person who, in the Member State concerned, is protected as a worker under national employment law'.

Thus, the concept of a worker in Community Law has not traditionally been linked to directives, but rather to the interpretation of the provisions of the founding treaties that pertain to free movement of workers. Nevertheless the term 'worker' is also used in directives, with the term 'employee' occurring as well[11].

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[9] See: *Hoekstra* (Case 75/63): 'If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person'. See also: Kranemann (Case C-109/04).

[10] See: *inter alia* HE 29/2007. (Finnish Government Bill) Hallituksen esitys Eduskunnalle 95. Kansainvälisen työkonferenssin hyväksymän työsuhdetta koskevan suosituksen johdosta, p. 6.

[11] The term 'worker' is used at least in Directive 2003/88/EC concerning certain aspects of the organisation of working time, Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies and Directive 2008/104/EC on temporary agency work. The term 'employee' is used to describe a worker in at least Directive 2001/23/EC on the approximation of the laws of the Member States relating to

The definition of 'worker' for the purposes of a directive and any interpretation thereof should thus proceed in terms of the national legislation of each Member State. One exception worth noting in this regard is that found in the Directive on the posting of workers (2008/104/EC). Article 2 (2) of the Directive prescribes that the concept of a worker is to be determined in keeping with the legislation of the country to which the worker has been posted: 'For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted'[12].

In a 2006 Green Paper, the Commission of the European Union pointed out that problems relating to the differing definitions of 'worker' had occurred primarily in the implementation of the directives on the posting of workers and on transfers of undertakings. In the Commission's view, the definitions of varying scope applied in these contexts by different countries were difficult to reconcile with the Community's social policy aims of striking a balance between flexibility and security for employees. The Green Paper also mentions the idea of harmonising the concept of worker in all Member States in matters falling outside the specific context of free movement[13]. Finland, among other countries, was opposed to this idea and stated that the concept of employment relationship in areas other than free movement of workers should continue to be defined nationally. The reasoning behind this position was the central status of the employment relationship and of

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the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[12] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. See also Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Article 4 (5): "The elements that are referred to in this Article used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties".

See also: Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers: 'seasonal worker' means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State.

[13] COM(2006)708 final. Green Paper. Modernising labour law to meet the challenges of the 21st century. See also: C. Barnard, *EU Employment Law*, Fourth Edition, Oxford, Great Britain 2012, p. 144–145. For a more extensive discussion on EU labour law, see also: R. Nielsen, *EU Labour Law*, Copenhagen 2013; B. Nyström, *EU och arbetsrätten*, Stockholm 2011.

its essential features in the application of the country's national labour legislation as a whole. Changes in the definition of 'employment relationship' would lead to changes in the application of national legislation that does not fall within the scope of Community law[14]. At this stage the discussion was thus confined to harmonisation of the concept of a worker outside of the provisions pertaining to free movement[15].

2. Focus of the present research

Interpretation of the definitions of 'worker' in Article 45 TFEU and in directives should be two separate undertakings. In recent years, the Court of Justice of the European Union has nevertheless taken the view in several of its judgments that the definition of 'worker' in Article 45 TFEU should be taken into account also when interpreting certain directives in the area of labour law[16].

The present article examines on a general level what the possible broadening of the EU concept of a worker will in fact mean and how it might affect national legislation in the Members States and the interpretation of the concept of a worker[17]. The particular example used in assessing the impacts is Finland, where the essential features of employment relationship are laid down in the Employment Contracts Act. The features set out in the Act, and thereby the definition of the status of 'worker', also affect the scope of application of other labour laws, such as the Acts on working hours, annual holidays and occupational safety. These laws make reference to the definition laid down in the Employment Contracts

[14] EU. GREEN PAPER Modernising labour law to meet the challenges of the 21st century (Europe communication) and Government Bill 29/2007, p. 6.

[15] See also: N. Bruun, *EU-työoikeus ja 2000-luvun haasteet – vuoden 2006 Vihreän kirjan tarkastelua. Työoikeudellisen Yhdistyksen vuosikirja 2006*, Helsinki 2007, p. 101–108.

