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THE CONCEPT OF EMPLOYMENT CONTRACT IN EUROPEAN UNION PRIVATE LAW

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Abstract This article provides a thorough analysis of the employment contract in comparative European private law and Community law. It argues that a common concept of employment contract should prevail in European private law. In that respect, the autonomous and broad interpretation which has been given to the term 'worker' in Community law could be a basis for adoption of an autonomous concept of the employment contract in European private law.

I. INTRODUCTION

A comparative study of the classification of contracts of employment amongst the Member States of the European Union highlights the fact that the various regulatory frameworks are organized around the key concepts of 'employee' and 'employment contract'.[1] These two central notions define the scope of the relevant substantive law. The terms are not, however, restricted to employment law.[2] Apart from specific aspects of the general body of law,[3] there are

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[1] In France: J Pelissier, A Supiot and A Jeammaud *Droit du travail* (21st edn Dalloz Paris 2002); in Italy: F Carinci, R De Luca Tamajo, P Tosi and T Treu *Dritto del Lavoro* 2, *Il Rapporto di lavoro subordinato* (5th edn PUBLISHER Turin 2002); in England: SF Deakin and GS Morris Labour Law (3rd edn PUBLISHER London); R Upex, R Benny, and S Hardy, *Labour Law* (1st edn OUP Oxford 2004); in Spain: M Valverde, Rodriguez-Sanudo Gutirrez, and Garcia Murcia *Derecho del Trabajo* (10th edn PUBLISHER Madrid 2001); for comparative law in matters of labour law, there are two permanent encyclopaedias: one is bilingual French/German, *Droit du travail* (Editions Techniques Paris YEAR); the other is in English, R Blanpain (General Editor) *International Encyclopedia of Labour Law* (Deventer, Kluwer PLACE YEAR).

[2] For labour law, see Art L. 121-1 s of the French Labour Law Code. In English law, the main statutory provision is section 230(1) of the Employment Rights Act 1996.

[3] For example, in the case of the law of tort, it may be necessary to determine whether a person is an employee or not: see particularly Tony Weir *Tort Law* (OUP Oxford 2002) 99 et seq, and in French law, art 1384 of the Civil Code which particularly states: '*Masters and employers [are liable], for the damage caused by their servants and employees in the functions for which they have been employed. . .*'

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whole areas of law of equal importance that relate to employment contracts: social security law,[4] tax law,[5] and private international law.

To that end, not only does the terminology differ from one Member State to another, but there can also be a considerable variation between the relevant substantive laws. This should certainly be true in European Union (EU) private law for the concepts of 'employee' and 'employment contract', to the extent that not only are the regulations largely of Community origin[6] but that they aim at harmonization and not mere coordination of the law.[7] Consequently, this article questions how the application of differing criteria to describe an employment contract can be reconciled with the harmonization envisaged by Community Law.

The various definitions of employment contract within the EU reveal a wide diversity. The reason, which is not within the ambit of this study, is that the term 'employee' generally determines the scope of a legal text, namely the rules governing the employment contract. But, depending on the purpose of the text, the meaning of the term may vary.[8] On the one hand, the domestic

[4] There is now a single definition in French law in the area of labour and social security law: see Cass Soc (13 Nov 1996) *Société Générale v URSSAF de la Haute Garonne* JCP 1997. E.II.911, note J Bathélémy, Dr Soc 1996, p. 1067, note J-J Dupeyroux. Dutch social security law uses the definition set out in art 610 of the Dutch Civil Code to describe the relation of salaried work for the purposes of social security. However, the interpretation of this text in matters relating to social security is different from that used by labour judges (see above). There are two reasons for this divergence of interpretation. First, the judges who handle social security litigation are not the same judges who deal with labour law litigation. Secondly, Dutch social security tribunals attach weight to the facts as well as to the intention of the parties, to the extent that the parties can agree between themselves to enable one of them to benefit from social security benefits without cost to the other. Labour litigation, on the other hand, does not lend itself to this type of agreement since it if usually the employer who has to pay rather than the public purse. In the UK, the position is governed by the Social Security Contributions and Benefits Act 1992 (as amended). Section 1 divides what it calls 'earners' into different categories, the following of which are relevant for present purposes: 'employed earners' (who pay national insurance contributions under Class 1) and 'self-employed earners' (who pay contributions under Classes 2 and 4): see ss 1, 6, 11, and 15. The two terms are defined in section 2. It is generally accepted that the test for determining status under the social security legislation is the test for determining employment status under employment law. In other words, those areas of the law which depend upon the categories of employment and self-employment for their application (such as social security law and tax law) follow the tests adopted in employment law. See *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, *Smith v Reliance Water Controls Ltd* [2003] EWCA Civ 1153, *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218; also see generally David Clutterbuck 'Employed or self employed?' Taxation 2004, pp 547–9.

[5] In English law, the definition of 'employee' in employment law is also used in tax law. Thus, employees are liable to taxation under the Income Tax (Earnings and Pensions) Act 2003, s 9 (formerly the Income and Corporation Tax Act 1988 (ICTA), s 19(1) and Schedule E), whereas the self-employed are liable under ICTA, s 18 and Schedule D. In French law, employees are taxed in a separate schedule titled '*Traitements, salaires, pensions et rentes viagères*' allowing special deductions.

[6] In contractual matters at least.

[7] See above.

[8] This proposition is clearly stated in ECJ decision, Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [12 May 1998] ECR I-2691, [2000] CMLR 449, note by Christian Tamuschat. See also O'Leary in (1999) 24 European Law Review 68, for a discussion of this case.

law of most of the Member States prefers the concept of the 'employee' to that of 'worker'.[9] On the other hand, Community law, in both the primary and the secondary legislative texts, more readily uses the concept of 'worker', and adopts the notion of the 'work relationship' in preference to that of the 'employment contract'. To what extent are these different concepts of 'worker/employee' and 'employment contract/work relationship' in effect identical?

It would appear that not only is the Community law concept of 'worker' not the same as that of 'employee' such as it is understood in the domestic law of the different Member States, but that also the Community law concept of 'worker' is not consistent even within the different Community law texts.[10] In order to demonstrate this, a distinction will be drawn between the notions originating in Community law and those purely of domestic law, but this formal distinction does not fail to take account of the integrated contribution of Community law.[11]

The first part of this article will examine the various definitions adopted by the major Member States of the European Union, considering those used in France, the United Kingdom, and Germany. It concludes that, although a common approach is taken, there are still grey areas. The second part will examine whether the EU interpretation of worker can be of assistance in proposing a definition of the concept of employment contract in EU private law. This article argues that European private law requires a standard definition of the term 'employment contract'.

