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subordinate work and self-employment
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A study about the dividing line between subordinate work and self-employment in six European legal systems

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ABSTRACT

This article presents a comparative analysis of six countries (France, Germany, Italy, Slovakia, the Netherlands, and the United Kingdom) that aims to examine the distinction between work under an employment contract (subordinate work) and self-employment, shedding light on the main criteria used by the law and judges to identify the two concepts and also provides an overview of how legal systems have tackled the problem of forms of work that lie halfway between work under an employment contract and self-employment. It also provides a uniform basis for discussions and a critical assessment of the various approaches that these legal systems have chosen to shape the concept of employment contract/subordinate work or other legal statuses that ensure protection.

In the final section, some conclusions are drawn about the studied countries, and the new concept of 'subjection' is introduced to reorganise the protection granted by labour law since it absorbs and expands the concept of subordination upon the consideration that the former can better match the current socio-economic scenario. Indeed, the latter scenario is described in section one of the article. Lastly, the study stresses the need to protect the

genuine self-employed through mechanisms to ensure social protection in cases of sickness, long-term impediments to work and retirement.

Keywords: subordinate employment; self-employment; worker; ‘subjection’; labour law protection.

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Introduction: Reasons for this study and content of the article

The study that follows is a fraction of a broader transdisciplinary project⁽¹⁾ that aims at conducting an in-depth study on how solo self-employment is measured, classified and represented in six European countries: France, Germany, Italy, Slovakia, the Netherlands, and the United Kingdom and, therefore, for this reason, it is focused on the same cluster of countries under scrutiny in the main project according to its general design⁽²⁾. In particular, on the basis of the definitions existing in the six European states under scrutiny, this article examines the distinction between work under an employment contract (subordinate work) and self-employment, shedding light

⁽¹⁾ This research is part of the broader research project SHARE – Seizing the Hybrid Areas of work by Re-presenting self-employment – which has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement N. 715950).

⁽²⁾ The project has selected these six countries because: they represent six different welfare state systems; of the composition of their labour forces in terms of the balance between employees and self-employed workers; and because of the number of solo self-employed among autonomous workforce. As clarified further in the article, self-employment without personnel has increased in the latter decade in the EU. Moreover, 4 out of 6 of the selected countries displays an upwards trend in the last 12 years in terms of the percentage of self-employed in their respective workforces. Italy and Germany, on the contrary, show a downward trend, but Italy is one of the countries in Europe with the highest percentage of self-employed workers (up to 21.7 in 2018). On this point, refer to the statistical Annex reported in European Commission Directorate-General for Employment, Social Affairs and Inclusion, *Employment and Social Developments in Europe 2019. Sustainable growth for all: choices for the future of Social Europe*, EU, 2019 in <https://op.europa.eu/en/publication-detail/-/publication/747fefa1-d085-11e9-b4bf-01aa75ed71a1/language-en>

on the main criteria used by the law and judges to identify the two concepts and also providing an overview about how legal systems have tackled the problem of categorising forms of work that challenged the traditional distinction between subordination and self-employment. This article also provides a uniform basis for discussions and a critical assessment of the various approaches that these legal systems have chosen to shape the concept of employment contract/subordinate work or other legal statuses that ensure protection.

The six countries under scrutiny are grouped according to similarities. Therefore, Slovakia and the Netherlands are presented first, since their legal frameworks are based on a dual approach that is still entrenched in the idea of a subordination understood as the employer's power to direct someone else's work. This does not mean, as is clarified further in the paper, that these countries do not face the issue of potential camouflage of dependent employment. Germany and the UK are presented next, as two cases of legal orders where the legislators decided to embed a *tertium genus*, which lies between subordinate work and self-employment with the aim to tackle the grey area of economic dependence. The case of France also represents a system where the weight of the power to direct is still at the centre of the definition of a contract of employment, thus it has been coupled with the case of Italy. Both these countries use different approaches to achieve a similar aim, which is to extend the scope of labour law to the most vulnerable self-employed, although their systems are still formally based on a distinction between subordination and self-employment that does not include a *tertium genus*.

In the final section, some conclusions are drawn about the studied countries, and the new concept of 'subjection' is introduced to reorganise the protection granted by labour law since it absorbs and expands the concept of subordination upon the consideration that the former can better match with the current socio-economic scenario – described in the next section. Moreover, the study stresses the need to protect the genuine self-employed through mechanisms able to ensure social protection in case of sickness, long impediment at work and retirement.

Section 1. Preliminary remarks related to the socio-economic scenario

1.1 The lost centrality of a social archetype

Over more than 40 years, the way that work as a means of production has been organised has changed and has thus sparked a large debate. Manufacturing was outsourced from the West to the East in both Europe and Asia. On-site integrated systems of production based on employment contracts have increased in the Global South, while the services sector has expanded in the Global North.

During the 20th century, two styles of production – Taylor-Fordism and Toyotism – emerged as models in the industrial sector for organising the workforce in such a pervasive way that they marginalised others. Today, the scenario is entirely different due to a variety of factors, including the emergence of new technologies, the end of vertical-integrated firms, the shift from the industrial to the service economy (in the West), the internationalisation and organisational decentralisation of enterprises, and the financialization of the economy⁽³⁾. These elements combined with a deep (de)regulation process in the field of labour law that began in the last part of the 20th century, as well as with a socio-cultural trend, which promoted the idea of people becoming ‘entrepreneurs of themselves’⁽⁴⁾. Therefore, in the economy of the 21st century, the centrality of the standard employment contract as a legal archetype came under stress. Of course, a life-long subordinate contract of employment was not the only option, not even after the Second World War, but it was the most common legal scheme to exchange work *versus* wages during the so-called ‘*trente glorieuses*’.

A shift compared with the previous century can also be perceived when a subjective perspective is considered. In fact, focusing on precarious workers, it is possible to realise that many of them are forced to bear more than one job at once, so that they simultaneously share multiple legal *statuses*,

⁽³⁾ A. Salento, *Finanziarizzazione e regolazione del lavoro. Un’alternativa analitica alle vulgate del postfordismo*, TAO Digital Library, 2012, in particular, brings forward criticism of most of the labour law scholars who, in his opinion, accepted a view of the general scenery according to technological determinism and therefore completely missed the consequences on human resource management due to the emergence of financial capitalism.

⁽⁴⁾ Refer to U. Bröckling, *The entrepreneurial self: Fabricating a new type of subject*, Sage, 2015 and to the forward-looking words of M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979*, Palgrave Macmillan, 2008 [1979].

including self-employment⁽⁵⁾. The implications in terms of welfare and social protection, as well as for health and safety in working, are easy to grasp. It is also worth clarifying that this kind of personal condition is not entirely new, but it is now more widespread in society at large than it was in the past.

The ILO⁽⁶⁾ has framed the growing use of self-employment as a variable form of non-standard employment because of the similarity of the consequences for the workforce, and also because of the drivers that bring employers to make full use of all of the variable forms of non-standard employment. Indeed, the definition of non-standard employment used in the 2006 ILO report includes all those forms of employment that deviate from standard employment, i.e. employment of indefinite duration for the same employer under a contract of subordination. Therefore, it refers to temporary employment, part-time work, temporary agency work and other multi-party employment relationships, disguised employment relationships and also dependent self-employment. Once self-employment is framed in this picture, it can be safely maintained that it is part of an increasing worldwide trend. According to the ILO, «over the past few decades, in both industrialised and developing countries, there has been a marked shift away from standard employment to non-standard employment».

As far as self-employment is concerned, both the ILO and labour law scholars focus their attention on a specific area, midway between the employment relationship and self-employment, that is marked out by economic dependence inasmuch as workers that are formally self-employed depend concretely on one or a few clients for their income⁽⁷⁾. Nevertheless, the area of self-employment is broader than the area of economic dependence.

⁽⁵⁾ On this point, see the definition of ‘hybrid areas of self-employment’ in A. Murgia and V. Pulignano., *Neither precarious nor entrepreneur: The subjective experience of hybrid self-employed workers*, in *EID*, 2019.

⁽⁶⁾ International Labour Office (ILO), *Non-standard employment around the world: Understanding challenges, shaping prospects*, 2016.

⁽⁷⁾ The European Commission gave its endorsement to the concept of ‘economically dependent work’ as a way to cover «situations which fall between the two established concepts of subordinate employment and independent self-employment», COM(2006) 708 final GREEN PAPER, *Modernising labour law to meet the challenges of the 21st century*. The document stated that those workers «occupy a ‘grey area’ between labour law and commercial law. Although formally ‘self-employed’, they remain economically dependent on a single principal or client/employer for their source of income». Moreover, at the request of its social partners, the Commission initiated a study by A. Perulli *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects. Study for the EU Commission* in 2002. Consistently the latter author maintained the idea that to give relevance in juridical terms to the concept of economic dependence would be a tool to provide workers who fall into the ‘grey area’ with sufficient protection. Among the many papers by the above-mentioned author on the issue of self-employment see in particular, A. Perulli A. *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?* WP CSDLE "Massimo D'Antona".IT, 2015, n. 235, 1-30).