[16] C. Barnard illustrates this development in the CJEU. C. Barnard, *op. cit.*, p. 144. In Finland Professor Bruun has dealt with this development in the praxis of the CJEU, particularly as it relates to legislation on working hours and annual holiday. See: C. Bruun, *Työsopimus, työsuhde ja työntekijän asema – EU-oikeuden vaikutus. Työneuvosto työlakien tulkitsijana – julkaisussa*, Helsinki 2013, p. 47–51. For purposes of the present article the author has not examined how the topic may have been dealt with in other contexts.

[17] Broadening can also be understood as the extending of the concept of 'worker' to cover self-employed persons. This facet of the topic is not examined in the article, however, which confines itself to the extension of Article 45 TFEU's concept of a worker to the interpretation of directives. See: C. Barnard, *op. cit.*, p. 144–155, where *inter alia* she deals with the status of dependent self-employed persons. This article does not deal with the above-mentioned extension of the concept of a worker or with the legislation enacted at the EU level to protect different groups of workers, for example, posted and seasonal workers. Anti-discrimination regulation and the effect it may have on different groups of workers also fall outside the scope of the present research.

Act. The definition in the Act thus is of crucial importance for the scope of labour legislation in Finland as a whole[18]. The article describes the basic principles for defining the status of 'worker' in Finland.

3. Broadening the interpretation?

3.1. Research questions

The Community concept of 'worker' is an understandable objective and one that ensures equality in particular where interpretations of the principle of free movement of workers are concerned.

Every Member State must implement the obligations set out in a directive as the state deems best using national measures, as long as the objectives of the directives are fulfilled. Directives are often drafted so as to give Member States a number of alternatives for achieving the desired end-result. The entity protected by directives – that is, who is considered a worker or employee – is determined in principle in terms of national legislation[19].

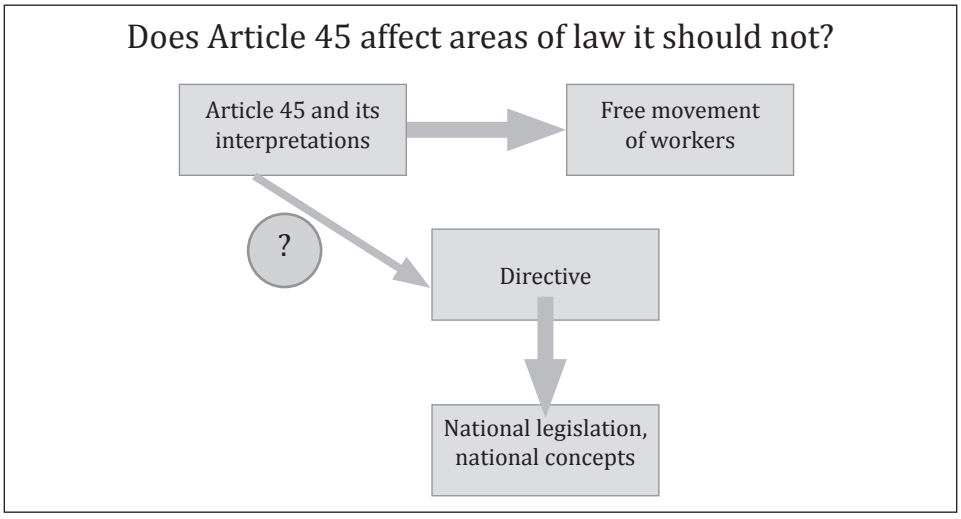

Figure 1. Influence of the concept of 'worker' as understood in Article 45 TFEU

[18] Labour laws are primarily applied to work done as part of an employment relationship. However, the scope of several labour laws has been extended to cover public-service employment. The Occupational Safety Act is applied widely to all work regardless of its legal status.

[19] Here I refer only to those directives in the area of labour law whose scope of application is linked to the definition of 'worker' or 'employee'.