[9] For the position in English Law, see Robert Upex, Richard Benny and Stephen Hardy *Labour Law* (1st edn OUP Oxford 2004) 51–69; and Robert Upex *The Law of Termination of Employment* (6th edn Jordans PLACE 2001) 7–29. But this is not always true. Thus Spanish law prefers the term 'worker' ('*trabajadores*') to that of 'employee' ('*salariado*'): Ley del Estatuto de los Trabajadores, Real Decreto Legislativo 1/1995, of 24 Mar 1995, por el que se aprueba el Texto Refundido de la Ley all Estatuto de los Trabajadores, Bulletin Official del Estado, 29 Mar 1995 and personal conversation with Maria Font, on 4 Nov 2003, Nijmegen. This is also true of Italian law, which prefers the term 'lavatore' to 'salariato' (see Art 2094 of the Italian Civil Code, available at <http://www.jus.unitn.it/cardozo/Obiter_Dictum/codciv.htm>), and—outside the EU—Brazilian law which prefers the term '*empregado*' to '*assalariado*' (Consolidacao das Leis do Trabalho—Decreto-Lei no 5.452/2943, available at <http:www.planalto.gov.br/ccivil_03/decreto-lei/Del5452.htm>).

[10] See Philippe Coursier *La notion de travailleur salarié en droit social communautaire* (Dr Soc 2003) no 3, p 305, Robert Rebhahn 'Les clauses générales dans le droit du travail européen' in *La clause générale dans le droit européen des contrats* Symposium of 27–28 June 2003, Paris, Society of European Contract Law; Pierre Rodière *Droit social de l'Union européenne* (LGDJ Paris 2002); Brigitte Reynes *La notion de travailleur salarié en droit communautaire : une notion en devenir, in Mélanges dédiés au Président Michel Despax* (Presse de l'Université des Sciences Sociales de Toulouse Toulouse 2002) 239; Denis Martin *La libre circulation des personnes dans l'Union européenne* (Bruylant Bruxelles 1995) no 17; Guy Desolre *De la notion au concept communautaire de travailleur* (Cah dr eur 1979) 38.

[11] ECJ Case 6/64 *Flaminio Costa v ENEL* (15 July 1964) Rec p 1141.

II. THE CONCEPT OF 'EMPLOYEE' IN THE DOMESTIC LAWS OF MEMBER STATES

The domestic laws of the different Member States are similar in respect of the technique that they employ in respect of the definition of the employment contract. However, this does not prevent certain identical situations from being differently classified according to the legal system under consideration.

A. Similar Technique

The technique of using the presence of a number of significant factors to identify employees seems to be a common characteristic of labour law in the Member States.[12] Not only do English and French law use this method for classifying an employment contract but it is also employed in German Law.

1. English Law

Under English law, there is a distinction between employees—those who provide their labour under a contract of employment or contract *of* service—and the self-employed—those who provide their labour under a contract *for* services. This latter group are called 'independent contractors' or 'consultants', but, whatever the title they are given, their relationship is governed by a contract for services.

The statutory definitions of 'employee' and 'contract of employment' are to be found in the Employment Rights Act 1996, s 230(1);[13] there is no statutory definition of 'self-employed', 'contract for services' or 'independent contractor'. In the absence of a satisfactory statutory definition, the courts have laid down tests to enable a distinction to be made between employee and self-employed persons. The older cases used what is called the 'control' test, which was in effect a test using a single criterion. Since the late 1960s the courts and employment tribunals have moved away from using a single criterion such as control for identifying the relationship of employment; the test currently preferred is the 'multiple test'. As in the case of French law, the exis-

[12] Alain Supiot, ME Casas, J de Munck, P Hanau, A Johansson, P Meadows, E Mingoine, R Salais, and P van der Heijden *Au-delà de l'emploi—Transformations du travail et devenir du droit du travail en Europe,Rapport pour la Commission des Communautés européennes avec la collaboration de l'Université Carlos III de Madrid* (known as *Rapport Supiot or Rapport du Groupe de Madrid*) (Flammarion Paris 1999) summaries available on <http://horizon.social.free.fr/audelaemploi.htm> and on <http://perso. Wanadoo.fr/marxiens/politicrevenus/supiot99.htm> (39). On the Rapport Supiot, see generally Ignacio Camo Victoria and Eduardo Rojo Torrecilla *A propos du rapport Supiot : réflexions sur les changements dans le monde du travail et en droit du travail* Les Cahiers de Droit 2002, vol 43, no 3; and Jean Lojkine *A propos du rapport Supiot—Dépassement du marché du travail ou simple adaptation du droit du travail aux nouvelles stratégies des entreprises capitalistes* Droit social 1999, nos 7–8, p 669 and the references cited.

[13] 'Employee' is defined as 'an individual who has entered into or works under . . . a contract of employment'. 'Contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing'.

tence of an employment contract is established from the identification of the grouping of a sufficient number of indicators, without the absence of one of these indicators alone being sufficient to negate its existence.[14] Judicial decisions, particularly those of the Employment Appeal Tribunal (EAT), the Court of Appeal and the House of Lords, have established precedents which enable employment tribunals[15] to decide whether a particular claimant is an employee or not.

For instance, the 'multiple' test was formulated in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,[16] where MacKenna J said: 'A contract of service exists if the following three conditions are fulfilled:

1. The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
2. He agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in sufficient degree to make that other master.
3. The other provisions of the contract are consistent with its being a contract of service'.[17]

The case involved an individual, Latimer, who had been an employee of the company since 1958. In 1959, the company introduced a system of delivery by owner drivers, who were to be treated as self-employed independent contractors; in 1965 Latimer entered into an extensive new written contract with the company for the carriage of concrete. He bought a lorry under financial arrangements made with a company associated with Ready Mixed Concrete (RMC); the lorry was to be painted in RMC's colours. He was allowed to employ substitute drivers, but, if RMC was dissatisfied, he was to provide another substitute. RMC could also require him to drive the lorry for the maxi-

[14] In French law, see Jean Pelissier, Alain Supiot and Antoine Jeammaud *Droit du travail* (21st edn Dalloz Paris 2002) no 131 et seq.

[15] Note that *Industrial Tribunals* were renamed *Employment Tribunals* by the Employment Rights (Dispute Resolution) Act 1998.

[16] [1968] 2 QB 497. For commentaries on this case, see Drake 'Wage Slave or Entrepreneur?' (1968) 31 MLR 408, and Brown 'The Test of Service' [1969] JBL 177. The case is also noted by Clarke: see 31 MLR 450. For a note on the later case of *O'Kelly v Trusthouse Forte* see Leighton (1984) 13 ILJ 62.

[17] ibid 515. It should be noted that, at the time this case was decided, it was customary to use the terminology 'master', 'servant' and 'contract of service'. This usage is now archaic and the terminology 'employer', 'employee' and 'contract of employment' are to be preferred. Debate amongst academics in England has tended to take place during general discussions on the employment status tests developed by the courts: David Clutterbuck 'Employed or self employed?' (2004) Taxation 547–9; Adrian Williams 'A Critical Appraisal of the Criteria Determining Employee Status' (2003) Business Law Review 239–47; Julian Hemming 'A Question of Status' (2003) New Law Journal 1213–1214; Adrian Williams 'What's in a Name: Defining Employee Status' (2002) Legal Executive 23–5.

mum hours permitted by law. He was required to wear the company's uniform and to carry out all reasonable orders from competent employees of the company 'as if he were an employee' of the company.

Applying the test set out above, the judge concluded that he was self-employed. He formulated his conclusion in terms of whether Latimer was in business on his own account, a formulation which has been recurrent ever since. Despite the fact that a number of factors in the case suggested the conclusion that Latimer was an employee of RMC, the judge based his conclusion that he was self-employed on what he called 'the ownership of the instrumentalities', ie the tools of the trade. The most significant of these was the lorry which Latimer bought under financial arrangements made with a company associated with RMC.