The spectrum of possibilities included within the former is vast since precarious or bogus self-employment also stands side-by-side with genuine self-employment⁽⁸⁾ Moreover, both high-skilled and low-skilled jobs can be performed as self-employed and, lastly, an autonomous worker can shape their activity in a way that resembles a business or can work as a solo self-employed with this peculiar form of self-employment gaining space in the last decade⁽⁹⁾ in statistical terms. From this point of view, the category of economic dependence is too loose to define an archetype to which the regulation would be attached. Indeed, an entrepreneur can also be economically dependent from other players in the market.

In recent years, a new phenomenon that is relevant to the portrayed scenario has developed, by contributing to re-shaping economies, and creating legal schemes that were sometimes considered among self-employment in many countries. Indeed, the emergence of the so-called online platform economy, or digital economy, includes many different arrangements in terms of how the service is organised and performed, as well in terms of contractual assets between the three parties that are typically involved in the exchange. More broadly, the platform economy, which matched well with the flat structures that enterprises had already started to embed in the 1980s, raised a range of legal questions connected to labour law deserving the attention of legal scholars and found a response by legislators – in some cases through special dedicated laws⁽¹⁰⁾.

Digital platforms and applications through which the exchanges take place are all technical tools that can cover many different legal transactions and also potentially include work that is performed with a variable degree of autonomy (and so also through an employment relationship that entails

⁽⁸⁾ A. Murgia, R. Bozzon, P. Digennaro, P. Mezihorak, M. Mondon-Navazo, & P. Borghi, *Hybrid Areas of Work Between Employment and Self-Employment: Emerging Challenges and Future Research Directions*, FS, 2020, 4, 86.

⁽⁹⁾ According to the Oecd/Eu, *The Missing Entrepreneurs 2017: Policies for Inclusive Entrepreneurship*, OECD Publishing, 2017, 27 in the Europe Union, although the proportion of workers who are self-employed has remained fairly constant at approximately 15% over the last decade, there have been some changes in the nature of self-employment. Indeed there has been an increase in the proportion of self-employed workers without employees who accounted for 65.8% of the self-employed in 2002 but reached up to 71.5% of the cluster in 2016.

⁽¹⁰⁾ According to V. De Stefano, and M. Wouters, *Embedding platforms in contemporary labour law*, in (ed.) J. Drahokoupil and K. Vandaele, *A modern Guide to Labour and the platform Economy*, (forthcoming), Edward Elgar Publishing 2021, five regulatory approaches can be distinguished worldwide to provide some form of labour protection to platform workers: a *lex specialis* approach; an universal labour rights approach; an approach that classifies platform workers as employees; an approach that classifies them as temporary agency workers, dependent contractors or employee-like workers; and an option that establishes an employment relationship between the worker and the user.

subordination). This explains why globally, and sometimes also in the same country, judges have variably framed the performed jobs alternately as self-employment or dependent work on a case-by-case base⁽¹¹⁾.

Platforms are a virtual market where each provider can be contacted at any time, hired and also paid, on the basis of an individual negotiation or a pre-set fee⁽¹²⁾ or where companies can choose the best *opus* to embed in their production cycle. From this perspective, new technologies have been used as a way of partially discharging business risk onto the shoulders of self-employed workers who consequently became micro-entrepreneurs, notwithstanding their work is still linked to someone else's productive organisation. At the same time, applications are also used to contract out microtasks or low-value jobs, paying as little as possible and keeping the business organisation as simple as possible. From this point of view, the use of new technologies is driven by the same goal that resulted in the explosion of self-employment⁽¹³⁾, subcontracting and outsourcing over the past few decades. In other words, it has proven to be a strategy for companies aimed at reducing labour costs to extract as much value as possible, particularly in the traditional, low-value-added sectors of the economy⁽¹⁴⁾. The concept of transaction costs⁽¹⁵⁾ can still perfectly explain both the above-mentioned phenomena.

⁽¹¹⁾ For an overview of the Civil law countries' case-law on platform-workers refer to G. Pacella, *Il lavoro tramite piattaforma digitale nella giurisprudenza dei Paesi di civil law*, *LLI*, 2019, 5, 1, 17.

⁽¹²⁾ P. Ichino, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in *RIDL*, 17, 4, 525-563, 526.

⁽¹³⁾ An accurate analysis of statistics on self-employment shows differentiated dynamics within the EU cluster (Eurofound, *Exploring Self-employment in the European Union*, Luxembourg, Publications, 2017) since, for example, northern European countries had self-employment rates below 10% (8% in Denmark and 9% in Estonia and Luxembourg), while Mediterranean countries had a higher percentage (for example, Greece with 31% or Italy at a rate of 23%). Those rates could suggest that massive use of self-employment, including a remarkable recourse to false self-employment, is typical for economies that have strived to compete globally by means of a reduction of labour costs while, by contrast, access to high-skilled self-employed workers (who are obviously a smaller part of the cluster and therefore have a lower impact on the statistics) has been beneficial in the most innovative sectors on which some countries place their economic hopes.

⁽¹⁴⁾ As has been said in A. Salento, *Digitalizzazione delle imprese e trasformazione delle competenze. Quadro analitico e riscontri empirici*, *Labor*, 2019, 131-142, 133, a distinction should be made between jobs that are properly digital and traditional jobs that embed interactions by means of digital tools.

⁽¹⁵⁾ R. Coase, *The Nature of the Firm*, *JLE &O*, 1937 1, 4, 3-17.

1.2 Subordination understood as a power to direct someone else's work has lost its capability to describe reality

As is well known, for historical reasons, legal systems have framed economically productive work into three statuses: dependent employment; self-employment; and entrepreneurial activity – with dependent employment considered the standard at the climax of Taylorism/Fordism in the last century, and self-employment carved out as a residual catch-all category that collected all the work that was not done for and within a firm. The consequence is that, during the fourth industrial revolution, the legal category of self-employment covers situations that are very different in concrete terms. It is important to specify that the author is well aware that the birth of labour law and the concept of subordination preceded the establishment of the social archetype of the factory worker and of the Fordist factory. Nevertheless, as legal orders evolve with society, it is clear that the hetero-direction somehow 'cannibalised' the same concept of subordination once the archetype gained space in society.

Debates about the changing nature of work and prospects for the retention of the standard employment relationship have recently become more widespread, but scholars had already started discussing the viability of the traditional rules in the 1990s, when they realised that the vertical disintegration of production¹⁶ was already breaking down the 'Aristotelian unity' of place, time and action that marked subordinate work⁽¹⁷⁾. Therefore, the fourth industrial revolution, and the new smart technologies more generally, built on a trend that was already in place, adding new nuances.

In the practice of employment law, judges and legislators faced increasing numbers of cases where the definition of employee status was more complicated to apply. From a legal standpoint, across Europe, on the one hand, the opportunity to demand work in a flexible way increased thanks to a large wave of reforms but, on the other hand, employment regulations and case-law have increasingly been extended to include workers who fail the full test of employee status within the scope of at least some of the protections ensured by labour laws.

Statutory definitions of employment, employee or contract of employment, as well as the similar tests that courts developed in many

⁽¹⁶⁾ H. Collins, *Independent contractors and the challenge of vertical disintegration to employment protection laws*, *OJLS*, 1990, 10, 3, 353.

⁽¹⁷⁾ B. Veneziani, *Gruppi di imprese e diritto del lavoro*, *LD*, 1990, 4, 611.

European countries, have mostly been shaped around a concept of subordination that postulates the existence of a hierarchical relationship of power and consequently a possibility for the employer to direct employee activities⁽¹⁸⁾. The related powers to control and sanction the employees in case of breach of contract are logically interconnected with the first. Once an order is issued, then it is possible and important to control whether it was executed and to sanction the worker in cases of inaccuracy or infidelity.

Over time, what has diminished in terms of ability to regulate the dividing line between those who are subjected to a different entity and those who are really autonomous, has been the concept of subordination as hetero-direction. The mechanism of power and control that was once exercised by means of the employment contract, in a growing number of cases, is today exercised *de facto* directly through the market. Nonetheless, if it is correct that the hetero-direction of the work has been utilised as the primary feature through which a working relationship is framed in the area of subordination, that is not the only factor taken into consideration by case law in particular. This is because legal orders have already had to contend with a kind of attenuated subordination that leaves a lot of room for autonomy, even in employment contracts⁽¹⁹⁾, ever since the decline of Taylorism (and even before that on account of managerial positions), and therefore long before the factors mentioned in the previous section (including the last wave of technologies) were able to reshape production systems.

The analysis conducted on the six mentioned countries showed that other tests or criteria alongside the hetero-direction had been commonly developed to identify the area of subordination or, more broadly, cases that were considered to deserve protection by the legal systems. Some indicators are used to measure or predict whether the worker takes the ultimate risk of loss or chance of profit (this is a kind of business risk assessment). Other indicators are instead used to perform a hetero-organisation test, which investigates whether the performed work is integrated into someone else's organisation. Lately, this scheme has found an echo in a landmark EU Court of Justice judgment.

