

Arbeitnehmerfreizügigkeit: Segen oder Fluch 50 Jahre Arbeitnehmerfreizügigkeits

The legal concept of 'worker' in European Union Law

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WORKERS IN TFEU.

- **ARTICLE 45**

- 1) *Freedom of movement for workers shall be secured within the Union.*
- 2). *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*

- **ARTICLE 48**

- 1) *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants.*

WORKERS IN TFEU

- **Article 153**

With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- *(a) improvement in particular of the working environment to protect workers' health and safety;*
- *(d) protection of workers where their employment contract is terminated;*
- *(e) the information and consultation of workers;*

WORKERS IN TFEU

Article 157

“Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”.

THE CONCEPT OF WORKERS IN TFEU AND IN THE SECONDARY LEGISLATION

- The concept of worker constitutes a key concept of both EU social security law and EU labour law. It may be described by EU law or national law.
- One cannot speak of a single concept that has an identical meaning in all Member States and in all fields of EU law, including labour and social security law.

SEARCHING FOR A HARMONIZED CONCEPT

- A statutory definition of the concept of 'worker' at European level has its advantages and drawbacks.
- It secures uniform application of EU legislation by providing transparent guidelines and prevents Member States from circumventing the European concept by means of exemptions and escapes.
- An excessively narrow definition obstructs the application of labour regulations to persons who are in a similar situation and, therefore, are in need of protection but do not fall under the definition.

SEARCHING FOR A HARMONIZED CONCEPT

- *In September 2015 , Commissioner Thyssen addressed to President Juncker a document suggested that DG EMPL may **'intend to prepare a legislative proposal to introduce an autonomous EU definition of "worker" and lay down a number of rights that all workers should be entitled to'**.*

SEARCHING FOR A HARMONIZED CONCEPT

- **Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union.**
- {COM(2017) 797 final}{SWD(2017) 478 final}.
- The proposal for a Directive is a direct follow-up to the proclamation of the European Pillar of Social Rights.
- Article 2 Definitions:
- (a) *'worker' means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration;*

SEARCHING FOR A HARMONIZED CONCEPT

- **María Sala v Freistaat Bayern (1998) C-85/96.**
- *“It must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied”.*

EUROPEAN CONCEPT OF WORKERS VERSUS NATIONAL CONCEPT

- *"If the definition of the term migrant worker 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". "Moreover nothing in articles 48 to 51 of the treaty leads to the conclusion that these provisions have left the definition of the term 'worker' to national legislation". (75/63 Unger)*

EUROPEAN CONCEPT OF WORKERS VERSUS NATIONAL CONCEPT

- *European union law must be interpreted as meaning that it is for the Member states to define the concept of 'workers who have an employment contract or an employment relationship' .(393/10, O'Brien)*

EUROPEAN CONCEPT OF WORKERS VERSUS NATIONAL CONCEPT

- *“To restrict the concept of “worker” as referred to in directive 2008/104 to persons falling within the scope of that concept under national law [...] is liable to put in danger the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive”.* (C-216/15 **Ruhrlandklinik**)

EUROPEAN CONCEPT OF WORKERS VERSUS NATIONAL CONCEPT

C-66/85 Lawrie-Blum .
C-216/15 Ruhrländklinik

- *Since freedom of movement for workers constitutes one of the fundamental principles of the community , the term 'worker 'in article 48 may not be interpreted differently according to the law of each member state but has a community meaning. Worker can be considered a person, that for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration .,). C-66/85 Lawrie-Blum*
- *In accordance with the settled case-law of the court, 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. C-216/15 Ruhrländklinik*

ALLONBY, C-256/01. EQUAL TREATMENT

- *“For the purposes of that provision(Article 157 TFEU), there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration”.*

THE CONCEPT OF WORKER IN THE LABOUR DIRECTIVES

- Some Directives refer to the national understanding while others leave the way open for the argument that an autonomous European interpretation has to be applied.
- It appears that the ECJ has increasingly moved towards a Union-wide concept of 'worker' in secondary law. This has been achieved not only through its interpretation of the directives but also by applying the argument of 'effect utile' (practical effectiveness of EU law) to those directives that explicitly refer to the national understanding of the concept of 'worker'.