The most recent case in which the Court of Appeal has considered this issue is *Express & Echo Publications Ltd v Tanton*.[18] The facts of the case are reminiscent of those of *Ready Mixed Concrete*. They involved a driver who was made redundant from his employment and who was later re-engaged under a contract which the company intended, and the driver agreed, should be a contract for services; in other words, it was agreed that he was to be self-employed. Clause 3.3 of the agreement provided that should the driver be 'unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services'. The driver applied to the employment tribunal for a declaration that his status was that of employee and an order that he should be supplied with a written contract of employment in similar terms to those enjoyed by the company's employees. The tribunal determined that he was an employee and the EAT dismissed the company's appeal. The Court of Appeal, however, allowed the company's appeal, saying that as a matter of law where a person is not required to perform the contract personally the relationship is not one of employee and employer. Thus, clause 3.3 was wholly inconsistent with the contract being one of service. Peter Gibson, LJ, with whom the other members of the Court agreed, said:[19]

> [I]t is necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an irreducible minimum of obligation, it cannot be said that the contract is one of service . . . [I]t is established on the authorities that, where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer.

[18] [1999] ICR 693. There is a vast wealth of information available on this issue, see generally: Peter Vaines 'Taxing Matters' (1999) New Law Journal 1041; Patricia Leighton 'Problems Continue For Zero-Hours Workers' (2002) Industrial Law Journal 71; David Clutterbuck 'Employed or Self employed?' (2004) Taxation 547–9; 'Employment relationship—Worker Not Obliged to Perform Services Personally' (1999) Employment Lawyer 10; 'Employment Status: Contract of Employment Must Require Employee to Provide Services Personally' (1999) 2–3.

[19] ibid 699–700.

This case was distinguished by the EAT in the later case of *MacFarlane v Glasgow City Council*,[20] which involved qualified gymnastic instructors working at sports centres operated by the Council. They were paid on a sessional basis at an agreed hourly rate. If an instructor could not take a class, she would arrange for a replacement from a register of coaches maintained by the Council; she would not herself be paid for the missed session. The replacements were paid by the Council not by the applicant. Lindsay J, President of the EAT, said that the clause in *Tanton* was extreme and that the case was distinguishable on the grounds, amongst others, that the applicant could not simply choose not to work in person and that she was not free to provide any substitute, but only someone from the Council's own register. Further the Council paid the substitute direct. Of *Tanton* the EAT said:[21] 'The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then in effect he would be the master.' Thus, in *MacFarlane*, the person concerned had no freedom of choice in relation to the substitute.

The process of deciding whether a person carries on business on his or her own account has been described by Mummery J in *Hall v Lorimer*,[22] in the following terms:

> [I]t is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. . . The process involves painting a picture in each individual case.

The following factors are the most important to evaluate in painting a picture of a person's work activity:

1. the contractual provisions;
2. the degree of control exercised by the 'employer';
3. the obligation of the 'employer' to provide work;
4. the obligation on the person to do the work personally;
5. the provision of tools, equipment, instruments and the like;

[20] [2001] IRLR 7.
[21] ibid 11.
[22] [1992] ICR 739, 744–5. The Court of Appeal upheld his decision that the taxpayer was not an employee: see [1994] ICR 218. See also *Lee Ting Sang v Chung Chi-Keung* [1990] ICR 409, 414, where the Privy Council uses similar language.

6. the arrangements made for tax, National Insurance contributions, sick pay and VAT;
7. the opportunity to work for other employers;
8. other contractual provisions, such as fees, expenses, and holiday pay; and
9. whether the relationship by which the person is a self-employed independent contractor is genuine or whether it is designed to avoid the employment protection legislation.

Although the range of indicators used by the English courts and tribunals is similar to, albeit more extensive than, those used by the French courts, the approach of the former proceeds from the question of whether an individual is in business on his or her own account. This approach has the danger, however, that the form in which the question is posed tends to dictate the answer. In other words, if the question were different (for example, is the individual 'economically dependent' on the person providing the work), the answer might be different. This debate is not unlike the debate in French law between Pic and Cuche,[23] but with the difference that arguments of 'economic dependence' have never commended themselves to the English courts and tribunals.

The main employment protection rights in the United Kingdom rest on the concept of 'employee', but it should be noted that there has been an increasing tendency over the last decade or so to give rights to 'workers'. Examples are to be found in the following provisions: the Employment Rights Act 1996, sections 13[24] and 43A,[25] the Employment Relations Act 1999, section 10,[26] the National Minimum age Act 1998, section 1,[27] the Working Time Regulations 1998[28] and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.[29] The definition of 'worker' is to be found in

[23] See (n 38).

[24] This provision gives 'workers' the right not to suffer unauthorized deductions from their wages. It started life as s 1 of the Wages Act 1986.

[25] This provision gives protection to 'whistleblowers', ie those who make what are called 'qualifying disclosures'. In brief, a worker will be protected by this provision if he or she makes a disclosure in relation to one of the specified categories of subject-matter and uses one of the specified manners of procedure to make the disclosure. Interestingly, this particular group of statutory provisions has its own special definition of 'worker', to be found in s 43K(1). It widens the definition of 'worker' set out in ERA 1996, s 230(3).

[26] This provision gives workers the right to be accompanied by a companion to a disciplinary or grievance hearing.

[27] This Act entitles 'workers' to be paid the national minimum wage. The term 'worker' is defined in s 54(3) of that Act. The definition is the same as that in ERA 1996, s 230(3), given below.

[28] These Regulations were introduced to implement Council Directive 93/104/EC concerning certain aspects of the organization of working time. Interestingly, the statutory provision which offers protection against 'action short of dismissal' in working time cases, ERA 1996 s 45A, extends to 'workers' whereas other provisions in this group (ERA 1996, ss 44-9) extend to employees only.

[29] Implementing 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

ERA 1996, section 230(3)[30] and would appear to be wide enough to embrace self-employed persons who offer consultancy services and who are thus in effect sole traders.

An analysis of these provisions yields some rather curious conclusions. First, the definition of 'worker' is not consistent. The definition given in ERA 1996, s 230(3) is generally followed in the other legislation,[31] with the exception of the provisions in the ERA 1996 which protect whistle-blowing workers from suffering a detriment short of dismissal. The definition of 'worker' in the context of whistle-blowing[32] is wider than the normal definition of 'worker'. The bizarre consequence of this is that, within the group of statutory provisions in the ERA 1996 which offer protection against action short of dismissal, three different categories of person are protected: 'employees' are protected by sections 44, 45, 46, 47, 47A, 47C, 47D, and 47E;[33] workers as defined by ERA 1996 section 230(3) are protected by section 45A;[34] and workers as defined by ERA 1996, section 43K are protected by section 47B. Thus, the category or person protected depends on the reasons for the treatment.