⁽¹⁸⁾ For this reason, as the employment contract can also be described as a set of powers in favour of the employer, a comparative study G. Casale (ed.), *The employment relationship: A comparative overview*, ILO, 2011 assembled the criteria used in different legal traditions worldwide around an investigation into the presence of hierarchical power, from which the other three descend (power to direct, control and sanction).

⁽¹⁹⁾ A. Supiot, *Lavoro subordinato e lavoro autonomo*. DRI, 2000, 2, 217-239 also in French in *DS*, 2000, 2 (*Les nouveaux visages de la subordination*) has written about autonomy in the employment contract and dependence on the contract of service.

Notwithstanding that the notion of ‘worker’ in EU law is variable and fragmented depending on the function of the law,²⁰ it is also true that the European Court of Justice has elaborated a Euro-unitary notion of subordinate worker essentially with the purpose of ensuring freedom of movement to the workforce in the internal market (Art. 45 of the TFEU). However, recently, the Court of Justice was asked essentially whether a provision of a collective labour agreement – which sets minimum fees for self-employed service providers who are members of one of the contracting employee’s organisations and perform for an employer, under a work or service contract, the same activity as that employer’s employed workers – does not fall within the scope of Article 101(1) TFEU. This judgment⁽²¹⁾ represents a landmark for the issue of the right to collective bargaining for self-employers, but it also has its importance concerning the notion of ‘worker’. Referring to its previous case-law, the Court also specified who is considered a ‘worker’ according to EU law and for the purpose of establishing the scope of the Treaties. In doing so, the Court pointed out the three criteria mentioned above. In the Court’s words⁽²²⁾, «the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work⁽²³⁾ [*hetero-direction*], does not share in the employer’s commercial risks⁽²⁴⁾ [*business test*] and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking»⁽²⁵⁾ [*hetero-integration*]⁽²⁶⁾.

⁽²⁰⁾ See Giubboni’s extensive work on this point and in particular in English *Worker*, in *Dictionary of Statutes within Eu law*, (ed.) Bartolini and others, Springer, 2019, 645. Also refer to M. Risak and T. Dullinger T., *The concept of ‘worker’ in EU law. Status quo and potential for change*, ETUI, Brussels, 2018.

⁽²¹⁾ CGUE 4.12.2014. *FNV Kunsten*, C-413/13

⁽²²⁾ Paragraph 36.

⁽²³⁾ See judgment CGEU 13.01.2004 *Allonby*, C-18/2004, paragraph 72.

⁽²⁴⁾ See judgment CGUE 14.12.1989 *Aggate*, C-3/87, paragraph 36.

⁽²⁵⁾ See judgment CGUE 16.09.1989 *Becu and Others*, C-22/98, paragraph 26.

⁽²⁶⁾ Italics are mine and used to emphasise the passages of the Court’s reasoning that resemble the three criteria in the brackets. Since it would be too long to report them more extensively, see also paragraphs 33-34-35 of the judgment.

Section 2. Countries' legal frameworks

2.1 (a) Slovakia

The Labour Law Code, adopted for the first time in 1965, was at first largely amended by Act No. 3/1991 Coll, the purpose of which was to create the basic legal framework for the transition to a market economy. This was replaced to remove any remnants of the previous regime and a new Labour Code was adopted in 2001⁽²⁷⁾. This reform marked an approximation process between Slovak and European Union law in many regards.

In Slovakia work can be performed either as dependent work, which requires a contract of employment, or as a business activity, which requires that a civil or commercial legal relationship is established. The Labour Code includes definitions of both 'dependent work'⁽²⁸⁾ and 'employer'⁽²⁹⁾.

The Labour Code underwent many amendments over time⁽³⁰⁾, including in 2007, 2012⁽³¹⁾, 2015⁽³²⁾ and 2018. It has been reported that the amendment of the Slovak Labour Code made in 2007⁽³³⁾, which introduced a

⁽²⁷⁾ By means of Act No. 311/2001 Coll. It is important to note that Part. 1, which is related to the general provisions and the scope of the Labour Code, includes a general clause according to which, «Unless stipulated otherwise by the part one of this Act, the general provisions of the Civil Code shall apply to legal relations according to paragraph 1» [1(4)]. This is of relevance since the first part of the Labour Code concerns general labour law concepts, such as the legal personality of the employer and employee, the method of counting time, and the invalidity of legal acts or legal safeguards.

⁽²⁸⁾ Part 1, General Provisions §1.

⁽²⁹⁾ Part 1, General Provisions §7. «(1) *An employer shall be a legal person or natural person employing at least one natural person in labour-law relation and, if so stipulated by a special regulation, also in similar labour relations.*

(2) An employer shall act in labour-law relations in his/her own name and shall have responsibility arising from these relations. An organisational unit of an employer shall also be an employer, if stipulated by special regulations or statutes under special regulation. If a participant to labour-law relation is an employer, his/her organisational unit cannot simultaneously be a participant and vice versa.

(3) An employee, who is also a statutory body or a member of a statutory body, shall have conditions according to § 43 paragraph (1) agreed in the employment contract by the body or the legal person who has established him/her as a statutory body.»

⁽³⁰⁾ Act No. 210/2003 (abolished soon after), Act No. 348/2007, Act No. 49/2009, Act No. 48/2011, Act No. 341/2011.

⁽³¹⁾ Act No. 361/2012 Coll., effective as of 1 January 2013. This reform largely contributed to harmonising the Slovak labour law with European Union law, but also included a new definition of dependent work, a new legal regulation of the probationary period, and stricter legal conditions of definite-period employment contracts.

⁽³²⁾ Art. 1(1) Act. 14/2015.

⁽³³⁾ Part one, General Provisions, Scope of the Labour Code § 1 «(2) *Dependent work, which is carried out in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work carried out personally as an employee for an employer, according to the employer's instructions, in the employer's name, for a wage or remuneration, during working time, at the expenses of the employer, using the employer's means of production and with the employer's liability, and also consisting mainly of certain repeated activities.»*

definition of dependent work for the first time, was due to «an increased number of cases where, in the legal practice, employees were being forced to change their legal employment status to a commercial relationship status despite the fact that these natural persons continued to perform the same dependent work as they did before. In this way, employees were formally transformed into entrepreneurs (henceforth labelled as ‘self-employed persons’ – abbreviated as SZCO in the Slovak legislation) although in fact the essential characteristics defining ‘business activity’ were not fulfilled».³⁴ Successively, both the amendments made by law 361/2012 and by Act 14/2015 included changes in the definition of ‘dependent work’, which is now consequently very different from the original version. The aim was to enlarge the coverage of the original definition since the latter consisted of so many elements that it was hard for an employee to meet them.

According to the original version of the law, «dependent work, which is carried out in a relationship where the employer is superior and the employee is subordinate», was defined according to seven elements: a) work has to be carried out personally; b) according to the employer’s instructions; c) in the employer’s name; d) for a wage or remuneration; e) during working time; f) at the expense of the employer, using the employer’s means of production and with the employer’s liability; and g) consisting mainly of certain repeated activities. The problem with this definition was that a working relationship could be framed as dependent work only when all those requisites were contemporarily fulfilled in a cumulative manner. The practical consequence was that employers were allowed and used to establish more flexible labour relations by concluding agreements that were formally civil or commercial contract and which masked performance of dependent work instead. This also made the work of inspectors more complicated⁽³⁵⁾. Therefore, «with the aim of preventing the substitution of labour-law relations with other forms of contractual relations (e.g. work carried out based on a trade licence)»⁽³⁶⁾, the definition was changed in 2012 to remove any reference to the employee’s expenses, means of production and liability, as well as to repetitive activities⁽³⁷⁾. For the same reason, a specific prohibition relating to performing

⁽³⁴⁾ M. Mészáros, *‘Employing’ of self-employed persons*, *CEJLLPM*, 2018 1,1, 46, 53.

⁽³⁵⁾ The previous situation is described by H. Barancová and A. Olšovská, *Slovak Republic*, *ELL Suppl.*, 2014, 414, Wolters Kluwer, 75.

⁽³⁶⁾ *European Platform tackling undeclared work Member State Factsheets and Synthesis Report*, European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Brussels, 2017, 159.

⁽³⁷⁾ The new text states that «Dependent work, which is carried out in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work carried out

dependent work as a business activity or another earning activity based on a contractual civil-law relation or a contractual commercial-law was stated⁽³⁸⁾. Lastly, in 2015 the wording «for a wage or remuneration» was deleted.

Despite the regulatory changes that took place, the current notion of subordination seems to reduce the core of the concept to the hetero-direction of work only. There are indirect proofs of this statement. First of all, a description of the type of work, the place of work performance, together with a working time schedule, are among the few substantial elements that a contract of employment has to include to be deemed concluded and valid⁽³⁹⁾, and they represent the frame upon which the control of the employer is applied. Moreover, in the labour code, there is no specific mention of integration in the employer's organisation as an indispensable element of the employment contract, so it can be only assumed implicitly. Economic dependence is also not mentioned and, «from the point of view of the legal regulations in force, it is fairly irrelevant»⁽⁴⁰⁾. However, among the criteria in use to investigate the nature of the relationship, two have a partial ability to measure the independence of the worker from the employer. The employee does not perform work to make their own profit or work in their own name, as this characteristics would frame the work performed as a business activity regulated by the Commercial Code.