National legislation, as well as any definitions of employment relationship or worker it may contain, are interpreted in light of the law of the relevant Member State and the principles of interpretation it applies. If a national provision has been influenced by a directive, the letter and the aims of the directive must be taken into account in interpreting national provisions, as must any interpretations emanating from judgments of the CJEU. At work here is what is known as the indirect effect of directives[20].

If the CJEU interprets the definition of 'worker' in a directive in a manner analogous to that within Article 45 TFEU, this may affect the content of any concepts of employment relationship and worker that have been defined nationally. This would seem to mean that the 'worker' who is protected by directives is meaningful on the EU level. If this is truly the case, how should the matter be addressed nationally and how does this affect labour law in Finland, for example? One might also ask whether the interpretation of Article 45 TFEU exerts influence in matters where it should not.

3.2. Views taken by the Court of Justice of the European Union

The CJEU has interpreted the concept of worker in Community terms outside the scope of Article 45 TFEU in at least *Union Syndicale Solidaire Isere* (Case C-428/09) and *Neidel* (Case C-337/10). The same phenomenon can be observed in the Court's interpretation of the Framework Agreement on part-time work in *O'Brien* (Case C-393/10). The agreement was adopted in the form of a directive, whereby 'worker' in the sense of the instrument is in principle to be defined nationally[21].

In *Union Syndicale Solidaire Isere*, the question addressed by the Court was whether Directive 2003/88/EC concerning certain aspects of the organisation of working time applies to casual or seasonal staff carrying out a maximum of 80 days of work per annum in holiday and leisure activity centres. The Directive does not define 'worker' for the purposes of its scope of application. Article 1, which defines the scope of the Directive, refers to an article of the Framework Directive on Safety and Health at Work and states that 'this Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14, 17, 18 and 19 of this Directive'. In the Framework Directive, 'worker' means 'any person employed by an employer, including trainees and apprentices but excluding domestic ser-

[20] See *inter alia*: C. Barnard, *op. cit.*, p. 156–158.

[21] Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work.

vants'. The Working Time Directive makes no reference to either that provision of the Workplace Health and Safety Directive or the definition of 'worker' to be derived from national legislation and/or practices.

In its judgment, the Court first refers to the broad scope of application of the Working Time Directive and takes the view that 'for the purposes of applying Directive 2003/88, [the concept of 'worker'] may not be interpreted differently in terms of the laws of Member States, but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of 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 ---. It is for the national court to apply that concept of 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved'.

Thus, in interpreting the Working Time Directive the Court decided to apply the concept of a worker in accordance with Article 45 TFEU. According to the conclusion of the Court, the Working Time Directive should also be applied to casual and seasonal work staff carrying out a maximum of 80 days of work per annum in holiday and leisure activity centres[22].

A similar broadening of the concept of 'worker' in the sense of Article 45 TFEU to the interpretation of directives can be observed in *Neidel* (Case C-337/10). The case involved application of the Working Time Directive to a fire fighter. Neidel had worked in Frankfurt am Main in Germany with the status of public servant and ambiguity arose regarding his right to an allowance in lieu of paid annual leave which had not been taken at the time of his retirement. The Court decided that the Working Time Directive was applicable.

The Court justified its decision with reference to the concept of a worker in Article 45 TFEU, which is broad and has a 'specific independent meaning'. Thus, it reiterated the practice that had developed in the interpretation of Article 45 and its predecessors and cited *Lawrie-Blum* (Case 66/85)*, Collins* (Case C-138/02) and *Trojani* (Case C-456/02).

Lastly, the Court noted that it is irrelevant whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law. It stated that '[t]hese legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of European Union law'.

[22] See: C. Bruun, *Työsopimus, työsuhde ja työntekijän asema*…, p. 49.

In the two cases presented above, the concept of 'worker' in the sense of Article 45 TFEU was applied in the interpretation of directives. Bruun has drawn attention to the spillover effect of the judgments, which is seen in the interpretation of the Framework Agreement on part-time work in *O'Brien* (Case C-393/10). Interpretations of the Working Time Directive have already influenced 'other areas of law'[23].