The second conclusion is that the right not to suffer detriment for the reasons set out in ERA sections 44–9 (considered above) is extended more widely than the right not to be unfairly dismissed. Those provisions in ERA 1996, sections 44–9 which extend to 'workers' are not replicated in the equivalent unfair dismissal provisions,[35] all of which apply only to *employees*. The only provision giving a 'worker' the right not to be unfairly dismissed is section 12(3) of the Employment Relations Act 1999, which treats a worker as automatically unfairly dismissed if the reasons (or main reason) for the dismissal is that he or she exercised or sought to exercise the right to be accompanied to a disciplinary or grievance hearing, or accompanied (or sought to accompany) another worker to such a hearing. The reason for offering a wider protection for one right (the right not to suffer a detriment) and a

[30] This provision defines a worker as someone who has entered into or works under '(a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. . .'

[31] See s 54(3) of the National Minimum Wage Act 1998, s 13(1) of the Employment Relations Act 1999, reg 2(1) of the Working Time Regulations and reg 1(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

[32] In ERA 1996 s 43K.

[33] In health and safety cases, Sunday working cases, cases where an employee is a trustee of an occupational pension scheme, cases involving employee representatives, cases involving employees exercising the right to time off work for study or training, employees taking leave for domestic or family reasons, employees taking advantage of their right to tax credits under the Tax Credits Act 2000 and employees exercising their rights to flexible working.

[34] In working time cases. A similar protection is offered to 'workers' who suffer a detriment because they exercised their statutory right to be accompanied at a disciplinary or grievance hearing: see Employment Relations Act 1999, s 12(1) and (2).

[35] ERA 1996, ss 99–105.

narrower protection which is arguable more important, since it relates to the loss of livelihood (the right not to be unfairly dismissed) is not immediately obvious.

Finally, it is pertinent to observe that, when one is confronted with such inconsistencies in one legal system, the arguments in favour of an autonomous definition throughout the legal systems of the EU and in private international law become even more attractive.

2. *French Law*

French domestic law does not give a definition of the employment contract; nor has the *Cour de cassation* suggested a complete and final definition of the employment contract. Legal writers are agreed, however, that an employment contract is 'the agreement according to which a natural person undertakes to place his services at the disposal of another person, natural or legal, in respect of whom he is a subordinate, in return for the payment of a salary'.[36] The fact of being in a subordinate position is not *'the'* criterion since the definition requires the combination of three elements: the personal provision of work (or the undertaking to supply it), the payment of a salary (or the promise to pay it), and a relationship of subordination.[37] However, the position of being in a subordinate relationship is regarded as the essential factor on which the court concentrates its attention in the event of any dispute.

Since confirming the importance of the existence of a subordinate relationship as a factor in the *Bardou* decision of 1931,[38] the French *Cour de cassation* has continued to extend its definition of the criterion as long as the provision of services was 'in the context of an organised service',[39] in order notably to bring within the definition professionals who of necessity work independently in respect of the provision of their services (eg doctors, lawyers, artists).

However, following the *Loi Madelin*,[40] the *Cour de cassation* has given a more restrictive definition to the criterion of subordination by stating that it is characterized by the carrying out of services 'under the authority of an employer who has the power to give orders and instructions, to control the

[36] Jean Pelissier, Alain Supiot, and Antoine Jeammaud *Droit du travail* (21st edn Dalloz Paris 2002) no 127.

[37] ibid no 127.

[38] Cass civ (6 July 1931) *Bardou* D P 1931.1.121, Pic note (M Pic, proponent of the theory adopted by the *Cour de cassation*, in preference to the test of economic dependence proposed by P Cuche).

[39] Jean Pelissier, Alain Supiot, and Antoine Jeammaud *Droit du travail* (21st edn Dalloz Paris 2002) no 128 and the case law cited.

[40] Law of 11 Feb 1994 relating to initiative and individual undertaking (known as the 'Madelin Act') created a presumption (simple) whose effect is that some contracts are presumed not to be a contract of employment (Art L 120-3 of the French Labour Code).

execution and to excuse the failings of his subordinate'.[41] In order to identify the elements that comprise the notion of subordination, the judges have recourse to the technique of *le faisceau d'indices* (in English law called 'the multiple test') considering the following factual elements:

1. the behaviour of the parties;
2. the relationship of the parties inter se;
3. the time and place of the activity;
4. the fact that the provider of the services works alone or with the support of another;
5. the ownership of the equipment and raw materials; and particularly,
6. the existence or absence of direction and control on the part of the person benefiting from the provision of the services, as well as the terms of remuneration.

3. German Law

'Employees' are known as '*Arbeitnehmer*' in German legal terminology, whereas 'self-employed' persons are often called '*Freie Mitarbeiter*'. An employment contract is an '*Arbeitsvertrag*'. The '*Freie Mitarbeiter*' will either have a '*Dienstleistungsvertrag*'—a 'contract for services'—or a '*Werkvertrag*', for which it is possible to find the same German translation in a variety of dictionaries. The group of employees known as '*Arbeitnehmer*' is subdivided into '*Arbeiter*' and '*Angestellte*'. The translation for '*Arbeiter*' is quite simple: 'worker', or to be precise, 'blue collar worker' or 'manual worker'. The translation for '*Angestellter*' is, if one follows most dictionaries, puzzlingly enough again 'employee' or the seldom used, because too colloquial, term 'white collar worker'.

This is unlikely to cause too much confusion, as in most areas '*Arbeiter*' and '*Angestellte*' share the same rights. However, it may be useful to consider briefly the difference between both sub-groups of employees, this time meaning '*Arbeitnehmer*'.

Under German employment or labour law (*Arbeitsrecht*) the distinction between an employee (*Angestellter*) and a worker (*Arbeiter*) is relevant for scholars of legal history, but of little interest for today's legal practitioners. However, for a very long time until the early 1980s the distinction between blue collar workers (*Arbeiter*) and white collar workers (*Angestellte*), respectively employees, played a vital role in defining the rights and protection offered by the law. For example, until 1990 the main codification of the German Civil Law (*Bürgerliches Gesetzbuch*, or BGB) laid down two different minimum

[41] Cass soc *Société Générale v URSSAF de la Haute-Garonne* (13 Nov 1996) JCP 1997 E.II.911, note J Bathélémy, Dr soc (1996) p 1067, note J-J Dupeyroux. The definition is as valid for labour law as it is for social security law. See also Cass Soc (19 Dec 2000), Dr soc (2001) p 227, A Jeammaud note.

termination periods for workers and employees if the termination was issued by the employer[42] (blue collar workers enjoyed less protection, ie a shorter minimum termination period, than the white collar employees).

In 1990, the Federal Constitutional Court (*Bundesverfassungsgericht*) handed down a judgment that declared this distinction unconstitutional and therefore void.[43] The main legal reason was not a big surprise to the German legal community as Article 3 (1) of the German constitution (*Grundgesetz*) states that 'All persons shall be equal before the law.' Inequalities are only allowed if there is an objective reason (*sachlicher Grund*)[44] for the unequal treatment of two different—and as far as minimum termination periods are concerned there is no such objective reason. Thus, since the revision of §622 BGB in 1993, the BGB makes no difference between workers (*Arbeiter*) and employees (*Angestellte*), but it still uses both terms.