The case of Slovakia demonstrates that when the concept of subordination is so rigid and still only rooted in the idea of external direction, it creates more opportunities for exploiting workers, above all in the current economic scenario. Indeed, employers will use work otherwise regulated, for example, as a form of self-employment to save costs in terms of taxation and contributions and to also exclude the workforce from the protection of labour laws.

personally as an employee for an employer, according to the employer's instructions, in the employer's name, during working time».

⁽³⁸⁾ Part. 1 §1[3] «*dependent work shall not be a business activity or another earning activity based on a contractual civil-law relation or a contractual commercial-law relation according to special regulations*».

⁽³⁹⁾ According to art. 43 (1) of Labour Code. The remaining ones are day of commencement of work and wage conditions

⁽⁴⁰⁾ On this point refer to R. Schronk, *The Concept of 'Employee': The Position in Slovakia*, in *Restatement of LabourLaw in Europe: The Concept of Employee*. (eds.) B. Waas and G. Heerma Van Voss, Hart Publishing, 2017. 619–640, 636 who reports also that «There is no relevant case law on this issue».

2.1 (b) The Netherlands

In 1909, a chapter to regulate various terms of the contract of employment was introduced in the Civil Code, which was thereafter modernised in 1997, on the occasion of the release of the new Dutch Civil Code.

In the Netherlands, dependent work is performed for the employer under its direction, while autonomous workers are also considered to be entrepreneurs. They are labelled as freelancers, or more properly ZZP (*Zelfstandige Zonder Personeel*: self-employed without personnel). They have to work for multiple clients and at their own expense and risk.

As far as subordinate work is concerned, Art. 7:610 (section 7.10.1) of the Dutch Civil Code contains a definition of ‘employment agreement’ described as an «agreement under which one of the parties (‘the employee’) engages himself towards the opposite party (‘the employer’) to perform work for a period of time in service of this opposite party in exchange for payment»⁽⁴¹⁾. As is clear from this statement, for the case of Dutch labour law, the employment contract is based on a synallagmatic exchange of remuneration and work. Moreover, the following article specifies that the work has to be done on behalf of another person and creates a presumption of the existence of an employment agreement when the work is performed for «three consecutive months and this weekly or for at least twenty hours per month»⁽⁴²⁾. This legal presumption has the function to reverse the burden of proof on the employer, who has to persuade the court that the contract is not a contract of employment.

This article of the Code also states, similar to other legal systems, that continuity in work performance for the same employer is considered to be an essential criterion in distinguishing employment from work performed by an independent contractor. This can be seen as an indirect way of measuring the grade of integration into the organisation of the employer since the performed work needs to be integrated into the employer’s ordinary cycle of production. The landmark judgement⁽⁴³⁾ of the Supreme Court can be considered to be an

⁽⁴¹⁾ The second paragraph states that «*when an agreement has the characteristics of both, an agreement as meant in paragraph 1 and of another statutory regulated particular agreement, then the statutory provisions of the present Title (Title 7.10) and the statutory provisions set by law for this other particular agreement shall apply simultaneously (side by side) to that agreement*», but in case of conflict, the provisions of this section of the Code prevail.

⁽⁴²⁾ Article 7:610, Sec. 7.10.1 CC. This article was amended to introduce the legal presumption by the ‘Flexibility and Security Act’ (Law 1998-05-14, No. 300).

⁽⁴³⁾ Dutch Supreme Court, 28 June 1996, JAR 1996/153.

additional indication in this same direction. The Court stated that there is no contract of employment if the performed work is merely directed to the extension of the knowledge and experience of a person⁽⁴⁴⁾ (as is in the case in a training relationship) because the work should contribute to the realisation of purposes of the employer to be framed as an employment contract. In other words, unlike the case of self-employed workers, the employer's organisation is considered to be an institution that points out the aims and target to which all the work must adhere.

A further element of the employment contract is the personality of the obligation to work, since the employee may not arrange to be replaced by a third party, except with the consent of the employer, as in cases of sickness⁽⁴⁵⁾. The words «in the service of the other party» (Art. 7:610) are considered to be the core of the concept of subordination in the Dutch labour law, as it entrusts to the employer the power to unilaterally issue binding rules concerning the way in which the work has to be done. In some cases, the exercise of the authority can be limited mainly to the organisational and disciplinary aspects of the job. According to the Supreme Court of the Netherlands, the element of 'authority' characterises the employment contract: «The view that the component of 'authority' continues to be essential dominates legal regulations as well. It is generally argued that replacing this with other criteria would conceal the crucial importance of the employer's⁽⁴⁶⁾ discretionary power». In this regard, a jurisprudential contrast relating to the subordination of workers of a well-known delivery platform was solved partially by leveraging the 'authority' element. At first, the Court did not recognise subordination⁽⁴⁷⁾, but later it overturned its position. Indeed, the Court based its verdict⁽⁴⁸⁾ on two main points: a) the case concerns work that is at the core of Deliveroo's business (this can be seen as a proof of the relevance of the hetero-organisation or 'alienness' of the business in the Dutch labour law); b) it was not possible to infer from the circumstance of the case

⁽⁴⁴⁾ HR 9 October 1982, NJ 1983/230 (*Hesseling v Stichting De Ombudsman*). In this case a student of the Social Academy pursued a traineeship at the Foundation of a Private Ombudsman. *Contra* in the *PhD Students v University of Amsterdam* case, the Court stated that although the work of PhD students is primarily aimed at obtaining a doctoral/PhD degree, their work was considered 'work' as understood according to the definition of employment contract.

⁽⁴⁵⁾ Section 7.10.7, Article 7:659 CC. «*The employee is obliged to perform the contracted work himself; in performing his work he can only be replaced by someone else with approval of the employer*» (par. 1).

⁽⁴⁶⁾ G. Heerma Van Voss, *The Concept of 'Employee': The Position in the Netherlands*, in *Restatement of Labour Law in Europe: The Concept of Employee*. (eds) B. Waas and G. Heerma Van Voss, Hart Publishing, 2017. 477, 481.

⁽⁴⁷⁾ *Rechtbank Amsterdam*, 23 July 2018, n. 6622665.

⁽⁴⁸⁾ *Rechtbank Amsterdam*, 15th of January n. 7044576.

that a relationship of authority between Deliveroo and the deliverer was deficient.

Since the Dutch Courts also used the control test extensively to distinguish the contract of employment from self-employment, they incurred the same difficulties as other national Courts in this regard, due to the increasing defectiveness of this criterion. The Dutch Supreme Court clarified that the Court's assessment on the subordinate nature of a contract should weigh all relevant circumstances that are connected with each other ('holistic approach')⁽⁴⁹⁾. This led to the elaboration of some more indicators by case law for the same purpose. To enumerate only the more important indicators, the judge investigates: whether the worker has the freedom to refuse to work; the discretion of the worker to organise their work and schedule; who bears the entrepreneurial risks; who owns the material used to perform the job; whether the worker performs other activities besides the one concerned; and whether the person needs to perform other jobs for a living. Therefore, «generally speaking, the control test is no longer seen as the unique or preponderant test distinguishing the contract of employment from other agreements for the performance of labour»⁽⁵⁰⁾

As far as self-employment is concerned, an independent contractor in the Netherlands can perform a job by means of a contract for service⁵¹ or a contract of work. A contract of work is defined as an agreement whereby one party (the independent contractor) agrees to produce particular work of a tangible nature for a sum of money to be paid by the other party (in other words, it is an obligation to deliver an *opus perfectum*). The contract implies the absence of subordination, and there is no obligation for the contractor to perform their duties personally.

«A service provision agreement is the agreement under which one of the parties ('the service provider') has engaged himself towards the other party ('the client') to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work

⁽⁴⁹⁾ Dutch Supreme Court, 11 February 2011, JAR 2011/75; Dutch Supreme Court, 17 November, 1978 1979, 140 and 5 November, 1982, NJ 1983, 231; Dutch Supreme Court, 8 May, 1998, JAR 1998/168.

⁽⁵⁰⁾ A. Jacobs, *The Netherlands*, ELL Suppl. 421, 2015, 66.

⁽⁵¹⁾ The 'contract for service' is regulated by Article 7:400 (se. 7.7.1) *et seq.* Dutch Civil Code which states that «A service provision agreement is the agreement under which one of the parties ('the service provider') has engaged himself towards the other party ('the client') to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work or the transportation of persons or goods» (par.1).

or the transportation of persons or goods»⁽⁵²⁾. The service provider must follow the directions the client has given them with regard to the performance of the service⁽⁵³⁾. In this case, the instructions are related to the service, but the client has no authority about the modality and organisation or the work performed. In this case, the elements that are considered useful to determine whether a worker can be qualified as an independent need to be found in a specular way if compared with those that are in use in case of dependent work. The most relevant are: the freedom to organise their work; whether payments are made directly by several clients; the extent to which the worker bears an entrepreneurial risk; the extent to which the worker supplies their own raw materials, consumables and tools; and the extent to which, in addition to the agreed work, other work is performed.