O'Brien centred on the question whether judges fall within the scope of the Framework Agreement on part-time work. In the view of the CJEU, Member States must formulate their concept of a worker such that it does not arbitrarily exclude particular groups of persons from the scope of the Agreement. Exclusion from protection under the Agreement could be permitted only if the nature of the employment relationship concerned is different from the relationship between employers and their employees who fall within the category of 'workers' under national law.

Although the content or manner of defining the concept of a worker on the national level is not an aspect of Community law, the CJEU has taken the view that EU legislation may entail restrictions on the content of national legislation. The concept of a worker cannot be interpreted to mean that a particular group performing work is arbitrarily excluded from the protection provided under EU law.

3.3. The example of Finland

The conceptual framework governing the regulation on employment contracts and employment relations varies from country to country. For example, Finland has enacted the Employment Contracts Act as the basic law governing employment relationships[24], with the Act providing the legal definition of employment relationship and thereby of employment contract. The Act also has provisions on the conclusion and duration of employment contract, the rights and obligations of the employer and employee, transfer of undertakings, lay-offs and termination of employment contract (giving of notice and cancellation). In addition to the Employment Contracts Act, Finland has a range of other employment laws, such as the Working Time Act and Annual Holidays Act, Occupational Safety and Health Act, Collective Bargaining Agreement, Act on the Protection of Privacy in Working Life, Act on Co-operation within Undertakings, Employees Pensions Act, and Unemployment Security Act. The scope of application of all these Acts is in one way or another linked to the definition of employment relationship laid down in the Employment Contracts Act.

[23] *Ibid.*, p. 50.

[24] The Act currently in force dates from 2001. Its predecessors were the Employment Contract Acts of 1970 and 1922.

Whether an employment relationship exists is assessed, and the line between activities within and without employment relationship is drawn, by examining whether the work performed actually meets the definition of the scope of application of employment contract set out in chapter 1, section 1, subsection 1 of the Employment Contracts Act.

Employment Contracts Act
Chapter 1
General provisions
Section 1. Scope of application

> *This Act applies to contracts (employment contracts) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration.*
>
> *This Act applies regardless of the absence of any agreement on remuneration, if the facts indicate that the work was not intended to be performed without remuneration.*
>
> *Application of the Act is not prevented merely by the fact that the work is performed at the employee's home or in a place chosen by the employee, or by the fact that the work is performed using the employee's implements or machinery.*

Traditionally, the view has been taken that the essential criteria that must be met for an employment relationship to exist are the same as for an employment contract. An employment relationship exists if one or more workers together have committed themselves personally to perform work under the direction and supervision of an employer for a remuneration. For an employment relationship to exist, the work performed must in reality meet all of these individual or basic criteria for employment relationship.

The threshold for fulfilling the contract criterion *required of an employment relationship is low. An employment contract can be concluded orally, in writing or electronically (telefax or e-mail). It can also come into being tacitly through the work being done without any express arrangements having been made for its performance. In such cases, the worker begins doing the work and the employer permits its performance.*

In an employment relationship the work must be performed for another person, that is, an employer (criterion of work being done for another person). *Work in the sense of the Employment Contracts Acts encompasses all human behaviour or activity which has economic significance. This could involve active, passive, mental or physical behaviour. The requirement of performing work for another*

means that the benefit resulting from the work must accrue to the employer. The employee benefits from his or her work in the form of remuneration, which is paid in exchange for the benefit that the employer gains from the worker's efforts. For example, a traditional case of work being done for oneself is that done by a shareholder in a general partnership or a partner in a decedent's estate where this is based on no more than the person's status as a shareholder in the company or as a partner in an undistributed estate.