One might argue that there is no reason to do so—if workers and employees have to be treated equally why are both terms still upheld and not replaced with a term that means both groups? Or alternatively why could not one term, eg employee, include the other, eg worker? The reason for that is that there might be some fairly remote areas where a distinction between workers and employees with respect to their legal rights is constitutional as there is an objective reason. In the context of this article, however, these rare singularities may be ignored as in the core areas of employment law, such as protection against unfair dismissal, there is no objective reason for a distinction between workers (*Arbeiter*) and employees (*Angestellte*). Finally, both are '*Arbeitnehmer*' (which can, as said, again be translated as 'employee').

There are two different species of an '*Angestellte*' and they can easily be distinguished: one group is entitled to fly economy, the other group may check in at the business counter. The economy class employee is just called 'employee' (*Angestellter*), the business class employee is referred to as 'executive employee' (*Leitender Angestellter*). Under German law, one would expect a codified definition of what an executive employee is and what distinguishes him or her from the lower ranks of ordinary employees.[45] But in fact there are two definitions. One is laid down in § 14 *Kündigungsschutzgesetz* (Protection Against Dismissal Act), the other is laid down in § 5 (3) *Betriebsverfassungsgesetz* (Employees' Representation Act), and both definitions differ.[46] However, if an employee is entitled to hire or to dismiss other employees without being obliged to ask the CEO or anybody else, this employee will in many cases be an executive employee under both Acts.

[42] §622 BGB. See also Manfred Lieb *Arbeitsrecht* (C F Müller Heidelberg 2003) §622 para 28

[43] BVerfGE 82, 126.

[44] Lieb (no 46) §622 para 83.

[45] There is no executive worker, by the way: see Manfred Löwisch and Günter Spinte, *Kommentar zum Kündigungsschutzgesetz* (Verlagsgesellschaft Recht und Wirtschaft Heidelberg 2004) § 14 para 23.

[46] Wolfdieter Küttner *Personalbuch* 2004 (Beck Verlag München 2004) § 14 para 17.

Unfortunately for the executive employee, both Acts state that they are not fully applicable to them.

The difference between an employee and a freelancer is the centre of the debate as to what distinguishes an employee (*Arbeitnehmer*) from a freelancer (*Freier Mitarbeiter*). Again one might be tempted to think that German law would have a proper legal definition somewhere in the statute book. Unfortunately that is not the case. In this most important area of law the Germans rely on case law, developed by the employment courts.

According to the highest German employment court, the *Bundesarbeitsgericht* (BAG), every single case must scrutinized separately and there must not be a schematic approach to determine the legal nature of the employment.[47] However, the main criterion that distinguishes an employee from a freelancer is that of factual and legal independence. A freelancer is not '*weisungsgebunden*', meaning that he is not subject to directives or dependent on the instructions of the employer, but '*selbständig*', meaning independent.[48]

However, the borderline between independence and dependence is blurred. Typically, a freelancer can determine his own place and time of work whereas an employee has to report for duty when and where the employer tells him to do so.[49] Furthermore, an employee will be fully integrated into the organization of the employer, whereas a freelancer is only loosely connected with his client.[50] Therefore, in most cases only employees will use the offices, the telephones, the computers, etc of the employer but not freelancers.[51]

When it comes to instructions, a freelancer will only be given a vague outline of what is expected from him. An employee will receive more detailed orders. To an employee the employer will assign new tasks without the consent of the employee within the scope of his so-called '*Direktionsrecht*', meaning the right to give compulsory directives to the employee. With a freelancer new tasks must be negotiated and agreed upon.[52]

All this sounds very theoretical—and indeed it is—but it is only the tip of the iceberg, as there are many more theories and aspects that have to be considered. But law does not exist for its own merit—it exists to solve cases (rather than create them). Thus, the most interesting question is: what would French and German employment law do with the English cases discussed before, namely *Ready Mixed Concrete, Tanton* and *MacFarlane*? Would the outcome be different? This question is considered below.

[47] BAG *Neue Zeitschrift für Arbeitsrecht* 51 (2001).
[48] ibid 1102 (2000).
[49] BAG *Betriebsberater* 1876 (1999); BAG Neue Zeitschrift für Arbeitsrecht 595 (1998).
[50] BAG *Der Betrieb* 1996 (1980).
[51] ibid.
[52] Küttner (n 50) 1132.

B. Grey areas

It is clear from the examination of the legal systems set out in the preceding sections that there are grey areas. In this context, it may be helpful to reflect briefly on the approaches of the French, English, and German courts. If one takes as an example the decisions in *Ready Mixed Concrete* or *Express & Echo Ltd v Tanton*, the facts of which are set out above, and compares the approaches taken by the French courts and the courts of the United Kingdom, it is likely that the French courts would reach the opposite conclusion to that reached by the courts in those cases. In *Ready Mixed Concrete*, the determinative factor for MacKenna J was the 'ownership of the instrumentalities' (as he put it), ie the ownership of the lorry. In *Tanton*, the Court of Appeal made much play of the fact that the individual in question was not required to perform the work personally and it seems to have been this factor that determined their view of the outcome of the appeal. On the other hand, although two of the *faisceau d'indices* used by the French courts are the ownership of the equipment and the fact that the provider of the services works alone or with the support of another, nevertheless the criterion of subordination would probably lead to the determination in both cases that the individual was an employee rather than self-employed. Had the Court of Appeal or MacKenna J looked at the case before them through the prism of economic dependence, again it might well have reached an opposite conclusion.

If one turns to consider how German Law would deal with these English cases, some interesting points emerge. In the actual decision itself, the fact that the person concerned owned the tools of the trade was enough to tip the balance against his claim to be an employee. The *Bundesarbeitsgericht* (BAG), has had to decide some very similar cases.[53] In this case, a lorry driver was considered to be an employee despite the fact that he owned the vehicle. The BAG argued that owning the tools of the trade was not a very important factor in determining whether somebody is an employee or a self-employed person. Instead, the focus is on the question whether the driver really is independent in conducting his business and whether he is allowed or even encouraged to work for other clients.

> In this case, the ownership of the vehicle is irrelevant for the determination whether the driver—the plaintiff—is self-employed or employed by the defendant. The independence of the driver does not result from the fact that he faces more risks, duties and burdens than an employee by providing the tools of the trade. Also, it is irrelevant whether the vehicle was painted with the colours and the logo of the defendant. Relevant, however, is if the use of the own vehicle provides the opportunity for the owner to act independently and to determine himself what to do and when to do. Here, this was not the case. Due to the amount of hours of work the driver had to work exclusively for the defendant and

[53] BAG NZA 1998, 364 = ??BAG DB 1998, 625.

due to the prohibition to take other parcels on boards than those delivered by the defendant, the plaintiff was not independent.

In any event, it appears that neither English law nor French nor German law is in complete agreement in relation to the definition of employment contract, as grey areas have been identified. This is also true—to a certain extent—for Community law.

III. THE CONCEPTS OF 'WORKER' IN COMMUNITY LAW

The examination of the concepts of 'worker' in Community law might appear deceptive. One reason for that is sometimes no such concept, because Community law leaves it to domestic law. However, there is one reason for satisfaction: sometimes Community law adopts an autonomous meaning which could be a basis for a definition in European private international law.