Disregarding the peculiarities of each contract, all of them are, in essence, discernible from the contract of employment «based on the lack of authority of one party over the other»⁽⁵⁴⁾.

Recently, in the Netherlands, the phenomenon of ‘payroll companies’ emerged that *de facto* have similarities with a specific tool that the French legislator decided to embed (whose peculiarities are reported below). The payroll companies exercise the role of the employer, although the employees do not work directly for them. Since the scheme for this kind of relationship resembles that of the temporary work agency, the Supreme Court stated that they fall into the scope of Article 7:690 of the Civil Code, which is the article that defines the latter. This decision was taken notwithstanding, differently from work agencies, payroll companies should not play an intermediary role in the labour market theoretically.

2.2 (a) Germany

In Germany, for many years the distinction between self-employed and employees was based on Section 84(1) located in the Commercial Code (*Handelsgesetzbuch – HGB*), which provides a legal definition of the term ‘commercial agent’ as a person «essentially free to arrange his professional activities at his own discretion and decide when to perform a job». This is still the notion of self-employment in Germany.

⁽⁵²⁾ Section 7.7.1, art. 7:400 CC.

⁽⁵³⁾ Section 7.7.1, art. 7:402 CC.

⁽⁵⁴⁾ G. Heerma Van Voss, *op.cit.*, 482.

Conversely, an employee was always deemed to be someone who may not determine their work performance free from instructions by the employer and who is bound by specific working times. In the Federal Labour Court's words, an employee is «a person who on the basis of a contract of private law is obliged to perform work in the service of another person»⁽⁵⁵⁾

Although «personal subordination has always been understood to differ from mere economic dependency on the employer [...] meanwhile, it has become highly contentious what personal subordination precisely means»⁽⁵⁶⁾. For this reason, it was the Federal Court that elaborated, over time, a complex notion of subordination consisting of a wide range of elements that had to be combined and evaluated together.

The Federal Court case-law laid down the foundation of the legislative intervention in 2017, through which the new section 611a, which includes a legal definition of an employment contract, was introduced into the Civil Code⁽⁵⁷⁾. Indeed, the new definition is strongly based on the existing case law and unites the typological method and the principle of primacy of facts. Some scholars criticised this intervention, considering it too cautious and unable to grasp the current world of work. Others focused their criticism on the poor crafting of the law. Either way, the point is that the legislator «has strongly oriented itself on the existing case law» with regard to the requirement developed by courts over the years to avoid any wrong⁽⁵⁸⁾.

In light of this and considering that it is not yet possible to measure how the Courts will interpret the new law and if, in doing so, the consolidated case law will change, it is still crucial to rely on the latter to understand what distinguishes subordination from other legal statuses, such as self-employment. In Germany, the Federal Labour Court clarified that a judge needs to investigate the working relationship with an overall view, which

⁽⁵⁵⁾ Federal Labour Court of 15 March 1978 - 5 AZR 819/79

⁽⁵⁶⁾ M. Weiss and M. Schmidt, *Germany*, ELL – Suppl. 366, 2010,

⁽⁵⁷⁾ According to section 611a BGB: «*The employment contract obliges the employee, in the service of another person, to perform work which is subject to instructions and determined by a third party and which is personally dependent (section 611a sentence 1). The right to issue instructions may relate to the content, performance, time and place of work (section 611a sentence 2). Anyone who is not essentially free to organise his activity and determine his working hours is bound by instructions (section 611a sentence 3). The degree of personal dependence also rests on the nature of the activity in question (section 611a sentence 4). An overall assessment of all circumstances must be made in order to determine whether an employment contract exists (section 611a sentence 5). If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant (section 611a sentence 6).*»

⁽⁵⁸⁾ B. Waas, *The legal definition of the employment contract in section 611^o of the Civil Code in Germany: an important step or does everything remain the same?*, ILLe-J, 2019, 1, 12, 31-32 who also reports the other scholars' opinions on the new law.

means that there is no single factor or criterion that is able *per se* to identify a case as an employment relationship. This kind of approach is called the ‘typological method’.

However, it is also true that, as in all the other legal frameworks, the personal subordination understood as the power of the employer to direct the work of the employee is still a key feature. Therefore, if a worker does not receive instructions about the content or mode of their performance, about working time and place of work, this is an important element that suggests independence. Of course, the degree of subordination depends on the characteristics of the job considered and, for example, the absence of a workplace does not imply that the employment relationship does not exist when instead all the other features are met.

In addition to the above-mentioned control test, the Courts also examine whether a person is part of the organisational structure of the supposed employer or, in other words, whether work is performed for an organisation which does not belong to the worker itself. So, for example, Courts are also used to scrutinise whether tools and materials are provided by the employer or whether work is performed interdependently – relying upon or supporting the work of others.

Since directions about the work can also be given by the customer in the case of contracts for work, the integration of the hetero-direction and hetero-integration is very important to distinguish employment, especially in the case of high-skilled workers; the Federal Labour Court clarified that «everything points to an employment contract if an activity is planned and organised by another person and the ‘contractor’ is incorporated in a foreign work organisation to an extent that the autonomous organisation of the work is *de facto* all but impossible»⁽⁵⁹⁾ The Federal Court also takes into consideration who bears the entrepreneurial risk under the terms of the contract since the employees are not normally burdened with business risk.

In Germany, there exists a category between employee and self-employed worker, since the dichotomy between the self-employed – being excluded from labour law – and employees – being fully covered by labour law – was not considered a totally acceptable solution. The ‘*Arbeitnehmerähnliche Personen*’⁽⁶⁰⁾ are self-employed whose economic situation nevertheless

⁽⁵⁹⁾ Federal Labour Court 25.09.2013 -10 AZR 282/12.

⁽⁶⁰⁾ On this topic refer to B. Wass, *Crowdwork in Germany*, in (eds) Wass, Liebman, Lyubarasky and Kezuka, *Crowdwork – A comparative Perspective*, HSI Schriftenreihe, 22, 147-149 and 160-161 and M. Weiss and M. Schmidt *op. cit.*, 47-48.

resembles that of an employee insofar as they are economically dependent from their clients. The criteria to identify ‘economic dependency’ were also developed initially by the courts. Indeed, the Federal Labour Court stated that «economic dependence is usually given when the employee’s livelihood is dependent on the utilisation of his labour and on the income he receives from the tasks he carries out for the contractual partner»⁽⁶¹⁾.

Currently, employee-like persons are defined in section 12°(1) of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz – TVG*) as persons who: a) are economically dependent and in need of social protection comparable to an employee; b) work on the basis of a contract of service or a contract for work and services for other person; c) have to perform their contractual duties personally and essentially without the help of employees; and d) either the major part of their work is performed for one person or more than on average half of their income is paid by one person. The client can also be an institution, a corporation or even a group of companies. Key elements of this status are the personality of the work performed and the economic dependence with their client. It is clear that the dividing line here is positioned on the lack of an organisation that would otherwise reach the level of a small business undertaking. Only some of the statutory protection typical of the employees has been extended to such workers. Hence, disputes between them and their contractual partners are to be settled by labour courts⁽⁶²⁾. They are treated in the same way as employees as far as minimum standards for annual holidays and public holidays are concerned⁽⁶³⁾. They have the right to join unions and exercise the right to collective bargaining, and therefore, their working conditions are potentially regulated by collective agreements⁽⁶⁴⁾. They cannot be discriminated against on the grounds of race or ethnic origin, sex, religion or belief, for being disabled, or on the grounds of age or sexual orientation⁽⁶⁵⁾. Other rights, such as temporary work permits and parental leave, as well as the laws on safety, have been extended to such workers.

⁽⁶¹⁾ Federal Labour Court, AP ArbGG 1979 § 5 No. 68

⁽⁶²⁾ Section 5 paragraph 1 sentence 2 ArbGG.

⁽⁶³⁾ Section 2 sentence 2 Federal Act on Holidays (*Bundesurlaubsgesetz – BUrlG*).

⁽⁶⁴⁾ Section 12a TVG.

⁽⁶⁵⁾ Section 6 paragraph 1 No. 3 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*).

2.2 (b) The United Kingdom

In the UK, it is possible to perform a job according to three personal statuses: independent contractor (self-employment, also known in the UK as a contract for service); employee⁽⁶⁶⁾ (also known as a contract of service) and ‘worker’.

Currently, there exists a statutory definition of both employee and ‘worker’ in Section 230(1) of the Employment Rights Act 1996.

The law states that «‘employee’ means an individual who has entered into works under (or where the employment has ceased, worked under) a contract of employment». The definition is somehow circular and not well defined. Therefore, interpreters have to rely on the criteria elaborated by the Courts for distinguishing between a contract of service and a contract for services or, in other words, they need to examine «the common law of the contract of employment, an area where, despite the marginal impact of many statutory provisions, the legal ground rules are still the judge-made ones»⁽⁶⁷⁾.