The criterion of remuneration *must also be met for an employment relationship to be created. In other words, the person performing the work must receive wages or some other form of compensation. A work-related legal relationship may, however, be an employment relationship even if no agreement has been made on compensation. The Employment Contracts Act states in chapter 1, section 1, subsection 2 that the Act is to be applied even if no agreement has been made regarding compensation; however, it is not applicable if the circumstances under which the work is done indicate that the parties' intention has been that the work be done without compensation. Compensation may take the form of any payment or performance which has economic value to its recipient. Thus, remuneration may be money, a payment in kind or a combination of the two. Reciprocal performance of work is also considered remuneration. In addition, the fact that the cloakroom attendant in a restaurant may receive tips from customers has fulfilled the criterion of remuneration. The opportunity to receive teaching has in some cases also been considered sufficient remuneration for purposes of the Act.*

A key element of an employment relationship is that a certain individual commits him- or herself to performing the work personally (personal performance criterion). *The personal obligation to perform the work entails that no one other than a natural person may have the status of 'worker'.*

According to the Employment Contracts Act the worker must perform the work under the direction and supervision of the employer (direction criterion). *What the direction and supervision are to consist of are not specified in the Act but the elements of the criterion are relatively well-established in the legal literature and case-law. Nevertheless, the factors determining whether the criterion has been met vary from case to case. 'Direction of the employer' refers to the employer's right before commencement and during the performance of the work to determine where, how and when the work is done. 'Supervision' means the employer's right to monitor that the worker observes the instructions given regarding performance of the work. The criterion is somewhat problematic in practice, because the employer is not required in concrete and specific terms to direct and supervise the worker's work. The position of the parties to an employment contract must be such as to allow the employer, should he or she so desire, to undertake actions geared to direction and supervision; in other words, no concrete direction and supervision are required. Direction and supervision make take the form of, among*

other actions, setting deadlines for performance of the work or reminding workers that the work has to be done[25].

Precisely because of this legal definition of employment relationship, difficulties in drawing the line between employment relationship and other forms of working are not common in Finland. Another factor possibly reducing the number of disputes is the long-established labour market practice. Whether or not an employment relationship has been created often becomes clear on the basis of a single criterion. Ambiguities and disagreements regarding the nature of the legal relationship under which work was performed frequently arise only after the employment relationship has ended. The actions brought tend to involve pay and payment of various forms of compensation. Most often the situation is one in which the party who performed the work demands outstanding remuneration, such as holiday or working time pay, based on the claim that he or she considered the existing legal relationship to be an employment relationship. The remuneration was not paid while the party worked for the employer, because at the time the work was not seen – at least not by the employer – as being done as part of an employment relationship, but rather, in the majority of cases, was viewed as work done by an independent entrepreneur[26].

For the most part, disagreement arises regarding the distinction between the work of a worker and of an independent entrepreneur. The decision as to whether an employment relationship exists is ultimately made by a court of justice[27].

Where difficulties arise in distinguishing between the work done under an employment relationship and other work, such as the work of an independent entrepreneur, the disputes can generally be described as difficult ones. Although 'employment relationship' has a legally defined and precise set of criteria, after examining the individual criteria for employment relationship it often becomes necessary to assess as a whole all of the facts that have been brought to bear in the case. Such an assessment may be required because the individual criteria may each be met regardless of whether the work is done as part of an employment relationship or not. Where the individual criteria for employment relationship are fulfilled, this does not necessarily – when detached from the context as a whole – provide a solution; an assessment of the situation as a whole is required. No such comprehensive assessment of the case is necessary, however, if one of the individual criteria, for example that requiring a binding contract between the parties, has not been met[28].

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[25] J. Paanetoja, *Työsuhteista työtä vai työtoimintaa? Tutkimus vajaakuntoisen tekemän työn oikeudellisesta luonteesta*, Helsinki 2013, p. 145–157 and references therein.

[26] No definition of 'independent entrepreneur' has been set out in Finnish law.

[27] At the request of the parties designated in the relevant legislation, the Labour Council may issue non-legally binding statements providing interpretations of, among other things, the Working Time and Annual Holidays Acts. These decisions on the application of the legislation may also examine whether an employment relationship existed.

[28] J. Paanetoja, *op. cit.*, p. 28–32 and references therein.