At first glance, a review of Community Law would give the impression that the concept of 'worker' is identical to the domestic notion of the 'employee'. The position is in fact rather more complex than that. In some cases, the English versions of directives refer to 'employees';[54] in others, they refer to 'workers'.[55] In fact, European Directives using the term 'worker' are trans-

[54] Thus, Council Directive 80/987/EEC of 20 Oct 1980 on the protection of employees in the event of the insolvency of the employer applies to the claims of 'employees' and leaves the definition of 'employee' to national law: Art 2(2). Council Directive 91/533/EEC, mentioned below, is expressed to apply to 'every paid employee having a contract of employment relationship defined by the law in force in a Member State . . .' Council 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 on the event of transfers of undertakings, businesses or parts of undertakings or businesses is expressed to apply to 'employees'; the word 'employee' is defined as 'any person who, in the Member State concerned, is protected as an employee under national employment law': Art 2(1)(d). A similar position is taken by European Parliament and Council Directive 2002/14/EC of 11 Mar 2002 establishing a general framework for informing and consulting employees in the European Community: see Art 1(1) and 2(d). The transposing instruments in UK law also apply to employees.

[55] This group of directives tend to be health and safety measures, which probably accounts for the fact that they apply to 'workers' as opposed to 'employees'. Thus, Council Directive 89/391/EC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (the '1989 Directive' or the 'Heath and Safety Directive of 1989') applies to 'workers'. These are defined by Art 3 as 'any person employed by an employer, including trainees and apprentices but excluding domestic servants'. Art 3 goes on to define 'employer' as 'any natural or legal person who has an employment relationship with the worker...' Following on from this Directive are Council Directive 92/85/EEC of 19 Oct 1992 ('the Pregnant Workers Directive') and Directive of the European Parliament and of the Council 2003/88/EC of 4 Nov 2003 concerning certain aspects of the organisation of working time, both of which refer back to the 1989 Directive. In addition, the Parental Leave Directive (96/34/EC of 3 June 1996) applies to 'workers . . . who have an employment relationship . . . as defined by the law . . . in each Member State': see clause 1(2) of the Annex; the Posted Workers Directive (96/71/EC of 16 Dec 1996) applies to 'workers', the definition being 'that which applies in the law of the Member State to whose territory the worker is posted': art 2(2); and the Part-time Workers Directive (98/23/EC of 7 Apr 1998) applies to 'part-time workers who have an employment contract or employment relationship as defined by the law . . . in force in each Member

posed into domestic law using the term 'employee' except where the term 'salaried worker'[56] is used as it is in France (but not in English law).

In the United Kingdom, the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002,[57] which bring into effect the European Directive of 1999 on Fixed Term Contracts,[58] are a typical example since they use the term 'employee' (*salarié*) to translate the term 'worker' (*travailleur*).[59] This is also the case with the legislation transposing the Pregnant Workers Directive and the Parental Leave Directive.[60] On the other hand, the legislation implementing the Part-time Workers Directive and the Working Time Directive is expressed to apply to 'workers'.[61] The impression one is left with is that there is little consistency to be found in the approach of Community law, especially when it leaves the term of 'worker' to the domestic law of the Member States. To that extent, it appears like a Russian doll concept. However, Community Law sometimes advocates the adoption of a standard definition of 'employee' and 'employment contract'.

A. Russian Doll Concept

Directives tend to leave it to the domestic law of the Member States to define the term 'worker', or 'work relationship'. So the 1996 Parental Leave Directive applies '*to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State*'.[62] In the same way, the

State': Art 2(1). The Fixed-Term Workers Directive (99/70/EC of 28 June 1999) uses a definition identical to that used by the previous directive.

[56] See Directive 91/533/EEC of the Council, of 14 Oct 1991 on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJEC no L 288 of 18 Oct 1991, p 32 (Art 1.1). No specific domestic legislation was introduced to implement this Directive, but the predecessor of the Employment Rights Act 1996 (the Employment Protection (Consolidation) Act 1978) was amended by the Trade Union Reform and Employment Rights Act 1993 so as to bring it into conformity with the Directive. Those provisions as amended (ss 1–12) were then consolidated into the Employment Rights Act 1996 as ss 1–12.

[57] SI 2002 no 2034.

[58] Directive 1999/70/EC of the Council, of 28 June 1999, concerning the ETUC, UNICE and ECPE framework agreement on fixed-term work, OJEC no L 175 of 10 July 1999, 43.

[59] And it would not appear that this adaptation is defective, insofar as the directive leaves the definition of the term in the hands of Member States.

[60] Compare Art 8 of the Pregnant Workers Directive (which gives a right to a minimum period of maternity leave) with ERA 1996, s 72 (which implements that right into UK law). The latter provisions applies only to 'employees'. So too with the Parental Leave Directive, which gives the right to parental leave to 'workers'. The relevant provision of the ERA 1996—ss 76–80—and of the Maternity and Parental Leave Regulations 1999 (SI 1999/3312) apply to 'employees'.

[61] See the Part-time Workers (Prevention of Less favourable Treatment) Regulations 2000 (SI 2000/1551), reg 1(2), and the Working Time Regulations 1998 (as amended), reg 2(1).

[62] Directive 96/34/EC of the Council of 3 June 1996 concerning the framework agreement on parental leave concluded by UNICE, ECPE and ETUC, OJEC no L 145 of 19 June 1996, 4 (clause 1.2 of framework partnership). The 1997 directive on part-time work adopts a similar wording: thus, it applies '*to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State*' (see

1996 Directive on the posting of workers states that the definition of 'worker' is 'that which applies in the law of the Member State to whose territory the worker is posted'.[63] On the other hand, one of the few directives in this field to apply to *employees* as opposed to *workers* is the 1991 Directive on the information to be supplied to employees. This Directive states that it is to apply to 'every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'.[64] The French version of the directive uses the term *'travailleurs'* whereas the English version uses the word 'employees'. This is exceptional: when the French version of a directive refers to *'travailleurs'* the English version normally speaks of 'workers'. Another example is the Acquired Rights Directive, which defines 'employee' as 'any person who, in the Member State concerned, is protected as an employee under national employment law.'[65]

Failing a precise definition in the Community law texts, it is the case law of the Court of Justice (ECJ) that has often decided to attribute a national and thereby plural definition to Community concepts. Thus, Regulation 1408/71, which is directly effective, applies to '*any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons*'.[66] The ECJ, on a reference by the Dutch *Hoge Raad* concerning the status of a director and majority shareholder of a private limited liability company carrying on business in two Member States, held that the terms 'employed' and 'self-employed' should be interpreted as '*activities which are regarded as such for the purposes of the social security law of the Member State in whose territory those activities are pursued*'.[67]

However, in this case, the Dutch government argued that the concepts of 'employed' and 'self-employed' should have a standard meaning by reference to Articles 39–42 of the EC Treaty.[68] The Court rejected this on the grounds

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 concerning the protection of consumers in the area of distance contracts. OJEC no L 144 of 4 June 1997 p 19 (Art 2.1 of the Agreement annexed to the directive)).

[63] Posted Workers Directive Art 2.2.

[64] Directive 91/533/EEC of the Council, of 14 Oct 1991, on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJEC no L 288 of 18 Oct 1991, p 32 (Art 1.1).