This case law thereafter developed in several tests in use to determine when a contract of employment is set. This peculiarity is due to the British labour law tradition, which conceptualised the contract of employment on a case-by-case basis using pre-industrial conceptions of ‘service’⁽⁶⁸⁾, whereas civil law systems of continental Europe moved from a general theory of contract towards a specific concept of an autonomous contract of employment⁽⁶⁹⁾. For this reason, and also because of the existence of a *tertium genus*, the English common law category of ‘employee’ is frequently narrower than the range of persons under a contract of employment in a civil law system.

Several tests were developed by Courts to distinguish between a contract of service and a contract for services. In the UK the first test to be developed was the ‘control test’. The recurrence of a power to control the manner in which the work is done is considered to be the critical element. A

⁽⁶⁶⁾ The Growth and Infrastructure Act in 2013 has introduced a sub-status of the employee status. Individuals can opt to become ‘Employee shareholders’ to receive shares in their employing company or parental undertaking of a minimum value fixed by the law. If they do so, they have to renounce: the right to be unfairly dismissed; the right to statutory redundancy pay; the right to request flexible working; and the right to request to undertake study or training.

⁽⁶⁷⁾ M. Freedland, *The Contract of Employment*, Clarendon Press, 1976, 1.

⁽⁶⁸⁾ Cfr. B. Veneziani, *The employment relationship*, in *The Transformation of Labour Law in Europe, a Comparative Study of 15 Countries 1945-2004*, (ed) B. Hepple, Hart Publishing, 2009.

⁽⁶⁹⁾ M. Butler., *Great Britain*, ELL Suppl. 456, 2018, 91.

contract of service, following this test, is one under which an employer «can not only order or require what is to be done but how it shall be done»⁽⁷⁰⁾

Of course, the higher the skills of the employees are, the more complicated it is to only rely on the control test. Consequently, in the UK, as in other legal frameworks, a second test has been applied in a few situations. The so-called ‘integration test’ investigates whether the person is part of the employer’s organisation. In other words, «under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it»⁽⁷¹⁾.

The Courts, therefore, started to apply the multiple-test that considers more factors, none of which is necessarily determinative: «The starting point of this approach is to ask whether there is a sufficient degree of control to make the worker an employee, and then to ask whether the provisions of the contract are consistent with its being a contract of service»⁽⁷²⁾.

In a number of cases, the most significant inconsistency with a contract of employment has been found to be the entrepreneurial character of self-employment. In other words, the judges introduced a so-called ‘business test’ or ‘economic reality test’, which aims to ascertain whether a person is in business on their own⁽⁷³⁾. «Factors to be considered in this context include the extent to which the person takes the chance of profit or risk of loss by investing money or equipment in the business»⁽⁷⁴⁾. The Court also check whether a substitution clause, which would allow the employee not to perform work personally, is integrated into the contract. Personal work is considered to be a characteristic of the contract of employment⁽⁷⁵⁾.

⁽⁷⁰⁾ *Lane v. Shire Roofing* [1995] IRLR 493 at 495. See also an older judgment such as *Ready Mixed Concrete Ltd v. Minister for Pensions and National Insurance* [1968] 2 QB 497, 515 (QB).

⁽⁷¹⁾ *Stevenson, Jordan & Harrison Ltd v. Macdonald & Evans* (1952) 1 TLR 101

⁽⁷²⁾ M. Butler, *op. cit.* 92. See the case *Express and Echo Publications Ltd Taunton* [1999] IRLR 367, CA. According to J. Benjamin and J. Prassl «today the courts adopt a compound approach to defining the contract of employment combining tests of control, organisation and considering whether an individual is ‘in business on his or her own account or, alternatively, whose business is it» in *The Concept of ‘Employee’: The Position in the UK, Restatement of Labour Law in Europe: The Concept of Employee.*, (ed) B. Waas and G. Heerma van Voss, Hart Publishing, 2017, 747–770, 756.

⁽⁷³⁾ *Ready-Mixed Concrete (SE) Ltd v. Minister of Pensions* [1968] 2 QB 497; *Lane v. Shire Roofing* [1995] IRLR 493 at 496.

⁽⁷⁴⁾ Butler, *op. cit.* 93. About the tests developed by case-law refer also to Deakin and Morris, *Labour Law*, 6th Ed. Hart Publishing, 2012, 121-160.

⁽⁷⁵⁾ Recently, the EU Court of Justice was asked (Case C-692/19) whether Directive 2003/88 precludes provisions of national law that require to work to be done personally to fall within the scope of the Directive. Thus, the option to subcontract tasks is considered a characteristic of self-employment in the UK. The EU Court realised an Order (22 April 2020) reminding the UK Court of

A relatively more recent test is one that relies on the ‘mutuality of obligation’ to determine whether a global contract exists. This is a more formal approach that looks at the obligations that parties underwent according to the contract. Basically, such a mutuality exists whereby an employee is obliged to work and an employer to continue to provide work or remuneration. The point of this test is to stress that a worker who can decline to work cannot be considered as an employee under a contract of service. This test resembles the idea of a synallagmatic relationship between the two parties, but once understood in such a way, it would be too generic to clearly distinguish a contract of service from a contract for service. Therefore, it is intended as a contractual mutual obligation to exchange labour for remuneration in the future and finds a substantial correspondent in the requirement of contractual stability (in other words, an obligation for mutual collaboration extended over a significant period)⁽⁷⁶⁾.

Section 230 of the Employment Rights Act 1996 also provides a definition of ‘worker’ that states: «‘worker’ means an individual who has entered into or works under (or, where the employment has ceased, worked 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». This definition is broader than that of employee, and it excludes those individuals who are not engaged *intuitu personae* because, for example, they in turn hire other personnel to complete the task or job, and those who work for professional clients. Also, a contract for the sale of a completed work (*an opus perfectum*) would exclude the applicability of this status, since the latter should be considered as self-employed. At the same time, the distinction to be drawn between self-employment and ‘workers status’ is a problematic one. Self-employed people who are not running their own business would fall within the statutory definition of ‘worker’, while self-

its previous case law on this point. The Court clarified that the personality of work is one of the elements that precludes the person from being classified as ‘worker’ for the purpose of the directive.

⁽⁷⁶⁾ B. Grandi, *Fatti, categorie e diritti nella definizione del lavoro dipendente tra common law e civil law*, Giappichelli, 2015, 166 ss.

employed who are in business for themselves would not be workers and instead classified as independent contractors⁽⁷⁷⁾.

Being labelled as employee grants access to a more considerable cluster of rights, such as, for example, rights to complain of unfair dismissal⁽⁷⁸⁾, to claim compensation for redundancy⁽⁷⁹⁾, to be given a written statement of employment terms⁽⁸⁰⁾, and collective rights. At the same time, to be included in the category of ‘workers’ is important to secure certain collective rights (right to form and be associated with a union and the freedom to participate in collective actions). Moreover, workers are entitled to certain employment rights, including rights to the national minimum wage and the national living wage; statutory paid holidays, statutory rest breaks, including night breaks; and limitations on consecutive working hours⁽⁸¹⁾; not being discriminated against if they work part-time; not being subject to a detriment, or offered inducements in relation to trade union membership; to be accompanied to a disciplinary or grievance hearing by a fellow worker or a trade union representative; to be automatically enrolled in a pension scheme. They are also granted protection against unlawful deductions from wages, against unlawful discrimination, and for ‘whistleblowing’.

Finally, the Equality Act 2010 applies to those employed under a contract of service or apprenticeship as well as those employed under a contract personally to execute any work or labour.

2.3 (a) France

There is no definition of employment contract or employee in the French Labour Code but, as in the other countries reviewed herein, according to scholars⁽⁸²⁾ and case-law⁽⁸³⁾, a contract of employment is a synallagmatic exchange of workforce for a wage or a salary. The employee puts their work at

⁽⁷⁷⁾ Sic. M. Freedland and H. Dhorajiwala, *UK response to new trade Union strategies for new form of employment*, ELLJ, 2019, 10, 3, 281-290, 285. See *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730.

⁽⁷⁸⁾ ERA 1996, s. 94(1).

⁽⁷⁹⁾ ERA 1996, s. 135.

⁽⁸⁰⁾ ERA 1996, s. 1.

⁽⁸¹⁾ No more than 48 hours on average per week.

⁽⁸²⁾ F. Favennec-Hery, and P. Verkindt, *Droit du travail*, LGDJ, *Manuel*, 4th edn, 2014, 615 pp.

⁽⁸³⁾ Recently, the *Cour de Cassation* summarised the employment relationship right, stating that «The contract of employment is an agreement by which a person undertakes to work on account of another and under its subordination in exchange for remuneration» (Court de Cassation, 22 July 2014, Bull civ IV, No 576).

the disposal of the employer who pays them. The employee is necessarily an individual and never a legal body. Moreover, the predominant factor, which differentiates employees from independent contractors, is still considered to be the power to issue orders and to check that instructions are respected, and this because it is «the only constitutive element that is not found in other contracts»⁽⁸⁴⁾.