A comprehensive assessment takes into account all of the facts that have been brought to bear in the case. It is needed to distinguish between employment relationship and other legal relationships in which the individual criteria for employment relationship are fulfilled, but which nevertheless differ from employment relationship in a manner indicating that they can be deemed to fall outside the scope of protection afforded by employment legislation. Hence, it is not the case that a comprehensive assessment is required whenever it has to be determined whether an employment relationship exists. However, a comprehensive assessment is the means of last resort for making that determination. Ultimately, the decision on the existence of an employment relationship, that is, on whether a party in fact had the status of 'worker', is made in stages. First, an examination is made of the individual criteria and only when this has been done does it become necessary to assess the legal relationship as a whole. The law contains no provisions on making a comprehensive assessment, but it has become the established approach in practice. It has also been accepted in legislative drafting and in research.

A comprehensive assessment of a worker's status is just that: it is an examination of all of the facts pertaining to the contractual relation under which the work is done and a determination on that basis whether an employment relationship exists. However, the factors figuring in the assessment are individual, because decisions are always made on a case-by-case basis. Employment laws have for the most part been enacted to protect workers. Accordingly, it is vital for the court to be able to identify the person who is the object of protection, that is, a worker in an employment relationship. In a comprehensive assessment, efforts are made to do so by examining the circumstances under which the work is done. The question to be answered is this: Is it possible to judge by the given circumstances whether the party performing work is in need of the protection or not? In addition, the assessment can take into account the terms of the employment contract and the parties' own conceptions of their status. These two factors may influence the assessment of the nature of the legal relationship only if the parties have complied with those terms and conceptions. It should be pointed out, however, that only a proven common purpose and actions appropriate to that purpose may in practice be considered in the assessment. This being the case, a contract pertaining to work, the terms of the contract, and the parties' conceptions must in practice always be examined together with the actual circumstances[29].

Some of the work fulfilling the criteria for an employment relationship may nevertheless fall outside the scope of application of the Employment Contracts Act based on the demarcation set out in the Act. According to chapter 1, section 2 of the Act, it is not applied to ordinary voluntary non-vocational activities, for example in sports clubs, youth associations, parishes and patient associations, where

[29] *Ibid*., p. 157–166 and references therein.

no wages are paid for the work[30]; to those employment relationships or service obligations that are subject to public law[31] (e.g. central and local government posts); or to contracts for work to be performed that are governed by separate provisions in the law. For example, the Act does not apply to seamen, family carers referred to in the Family Care Act, or informal carers referred to in the Act on Support for Informal Care.

Determining the nature of an employment relationship and the status of a worker in the cases mentioned above always is, and in EU terms should always be as well, a national matter because the issues under consideration do not fall within the scope of free movement of workers.

Section 3.2 above analyses the decisions of the Court of Justice of the European Union in which the definition of 'worker' in the meaning of Article 45 TFEU, which relates to free movement of workers, was also applied in the interpretation of directives. This case-law may have ramifications in Finland when interpreting the Working Time and Annual Holidays Acts, but perhaps even more so when determining who has the status of 'worker'. The approaches taken in such interpretation and the influence they exert also have broader significance where the role of the EU and its competence are concerned.

Firstly, the end-result in *Neidel* (Case C-337/10) may lead to direct appeals to EU law in each Member State[32]. Such a situation may arise if, according to national legislation, the person performing work is deemed to fall outside employment relationship/the status of 'worker' and, therefore, not to be eligible to protection in respect of working hours and annual holiday afforded by directives. If the judgment in *Neidel* is observed, a person falling outside such protection may demand protection under the directive by invoking the concept of 'worker' in Article 45 TFEU, provided that the interpretation under national legislation is narrower than that based on Article 45 TFEU[33]. This may result in national legislation being bypassed when interpreting the national provisions that are based on the Working Time Directive.

In Finland it is possible to lay down a provision in the law whereby certain work remains outside the scope of application of the Employment Contracts Act and, by extension, outside the scope of application of other employment laws. For example, the law provides that work experience schemes organised for long-term

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[30] The scope of application of the Occupational Safety and Health Act is broad and the Act is applied in these cases as well.

[31] Employment relationships or service obligations that are subject to public law are, however, governed by the Working Time Act, the Annual Holidays Act and the Occupational Safety and Health Act.