[65] Council Directive 2001/23/EC 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 under-takings or businesses. This is a consolidation of the 1977 Directive (77/187/EEC) and the amending Directive (98/50/EC).

[66] Regulation (EEC) no 14087/71 of the Council, of 14 June 1971, relative to the application of social security schemes to employees and their family who move within the Community, OJEC no L 149 of 5 July 1971, 2, Celex no 3197IR1408 9 (Art 1. a) (i)).

[67] ECJ case C-221/95 *EJM de Jaeck v Staatssecretaris van Financiën et Institut national d'assurances sociales pour travailleurs indépendants v C Hervein et Hervillier SA* (30 Jan 1997) 2 decisions. Rec p I-461, Europe 1997, comm 111, Travail et Protection Sociale 1997, comm 196, obs Ph Coursier.

[68] ibid point 16.

that the aim of the Regulation was to bring about a coordination of domestic laws and not their total harmonization.[69] This was why the Court decided that it was appropriate to respect the territoriality of social security law. In that sense, the meaning of these terms turns to be a 'Russian doll concept'!

Furthermore, the ECJ has also indicated that the term 'worker' in Regulation 1408/71 is to be applied to any person who 'is *covered, even if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme*', and that is '*irrespective of the existence of an employment relationship*'.[70] The Court drew attention to the fact that the term 'employee' can have a different meaning in respect of social security law from that in respect of labour law.[71]

In conclusion it can be deceptively stated that, in their domestic legislation, Member States do not have the same definition of the term 'employee' which means that the Community law term 'worker' can be interpreted differently according to the Member State to which the interpretation is left, either by the Community Law text or by Community case law. Alternatively however, Community law sometimes adopts an autonomous conception of worker, and therefore of employment contract.

B. An Autonomous Concept

Some Directives opted for an autonomous concept of 'worker', together with the ECJ when interpreting the Freedom of Movement of Workers.

1. Some Directives

Not all Community law texts leave the matter of the definition of 'employee' or 'worker' to be decided by the Member States. Where the text is silent on the matter, there is another possible approach. One can take the view that an autonomous Community definition should be adopted. An important example of this approach is the Health and Safety Directive of 1989.[72] The Directive is expressed to apply to all sectors of activity, both public and private and appears to allow no latitude of definition to the Member States. Article 3 defines 'worker' as 'any person employed by an employer, including trainees

[69] ibid point 28.

[70] ECJ C-85/96 *Maria Martinez Sala v Freistaat Bayern* (12 May 1998) Rec p I-2691 (point 36), CMLR 2000, 449, note by C Tomuschat.

[71] Which is no longer the case in French law: see (n).

[72] One of the Directives to derive from the main 1989 Directive is Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding. The Directive appears to adopt the definition of worker given in the main directive. As with other implementing UK legislation mentioned earlier, the legislation applies to employees: see Employment Rights Act 1996, ss 71–75, as substituted by the Employment Relations Act 1999, s 7 and Sch 4, Pt I and amended by the Employment Act 2002, s 17(1) and (2).

and apprentices but excluding domestic servants.' Unlike the other directives mentioned earlier, it says nothing about leaving it to the Member States to define the term. This tends to suggest that a community definition is intended.

One of the Directives to derive from the 1989 Directive is the 1993 Working Time Directive,[73] now consolidated into the 2003 Directive. This directive gives no definition of the term 'worker'. It applies to 'all sectors of activity'.[74] Bearing in mind that the Directive derives from, and is linked to, the 1989 Directive, it would seem that the 1993 (now the 2003) Directive was intended to utilise the definitions set out in the earlier Directive. This being so, in the absence of a precise definition, should one adopt the general definition favoured by Community law[75] or, on the contrary, take the attitude that it is appropriate to adopt a national rather than a Community interpretation?

Bearing in mind that the 1989 Directive, unlike many of the other Directives considered above, says nothing about leaving the definition of the term 'worker' to the Member States, we believe that the only conclusion that can be reached is that, at least in the field of legislation aimed at harmonizing the law relating to health and safety, the intention was that there should be a definition which would apply on a Community-wide basis. On the other hand, the other Directives, which relate to matters of private law,[76] effectively permit a national rather than a Community interpretation. There is thus, in effect, a limit to the harmonization of Community Law: the ECJ drew attention to this notably in cases where harmonization can impact on the social security budget of Member States.[77]

However, in the case of primary or secondary Community Law where the legislation extends beyond coordination and aims for true harmonization,

[73] Formerly art 118A. See also Art 137.

[74] Directive 93/104/EC of the Council, of 23 Nov 1993, concerning certain aspects of the organization of working time, OJEC no L 307 of 13 Dec 1993, p 18 (Art 1.3). This Directive has now been consolidated into Directive 2003/88/EC of the European Parliament and of the Council, of 4 Nov 2003. The article in the three consolidated directive is 1.3.

[75] See above.

[76] In fact, when the above 1993 Directive was being voted on, the British government claimed that a unanimous vote was necessary because the provision did not qualify as a measure subject to majority voting. They subsequently took proceedings in the ECJ, arguing that, as the directive was a social measure, it required unanimity rather than the qualified majority voting procedure used by the Council. They lost: see United Kingdom v Council of the European Union [1997] ICR 443. Art 137 of the EC Treaty (ex-art 118) states: 'the Community shall support and complement the activities of the Member States in the following fields:

- improvement, in particular, of the working environment to protect the workers' health and safety;
- working conditions;
- the information and consultation of workers; (...)'.

It goes further: However, 'the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee and the Committee of the Regions in the following fields: (...) (c) social security and social protection of workers; (...).'

[77] ECJ case C66/95 *R. v Secretary of State for Social Security, ex parte Eunice Sutton* (22 April 1997) Rec p I-2163.

these instruments demand the adoption of a standard definition of the terms used. The result is that alongside the delegated Community legislation referred to above which perpetuate national concepts, there is a community law concept of the term 'employee' which reveals, if the need arises, the complexity of the notion.

Put another way, when it is no longer a case of a simple coordination between the systems or regulations of the Member States (as in respect of the question of social security), but where there is a clear case of harmonisation of regulations, then a community notion of the employment contract is required. This is the case, for example, in respect of the free movement of workers.

2. *The Wide Interpretation Applied in Respect of the Freedom of Movement of Workers*

Originally Community Law, as contained in Article 39 EC Treaty[78] and as interpreted by the Court of Justice, in effect took the view that the term 'worker' should have a standard interpretation.[79] The Court interprets this term very widely. Thus, at a very early date, the Court held in the *Unger* case that the definition of worker extended beyond the actual periods of actual work to cover periods of professional training or the search for employment.[80] The reason for this is that it involved the interpretation of one of the fundamental freedoms of the EEC Treaty (free movement of workers) and that the aim of the Court was to avoid the situation whereby a Member State could, by means of the application of a restrictive definition, limit as much as it wished the scope of the principle of free movement of workers.[81]

In a second case, Mrs Levin, a British national living in the Netherlands, worked as a chambermaid for a salary below the minimum level fixed in the Netherlands. The Dutch government considered that she could not be considered to be a 'worker'. The Court of Justice on the other hand considered that there could be no reliance on national law and that the concept should have a Community construction.[82]

[78] Previously art 48 EEC Treaty.