Occupational Safety and Health (OSH) Framework Directive 89/391/EEC81

- *Article 3(a) defines 'worker' as 'any person employed by an employer, including trainees and apprentices but excluding domestic servants'*
- *Article 3(b) defines 'employer' as 'any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment'.*

Part-Time Work Directive (97/81/EC),
Fixed-Term Work Directive (1999/70/EC)
Parental Leave Directive (2010/18/EU)

PERSONAL SCOPE:

“Persons who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”

C-105/84 DANMOLS. DIRECTIVE 77/187/EEC, TRANSFERS OF UNDERTAKINGS

- Levin ruling : *The term ' worker ' as used in the Treaty , may not be defined by reference to the national laws of the Member States but has a Community meaning .*
- *It is clear from those provisions that directive no 77/187 is intended to achieve only partial harmonization essentially by extending the protection guaranteed to workers independently by the laws of the individual Member states to cover the case where an undertaking is transferred .*
- *Its aim is therefore to ensure , as far as possible , that the contract of employment or the employment relationship continues unchanged with the transferee so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer .*
- *It is not however intended to establish a uniform level of protection throughout the community on the basis of common criteria .*
- *It follows that Directive no 77/187 may be relied upon only by persons who are , in one way or another , protected as employees under the law of the member state concerned . if they are so protected , the Directive ensures that their rights arising from a contract of employment or an employment relationship are not diminished as a result of the transfer .*

Case C-108/10, Ivana Scattolon. DIRECTIVE 77/187/EEC, TRANSFERS OF UNDERTAKINGS

- *Since that legislation may be relied upon only by persons who are protected in the Member State concerned as workers under national labour law.... It follows that the applicant in the main proceedings is capable of benefiting from EU legislation on maintaining the rights of workers, provided the conditions for applicability specifically set out in that legislation are met. persons who are protected in the Member State concerned as workers under national labour law.*

Transfer of Undertakings Directive 2001/23. A possible solution

- “employee” shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.
- This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.
- However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:
 - (a) of the number of working hours performed or to be performed,
 - (b) they are employment relationships governed by a fixed-duration contract.
 - (c) they are temporary employment

Temporary Agency Work Directive (2008/104/EC)

- *'Worker' means any person who, in the Member State concerned, is protected as a worker under national employment law*

C-216/15, RUHRLANDKLINIK MoveS

Temporary Agency Work Directive (2008/104/EC). Case law doctrine of the CJUE

- *The concept of 'worker' for the purposes of that directive covers any person who carries out work and who is protected on that basis in the Member State concerned.*
- *Ms K., cannot be excluded from the concept of 'worker' and from the scope of that directive, on the sole ground that she does not have a contract of employment with the temporary-work agency and that she therefore does not have the status of worker under German law.*
- *That provision means only that the EU legislature intended to preserve the power of the Member States to determine the persons falling within the scope of the concept of 'worker' for the purposes of national law and who must be protected under their domestic legislation, an aspect that Directive 2008/104 does not aim to harmonize.*

C-216/15, RUHRLANDKLINIK. Temporary Agency Work Directive (2008/104/EC)

- That provision cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104. The EU legislature did not leave it to the Member States to define that concept unilaterally.
- To restrict the concept of 'worker' as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law, is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.
- Such a restriction would permit the Member States or temporary-work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that directive, in particular, from the application of the principle of equal treatment, even though the employment relationship between those persons and the temporary-work agency is not substantially different to the employment relationship between employees having the status of workers under national law and their employer.

C-311/13 O. Tümer

Directive 80/987/EEC of 20 on the protection of employees in the event of the insolvency of their employer.

C-311/13 O. Tümer

- Furthermore, the Directive 80/987 must be interpreted in the light of the social objective of that directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer's. Member States therefore cannot define at will the term 'employee' in such a way as to undermine the social objective of that directive
- The discretion enjoyed by Member States to define the term 'employee', is thus circumscribed by the social objective of Directive 80/987, which the Member States are required to respect.