Case law has had an essential role in clarifying the boundaries of this subordination. The French Supreme Court ruled that «a relationship of subordination is characterised by the performance of duties under the authority of an employer who has the power to give orders, monitor execution of assigned duties and punish his subordinates' breaches of duties»⁽⁸⁵⁾. In other words, the Supreme Court acknowledges the three classical powers to direct, control and sanction the employee. Even so, this understanding of the subordination did not prevent the French Courts from going partially beyond this restricted definition, lending weight to concrete indicators, similar to what happens in other European countries. Courts normally investigate whether a worker: must comply with a scheduled working time or can instead arrange it as they wish; receive remuneration on a regular basis; works on company premises and the company provide them with all necessary work equipment and materials; has a portfolio of clients; and whether the company cannot accomplish the same tasks with its own staff. These elements tend to measure the existence of controlling mechanisms and integration in the employer's organisation, as well as a lack of independence. This is because, on the flip side, art. L 8221-6-1 of the Labour Code clarifies that a self-employed worker is presumed to be one whose working conditions are defined exclusively by themselves or by means of the contract with their client.

Before the wave of the platform economy, the *Cour de Cassation* already qualified, based on these criteria, that a taxi driver was an employee. Although this worker rented the car from a company, he did not exercise any organisational choice as to working arrangements or services offered⁽⁸⁶⁾.

⁽⁸⁴⁾ F. Kessler, *The Concept of 'Employee': The Position in France*, in *Restatement of Labour Law in Europe: The Concept of Employee*, in B. Waas and G. Heerma Van Voss (Ed.), Hart Publishing, 2017, 197–218, 199.

⁽⁸⁵⁾ Cass. Soc. 13 November 1996, n° 94-13187. The first judgement where the concept of subordination was clarified is Cour de Cassation, 6 luglio 1931, n. DP 1931.1.131, n. P. Pic, in E. Dockès, cit., p. 5 reported in E. Dockès E., *Le salariat des plateformes. À propos de l'arrêt TakeEatEasy*, DO, 2019, n. 846.

⁽⁸⁶⁾ Cour de Cassation, Chambre Sociale, 19.12.2000, MM Labanne v. Soc. Bastille taxi et autre, n° 98-40572. Recently Uber drivers were also classified as employees, see Cour d'appel de Paris, 10 ja 2019, n° 18/08357.

Recently the same *Cour de Cassation* issued a judgment⁽⁸⁷⁾ on the case of the TakeEatEasy platform in which the Court infers the existence of an employment contract empirically, which verifies a company's unilateral power to geolocalise and disconnect the workers from the platform. Therefore, all three powers were not investigated in detail. However, the circumstances of the case were used to inspect the existence of a relationship where one party has the power to control and punish the other. In this way, the power to strongly influence how tasks should be performed remains with one party to the contract only. In other words, the *Cour de Cassation* did not investigate in detail the recurrence of the key criteria of subordination in this case, but conversely it could not infer, from the facts under scrutiny, the typical characteristics of a contract for service, i.e. the independence of the contractor in carrying out their work without receiving permanent instructions and orders from the company.

The French system also adopted a technique based on legal presumptions. Article L.8221-6 of the *Code du travail* provides a rebuttable presumption to those individuals who are registered as self-employed service providers. In particular, those who are registered are presumed not to be bound to the client through an employment contract for the business activity covered by the relevant registration. However, if the reality of facts during a trial demonstrates that the terms of work were typical of an employment contract, the presumption does not apply.

On the opposite side, the legislator decided to set specific legislation for professions where cases of bogus self-employment can often occur in so far as the atypical nature of the relationship makes it difficult to prove subordination. Therefore, in these cases, a presumption of a contract of employment is set, which is very difficult to reverse. That is the case, for example, for journalists⁽⁸⁸⁾, artists⁽⁸⁹⁾, models⁽⁹⁰⁾ caregivers, employees of buildings, attendants and nursing assistants⁽⁹¹⁾ and even some managers of businesses⁽⁹²⁾. The legislator aimed to extend the legal regime of the subordinate employees to these workers for a certain and variable extent. Journalists are, for example, entirely assimilated as employees and even enjoy some additional advantages, whereas only protections concerning salary,

⁽⁸⁷⁾ Cour de Cassation, Chambre Sociale, 28 novembre 2018, n. 1737.

⁽⁸⁸⁾ Section L. 7112-1 of the Labour Code.

⁽⁸⁹⁾ Section L. 7121-3 of the Labour Code.

⁽⁹⁰⁾ Section L. 7123-3 of the Labour Code.

⁽⁹¹⁾ Section L. 7211-2.

⁽⁹²⁾ Section L. 7321-3.

dismissal and working time have been granted to managers of food franchises. Moreover, the legislator intervened to qualify *ex lege* as a labour relation those occupations whose nature could have been doubtful (this is the case, for instance, of homeworkers⁽⁹³⁾ and commercial travellers)⁽⁹⁴⁾.

In brief, the French case stands out for the specific legislative techniques⁽⁹⁵⁾ that are used to directly enlarge the scope of labour law to the most controversial area of work with the similar aim that case law attempted to achieve⁽⁹⁶⁾. Other regulatory provisions can also be considered in terms of this ‘expansive’ technique. Indeed, some managers or persons who are at the head of an enterprise, such as managers of petrol stations, licensees, exclusive distributors and franchisees, can benefit from the protection of the Labour Code⁽⁹⁷⁾. Economic criteria are considered that include the exclusivity or quasi-exclusivity of the activity for one company and prices imposed by this company⁽⁹⁸⁾.

Two more legal devices are worth mentioning because they sit on the edge of the dividing line between subordination and self-employment and should theoretically ensure more protection to those workers. First, the *portage salarial* scheme (which resembles the case mentioned above of the ‘payroll companies’ in the Netherlands’ legal framework) was introduced by law in 2008⁽⁹⁹⁾ at Art. L 1251-64 of the Labour Code. The law defines the *portage salarial* as a unity of contractual relationships organised between an umbrella company⁽¹⁰⁰⁾, an independent contractor and a customer company. In this

⁽⁹³⁾ Sections L. 7411-1 and L. 7412-1 of the Labour Code.

⁽⁹⁴⁾ Section L 7313-1

⁽⁹⁵⁾ A peculiar case involves platform work. On the one hand, by means of law n° 2016-1088 *du 8 août 2016*, the French legislator added some provisions (art. 7341-1 et seq.) to Part VII of the Code related to digital platform workers creating a *de facto* presumption of self-employment that can be rebutted in a trial in cases where workers prove that their job has the features of subordination. However, on the other hand, some rights have been extended to platform workers that therefore benefit, for instance, from insurance for accidents at work and the right to continuing professional training, which are both responsibilities of the online platform in question. They also have the right to: constitute and join a trade union; have a union representing their interests; and furthermore, to take collective action in defence of their interests.

⁽⁹⁶⁾ However, the binary divide between dependent work and self-employment remains untouched if the option to add an intermediary category has been considered. A report was prepared for the minister to pave the way for this option. See H. Antonmattei and J. Sciberras, *Le travailleur économiquement dépendant: Quelle protection?*, 2008, in <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000694.pdf>.

⁽⁹⁷⁾ Art. L 7321-1 and following.

⁽⁹⁸⁾ On this point refer to F. Kessler *Op. cit.*, 215.

⁽⁹⁹⁾ Law No 2008-596 of 25 June 2008.

⁽¹⁰⁰⁾ On the topic of the umbrella company see ICHINO P., *A new labour law for platform workers and umbrella companies, the consequences of technological innovations on labour law systems*, in *WOL&G*, 2, 2018.

case, high-skilled workers can perform jobs for several clients, enjoying administrative services, such as invoicing and recovery of payment, provided by for the *portage salarial* company. Persons who work for such a company should have the competence to autonomously identify potential clients and negotiate directly with them, as if they were self-employed, but they formally conclude a contract of employment with the *portage salarial* company. These companies «function as employers only on paper, since they do not exercise power or provide work for these workers»⁽¹⁰¹⁾. Basically, those workers find their own customers and receive their remuneration from the *portage salarial* company based on the amount that the customer pays to the same company, deducting social security contributions and some operating costs. Scholars have criticised this legal instrument because it is self-evident how this scheme can, in practice, resemble the tripartite scheme of temporary agency work with the company that hires out labour⁽¹⁰²⁾. Theoretically, this instrument aims to make workers benefitting from employment status and other advantages, such as affiliation to social security and pension funds, contributions to unemployment insurance, paid vacation, right to training, management of legal-administrative and accounting tasks by the company without being subordinate or economically dependent.

Second, there is the status a worker acquires when becoming a member of a *Coopératives d'activité et et d'emploi*, which also ensures individual support to project holders to launch a new activity by offering them the chance to become 'salaried-entrepreneurs' (*entrepreneurs-salariés*). As with the case of the *portage salarial*, the project holder can work autonomously, find clients and deliver their services. However, they are bound to the cooperative by an employment contract. The cooperative collects clients' payments and gives them back to the project owner in the form of a salary once social charges and management fees have been deducted. Known in the anglophone debate as a 'Business and Employment Cooperative' (BEC), these cooperatives can either be a SCOP (only the workers can vote) or a SCIC (other types of actors are involved in the governance)⁽¹⁰³⁾.