[79] See generally Margot Horspool et al *European Union Law* (3rd edn Butterworths London 2003) no 16.7 et seq.

[80] ECJ Case 75/63 *MKH Unger, wife R. Hoekstra v Bestuur der Bedriijfsvereniging voor Detailhandel en Ambachten à Utrecht* (19 Mar 1964) Rec 347 (point 51), Dr soc 1964, p 658 G Lyon-Caen note. Ms Hoekstra was a resident of the Netherlands where she worked for some time. Whilst visiting her family in Germany, she had to undergo medical care for which she demanded reimbursement from the Dutch social security authorities. Her right to reimbursement depended on the question whether she was a '*worker or an assimilated worker*' in the sense of regulation no 3 concerning social security of migrant workers, implementing the EEC Treaty.

[81] Idem (point 51); G Lyon-Caen *La jurisprudence sociale de la Cour de justice des Communautés en 1964* (RTD eur PLACE 1965) 84 (85); Alain Supiot (under the direction of) *Au-delà de l'emploi : transformations du travail et devenir du droit du travail en Europe* (Flammarion Paris 1999).

[82] ECJ Case 53/81 *D M Levin v Secrétaire d'Etat à la justice* (23 Mar 1982) Rec 1035. The Court later stated that the motives that can influence a national of the Community to look for

The Court later confirmed that the definition of the term 'worker' in the sense of Article 39 EC Treaty should have a Community interpretation.[83] In actual fact, the ECJ laid down three factors characteristic of a work relationship under Article 39 EC Treaty: '*the essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration.*'[84] Furthermore, the services must be real and effective rather than being purely marginal and borderline.[85]

In the *Lawrie Blum* case it was established that the trainee teacher was, throughout the period of his teacher-training placement, under the direction and control of the teaching establishment to which he was attached, and which fixed the tasks to be carried out and the hours of work. The trainee teacher had to carry out these instructions and comply with the regulations throughout a substantial period of his teacher-training placement. He was even called upon to teach pupils of the school, thus supplying for the benefit of the establishment services with an economic value. The payment that he received could be considered as remuneration in respect of these services and the obligations that the completion of the teacher-training placement imposed on him. The Court therefore held that the three criteria required to establish the existence of a work relationship were established as being present.[86]

In respect of the interpretation of Articles 49 and 50[87] of the EC Treaty, which deal with freedom of movement of services, the ECJ held that the work of M Steymann in a religious order for which he received no remuneration, but in respect of which the religious order provided for his material needs, was an economic activity.[88]

employment in another Member State are not relevant: ECJ Case 139/85 *R H Kempf v Secrétaire d'Etat à la Justice* (3 June 1986) Rec 1741.

[83] For recent examples, see ECJP case C-107/94 *H Asscher v Staatssecretaris von Financiën* (27 June 1996) Rec p I-3089 (point 25), citing ECJ Case 66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121 (point 17).

[84] ECJ Case 66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121 (point 17).

[85] ECJ Case 53/81 *D M Levin v Secrétaire d'Etat à la Justice* (23 Mar 1982) Rec 1035.

[86] ECJ aff 66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121 (point 18). French case law separates the definition of a contract of employment when the work, instead of being the main subject of a contract, constitutes a simple means of training for educational purposes. Thus, there is no contract of employment between an employer and a trainee working in the course of an educational degree: Cass soc, 14 Novr 2000, RJS 2/01, no 157. The English law position on this is best highlighted in *Wallace v CA Roofing Services Ltd* [1996] IRLR 435, where it was held that despite modern legislation having, for some purposes, assimilated apprenticeships to contracts of employment, the contract of apprenticeship remained a distinct in the realms of common law. Its first purpose was training; the execution of work for the employer was merely secondary, and was therefore not regarded as a contract of employment. The possibility of transforming such a contract for training into a contract of employment was appreciated, but would require precise and clear wording.

[87] Previously 59 and 60. Art 50 states that services are to be considered as 'services' within the Treaty where they are normally provided for remuneration.

[88] ECJ Case 196/87 *Udo Steymann v Staatssecretaris van Justitie* (5 Oct 1988) Rec 6159. On

IV. CONCLUSION

This article concludes that the following definition of employment contract could be adopted in European private: 'an employment contract is a contract whereby a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration'. This definition, taken from the *Lawrie–Blum* decision, can be taken as a sound basis for a concept of employment contract in European private law. More importantly, this article defends the idea that a broad interpretation has to be given to the notion of the employment contract in European private law, in a similar way to the interpretation given by Community law when construing the Freedom of Movement of Workers. This is because European private law rules pertaining to employment contract are protective of employees; such protection could be impaired if a narrow definition, or a definition left to the Member States, was to be adopted.

the other hand, in the sense of Art 39 of the EC Treaty, the person exercising an activity within the framework of his rehabilitation in a therapeutic centre for drug addicts is not engaged in an economic activity but only an activity of a social nature: ECJ aff 344/87 *I Bettray v Staatssecretaris van Justitie* (31 May 1989) Rec 1989 1621. Regarding French law, a worker of the Emmaus Community who '*submitted himself to the community's rules of life which defines a host environment comprising the participation in a work designed for the integration of workers*' is exclusive of any subordination link: Cass soc 9 May 2001, *Communauté d'Emmaus de la Pointe Rouge v José Maria Miralles Barons*, Dr soc 2001, 798, J Savatier note, D 2002,1705, E Alfandari note. Similarly, the agreement concluded between a company and the French National Employment Agency (ANPE) (*Association Nationale Pour l'Emploi*) to assess a job applicant at a place of work for a period that can extend up to two weeks does not characterize a work contract (Cass soc 18 July 2001, *M Duquenne v M. Rapnouil*, Dr soc 2001, 1115, obs Y Rousseau). In the United Kingdom, the tendency of the courts and tribunals in all the cases which have come before them in recent years has been effectively to remove from church ministers and priests the temporal jurisdiction of the courts, by holding, irrespective of religious denomination, that they are not employed under a contract of employment. The preferred approach is that of the Court of Appeal in *President of the Methodist Conference v Parfitt* [1984] ICR 176, which is to ask, first, whether the applicant had a contract with the religious organization in question, and, if there was a contract, whether the contract was a contract of employment. The Court of Appeal's approach in *Parfitt's* case has been followed in cases involving other religions: see, for example, *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309, which involved a Sikh priest who was dismissed by his temple and *Diocese of Southwark v Coker* [1999] ICR 140, which involved a priest of the Anglican Church who was an assistant curate in the diocese of Southwark. For a detailed analysis of the status of priests in the Church of England, see Brodin 'The Employment Status of Ministers of Religion' (1996) 25 ILJ 211. On the other hand, employees of the church would have the ordinary protection of Employment Law, for example, the organist or those employed in a shop run by the church, subject, of course, to the proviso that they fulfilled the requirements of the multiple test. This can be inferred through the ecclesiastical cases of *Davies v Presbyterian Church of Wales* [1986] IRLR 184. A similar position in the UK can also be seen with regard to volunteers. Employee status has been found despite volunteers not being engaged in an economic activity, and only receiving flat rate 'expense' payments: *Migrant Advisory Service v Chaudri* Appeal Number: EAT/1400/97 (28 July 1998).