[32] Article 45 TFEU is what is known as a directly applicable norm in a Member State, which creates direct legal effects regardless of whether it has been brought into force nationally. Even the provisions of directives that have not been properly implemented through national legislative means may under some circumstances have direct effect. However, a demand that such provision be given direct effect may generally only be addressed to a Member State.

[33] N. Bruun, *op. cit.*, p. 50.

unemployed persons and the specific work for people with disabilities based on the Social Welfare Act[34] do not give rise to employment relationships. These forms of work thus fall outside the scope of the Working Time and Annual Holidays Acts. How the decision in *Neidel* (Case C-337/10) might affect the protection of those performing work in the legal relationships mentioned is an interesting, but as yet unresearched matter[35].

If the definition of 'worker' within Article 45 TFEU must be taken into account in a Member State when interpreting the provisions of employment laws that are based on the Working Time Directive (in Finland the Working Time and Annual Holidays Acts), this could lead to fragmentation of the scope of application of employment laws. Finland has a large number of other employment laws whose interpretation adheres to the national definition of employment relationship, whereas in the case of the Working Time and Annual Holidays Acts the definition of 'worker' in the meaning of Article 45 TFEU should be taken into account. Moreover, the same worker and the same group of workers could end up being in different positions when interpreting different employment laws.

Secondly, the decision in *O'Brien* (Case C-393/10) would seem to lead to a situation where the concept of 'worker' could not be interpreted nationally in a manner that would arbitrarily exclude a certain group performing work from the protection provided by the Framework Agreement on part-time work. It would be possible for a worker to fall outside the protection afforded him or her by the Framework Agreement only if the nature of the work at issue differed substantially from the work enjoying that protection. This may mean that nationally it is not possible, at least categorically, to exclude certain forms of work from protection. Exclusion is only possible where the work at issue differs substantially from 'ordinary' work[36]. How ordinary work and substantial deviations from it are defined in this context are open questions. Among other things, Finnish law excludes from the protection of employment laws the previously mentioned work experience schemes and the work activity described in the Social Welfare Act. In

[34] Section 27e, paragraph 1 of the Act states: 'Specific work for people with disabilities is intended to allow them to maintain their functional capacity and activities promoting it. Such work is organised for persons incapacitated for work who due to their disability are not able to take part in the work referred to in section 27d and whose income is mainly based on benefits granted on the basis of illness or incapacity for work'. The work based on an employment relationship and referred to in section 27d of the Social Welfare Act may be provided as a social service 'for persons who have, due to their disability or illness or for comparable reasons, particular long-term difficulties in managing the ordinary functions in everyday life and who are in need of, in addition to the services and measures of the labour administration, the supportive measures mentioned… in order to find employment on the open labour market'. This work was previously known as sheltered work.

[35] These forms of work do not necessarily involve the activity which figured in *Bettray* (Case C-344/87). Both rehabilitative work activity and the work activity described in section 27e of the Social Welfare Act may be performed as "ordinary" work which is effective and genuine economic activity. For more information, see: J. Paanetoja, *passim*.

[36] J. Paanetoja, *op. cit.*, p. 254–255.

addition, in keeping with the established practice – but without the support of legislative provisions – the work activity described in the Act on the Special Care of Mentally Handicapped Persons has in practice been considered activity that does not give rise to an employment relationship[37].

On the basis of the foregoing, it is reasonable to ask about the extent to which Member States are ultimately free to define the scope of application of national laws based on EU directives, and about the possible range of impact the decisions of the CJEU may have. Furthermore, it must be asked whether the broadening interpretation of the concept of 'worker' is leading to a situation where the concept of 'worker' set out in Article 45 TFEU exerts influence in instances where it should not. Do directives no longer leave the national legislatures of Member States the freedom they should have, if the objects intended to be protected by the directives must always be interpreted in accordance with the Union's concept of 'worker'?

4. Topics for future study and research

To answer the questions posed above is not a simple task. The series of questions could be extended and one could also consider whether the broadening of interpretation now observed will continue or whether what we have seen so far are scattered cases that are no basis for generalisations.