Regulation (EU) No 492/2011

- NO DEFINITION OF WORKER.
- *Recitals: "Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services".*
- *Case 53/81. Levin The court has already stated in its judgment of 19 march 1964 in case 75/63 hoekstra (nee unger) (1964) ecr 1977 the terms ' worker ' and ' activity as an employed person ' may not be defined by reference to the national laws of the Member states but have a community meaning . if that were not the case , the community rules on freedom of movement for workers would be frustrated , as the meaning of those terms could be fixed and modified unilaterally , without any control by the community institutions , by national laws , which would thus be able to exclude at will certain categories of persons from the benefit of the treaty .*
- *According to case 'Lawrie-Blum" – the essential feature of the employment relationship is that, for a certain period of time, one person performs services for and under the direction of another person in return for which he or she receives remuneration*

REGULATION 883/04

The definition of worker used in connection with the free movement of workers (Article 45 TFEU) does not necessarily coincide with the definition applied in relation to Article 48 TFEU (coordination of social security systems) and Regulation 883/04

C-543/03 Christine Dodl and Petra Oberhollenzer

- *“it is therefore not the status of the employment relationship which determines whether or not a person continues to fall within the scope ratione personae of Regulation No 1408/71, but the fact that he or she is covered against risks under a social security scheme mentioned in Article 1(a) of that regulation”*

C-516/09.Tanja Borger Regulation 1408/71

As regards the first of those points, suffice it to note that, according to Dodl and Oberhollenzer, in the determination of whether or not a person comes within the scope *ratione personae* of Regulation No 1408/71, the existence of an employment relationship is irrelevant, as the determining factor in this regard is the fact that that person is insured, compulsorily or on an optional basis, for one or more of the contingencies covered by a general or special social security scheme mentioned in Article 1(a) of that regulation (Dodl and Oberhollenzer, paragraph 31).

María Sala v Freistaat Bayern (1998) C-85/96

The definition of worker used in the context of Article 48 of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the EC Treaty and Regulation No 1408/71

Regulation 883/04 versus Regulation 492/2011

- It has been used to define the personal scope of the relevant Treaty provisions and/or secondary EU law and/or to determine measures whether or which national legislation is applicable in a given case. Because of the close ties that exist between social security law and labour law at national level it would be desirable if the concept of “activity as an employed person”, as used in Regulation (EC) No 883/2004, had a meaning similar to ‘worker’ in the field of EU labour law.
- However, this is not the case. A person who performs activities as an employed person in the sense of Regulation (EC) No 883/2004 does not necessarily qualify as a worker for purposes of EU labour law. Conversely, a person who is regarded as a worker for labour law purposes is not necessarily covered by Regulation (EC) No 883/2004

Regulation 492/2011 versus Regulation 883/04

- Case 139/85.KEMPF:
- German piano teacher giving 12 lessons a week in Belgium. Considered as worker according Regulation 1612/68.
- Case C-2/89. M. G. J. Kits van Heijningen
- There is nothing in Regulation No 1408/71 which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities . Consequently, a person must be considered to be covered by Regulation No 1408/71 irrespective of the amount of time which that person devotes to his activities .

Regulation 492/2011 supplements the protection of Regulation 883/04

- Where Regulation (EC) No 883/2004 is not applicable in a given case, Article 7(2) of Regulation (EC) No 492/2011 may serve as a safety net provision.
- MEINTS C 57/96:
- The CJEU accepted that a frontier worker who had lost his job at a farm (and who received an unemployment benefit in his State of residence) could in the State of employment claim a special social benefit granted to agricultural workers who had been made redundant. That benefit was not covered by Regulation (EC) No 883/2004, but the frontier worker concerned could claim equal access to it, as it did constitute a social advantage for purposes of Article 7(2) of Regulation (EC) No 492/2011

Regulation 492/2011 supplements the protection of Regulation 883/04

- C-35/97, COMMISSION V FRANCE
- *It follows that those schemes — together with the system for the validation of concessionary points which forms part thereof — are not covered by Regulation No 1408/71, so that they cannot be assessed in the light of the provisions of that Regulation.*
- *Declares that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic has failed to fulfil its obligations under Article 48(2) of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;*

CONCLUSIONS

- Does not exist a harmonized concept of workers in the Union Law .
- A community concept of workers is established by the CJEU for combating discrimination.
- The concept of worker for most cases relays on national legislations but the Directives establish a uniform level of protection on the basis of common criteria .
- A person who performs activities as an employed person in the sense of Regulation (EC) No 883/2004 does not necessarily qualify as a worker for purposes of EU labour law. Conversely, a person who is regarded as a worker for labour law purposes is not necessarily covered by Regulation (EC) No 883/2004

AUF WIEDERSEHEN UND DANKE

- Der Begriff des “Arbeitnehmers” im Unionsrecht : **Segen** oder **Fluch**?.

OHNE ZWEIFEL, **FLUCH**...