The motives of the CJEU broadening the interpretation of the concept of 'worker' in the meaning of Article 45 TFEU so that it affects the interpretation of directives or their parts are unclear. If the Court is seeking uniform terms of employment and working conditions for workers who fall within the scope of free movement of workers, this aim will not be easy to achieve. The reason for this is that at least in Finland there is an extensive body of employment legislation which has no 'EU connection'; employment law directives cover a far narrower scope than Finland's employment laws. At the end of the day, one is left with a number of laws enacted to protect the worker whose scope of application is determined entirely on the basis of the national definition of 'employment relationship'.

In assessing the practical significance and impact of the broadening of the concept of 'worker' in the decisions of the CJEU, it must be taken into account that employment relationship and the status of 'worker' are not defined in the same way in each Member State. Unlike Finland, a number of Member States have no legal definition of 'employment relationship'. It is a matter for further research to determine whether the legal definition of 'employment relationship' may be 'extended' using the CJEU interpretation. In other words, could the CJEU conclude that Finland should interpret the provisions of its employment laws based

[37] The long-established view has, however, been challenged in research, with the conclusion being reached that the criteria for an employment relationship may be fulfilled also in the case of work activity engaged in by mentally handicapped persons. See: J. Paanetoja, *op. cit.*, p. 181–219.

on the Working Time Directive so that those workers who fall outside the national legal definition of 'employment relationship' would also be protected[38]?

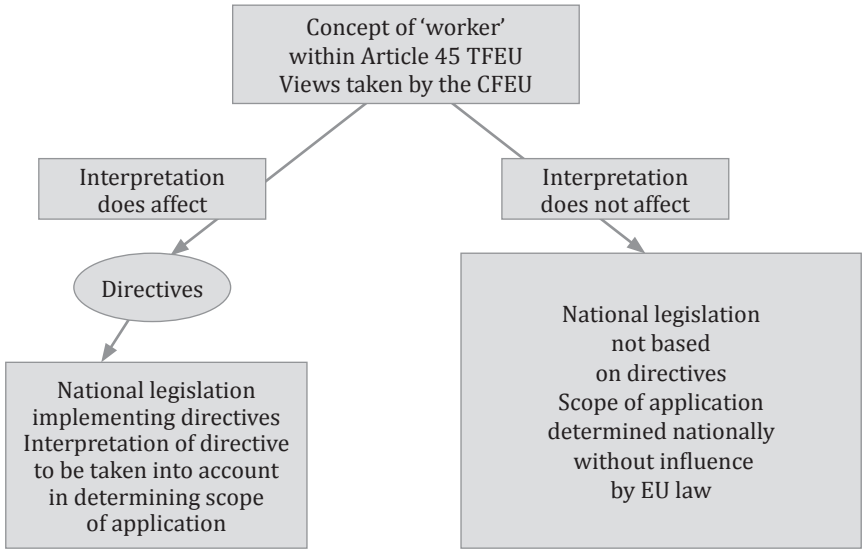

Figure 2. If the national legislation covers a broader scope than the directives, room is left for a national definition of 'worker'. Where this is the case, it will not be possible to achieve any objective of harmonising the rights of workers through a Community interpretation of the concept of 'worker'

Furthermore, it would be appropriate to consider in greater depth the content, bases and objectives of the development that has occurred. Does the situation we see indicate that the CJEU has in practice implemented the ideas brought out in the 2006 Green Paper? Has the CJEU fulfilled the aims of the Green Paper and sought to harmonise the concept of 'worker' in all Member States in cases falling outside the free movement of workers?

In 2006, the International Labour Organisation (ILO) issued its Employment Relationship Recommendation (No. 198). Chapter I, section 2 of the Recommendation states that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account the relevant international labour standards. The content and significance of the ILO Recommendation, as well as the status of the ILO more generally, would also be worthwhile topics to address in future research.

[38] In the present case, no study has been made of the legislative provisions on the employment relationship and the status of 'worker' in those countries affected by cases in which the CJEU has extended its interpretation; that is, no determination has been undertaken of whether those countries have a legal definition of 'employment relationship', 'worker' or status of 'worker'.