A few words are needed about a form of individual entrepreneur – the 'auto-entrepreneur' – that was introduced in the Law on Economic

⁽¹⁰¹⁾ E. Dockés, *New trade union strategies for new forms of employment*, ELLJ, 2019, 10, 3, 219-228, 222.

⁽¹⁰²⁾ E. Dockés, *ibidem*, who refers to this happening frequently.

⁽¹⁰³⁾ M. C. Bureau, A. Corsani, *The French Business an Employment Cooperative. An autonomy factory?* In (eds) E. Armano, A. Bove and A. Murgia, *Mapping Precariousness: Labour Insecurity and Uncertain Livelihoods*. Routledge, 2017.

Modernisation in 2008. «The system established by the law does not create a specific status, rather a regime for independent workers» pursuing or beginning a small-scale activity that can also be complementary⁽¹⁰⁴⁾. Once the worker opts for this regime, they can benefit from simplified tax returns and social charges, subject to a maximum turnover. The self-entrepreneurs are solo traders or one-person businesses or professionals and in principle are not included in the scope of labour law.

2.3 (b) Italy

Art. 2094 of the Civil Code contains a definition of a ‘subordinate employee’ as being an individual «who undertake an obligation to cooperate in the business in exchange for a remuneration by performing his work manually or intellectually at the dependence and under the direction of the entrepreneur»⁽¹⁰⁵⁾.

On the flip side, a definition also exists in Art 2222 CC of an ‘independent worker’ as a person who is under an obligation to perform a service or deliver a piece of work for a fee, mainly by means of their labour, and in the absence of subordination vis-à-vis the principal. Basically, the system is set in a way that all the workers that are not employees, since subordination is lacking in their case, are classified as self-employed.

While the Italian legal framework has always been based on a binary system, but over time the legislator has decided to extend at least some of the protections that were originally reserved for employees to workers who are

⁽¹⁰⁴⁾ N. Levratto, E. Serverin, *Become independent! The paradoxical constraints of France’s ‘auto-entrepreneur’ regime*, JSBM, 2014, 53, 1, 284-301, 285.

⁽¹⁰⁵⁾ Art. 2094 cc «È prestatore di lavoro subordinato chi si obbliga mediante retribuzione a collaborare nell’impresa, prestando il proprio lavoro intellettuale o manuale alle dipendenze e sotto la direzione dell’imprenditore». The definition provided for in art. 2094 of the Civil code contains complex legal terminology which has spurred a large debate in the Italian doctrine that is still ongoing. For this reason, it was translated in very different ways by different authors. See T. Treu, *Italy*, ELL – Suppl. 435, 2016, 41; E. Ales, *The Concept of ‘Employee’: The Position in Italy*, in *Restatement of Labour Law in Europe: The Concept of Employee*. (Ed.) B. Waas and G. Heerma van Voss, Hart Publishing, 2017. 351–376, 351; E. Gramano and G. Gaudio, *New Trade Union strategies for new form of employment: Focus on Italy*, ELLJ, 2019, 10, 3, 2019, 240-253, 241; V. Pietrogiovanni, *Redefining the Boundaries of Labour Law: Is ‘Double Alienness’ a Useful Concept for Classifying Employees in Times of Fractal Work?*, in *Theorising Labour Law in a Changing World -Towards Inclusive Labour Law*, (Ed.) A. Blackham -M. Kullmann -A. Zbyszewska, Hart, 2019, 55-69, 62. Scholars offer a different interpretation of the concept of ‘collaboration’. Moreover, the wording «alle dipendenze e sotto la direzione» can be considered as a hendiadys translating only the power to direct someone else’s work or, more properly, as expressing two separate concepts.

considered self-employed, but in need of some safeguards, as is clarified below.

The criteria used to identify the employee have been discussed for decades by legal commentators and in the Court. In Italy, a typological method based on the primacy of facts and concrete circumstances that are used as indirect indicators of subordination has also been developed by the Courts. According to the prevailing opinion, the core of the subordination still lies in the employer's power to issue orders and instructions, to control employees and sanction them in case of a breach of contract. This is also considered to be true if those powers are not concretely exercised and remain in a potential status only.

On this point, an issue arises whereby a client has the right to ask the *opus* to have specific characteristics or to be made according to specific conditions. This, in turn, means that this kind of request is also capable of influencing the work performed by a self-employed worker⁽¹⁰⁶⁾. Therefore, in order to define a difference, the employer's power is understood as operating in a more pervasive way, to the point that employees have the duty to comply with specific procedures and can be requested to observe a specific operational modality in performing tasks. Even when so characterised, the so-called hetero-direction is an insufficient criterion to secure a demarking line, since there are employees who enjoy large discretion on the job because that is essential to operate in favour of the company⁽¹⁰⁷⁾. This freedom of action does not, *per se*, exclude subordination⁽¹⁰⁸⁾.

⁽¹⁰⁶⁾ Both art. 2224 and 1665 of Civil Code are clear examples of a possibility for the client to control and supervise the way the job improves.

⁽¹⁰⁷⁾ This is, for instance, the case for workers higher up in the hierarchy or who are in charge of managing the company or other workers. It is also, for example, the case for creative industries where workers are encouraged to innovate. In this case, the Italian case law elaborated the concept of 'attenuated subordination'. Therefore, according to the Italian Corte di Cassazione in these cases, the employer's hierarchical power is expressed by means of general programmatic recommendations (Cass. Civ. 1094/93; 5301/86; 648/86; 5022/85) and therefore without any need for direct and continuous orders and checks by the employer (Cass. 6086/1991). M. Barbieri, in *Della subordinazione dei ciclofattorini*, *LLI*, 2019, 5, 2, points out that the case-law related to the so-called 'attenuated subordination' recognises *de facto* that, in some cases, the subordination essentially consists of a permanent inclusion in the employer's productive organisation and that this is the inevitable result of a more correct interpretation of the wording of art. 2094 c.c, which already embeds both hetero-direction and hetero-organisation. On the contrary, according to M. Pallini, *Towards a new notion of subordination in Italian Labor law?*, *ILLeJ*, 2019, 12, 1, 4, «Italian case-law has remained firmly anchored in the concept of hetero-direction as a necessary (and sufficient) requirement to classify a relationship as subordinate, with respect to which the other indicators are merely 'subsidiary'». Nevertheless, in the same article, the author suggests that the last wave of reforms marked the decline of the hetero-direction as the exclusive distinguishing element of 'subordination' in Italian labour law.

⁽¹⁰⁸⁾ This statement was already expressed by the Italian Corte di Cassazione in the '1970s (Cass. civile n. 1885/76 and Cass. Civile n. 1064/75).

For this reason, other elements help in defining a dividing line when subordination understood merely as hetero-direction is insufficient. For this purpose, some specific words that are integrated into the definition of employee ex art. 2094 CC have been used as a gateway for such an operation. In particular, the words ‘dependence’ and ‘cooperation’. ‘*Alle dipendenze*’ can be understood according to different nuances as a stable transfer of work energy or as availability over time of the employee, or as a permanent inclusion in the productive organisation of others⁽¹⁰⁹⁾. All of these definitions recall the idea of permanency or continuity, which should be lacking in the obligations of a self-employed worker. However, some forms of employment, such as on-call jobs, have reduced the capability of the criterion of continuity to serve as a distinctive sign of an employment contract when merely understood in terms of continuity in the availability and performance of the worker.

The Italian *Corte di Cassazione* underlined the critical importance of continuity in terms of functional dedication of working energy to the productive result pursued by the entrepreneur when it comes to demonstrating subordination⁽¹¹⁰⁾. Therefore, to explain how a labour relationship that does not entail the worker always performing their tasks (for instance on-call or part-time jobs) can be deemed to be classified as a contract of employment, the emphasis should be on the functionality of tasks to reach an external purpose. The employer indeed decides this purpose, and it can change over time.

The obligation to cooperate with the employer’s targets and purpose can also be understood as a way of ‘translating’ a technical and organisational element of integration in the employer’s organisation.

In a way, a link with this point can be found in the idea of ‘double alienness’, which was first elaborated in legal literature⁽¹¹¹⁾, and thereafter applied in a judgment of the Constitutional Court⁽¹¹²⁾. According to the latter

⁽¹⁰⁹⁾ On this point and for more references, see O. Razzolini, *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura*, *DRI*, 2020, 2, 360-61 and the doctrine mentioned *ivi*.

⁽¹¹⁰⁾ Cass. Civ. 5024/85; 57/84.

⁽¹¹¹⁾ U. Romagnoli, *La prestazione di lavoro nel contratto di società*, Giuffrè, 1967, 188 ss. and L. Mengoni, *Lezioni sul contratto di lavoro*, Celuc, 1971 as well as in *La questione della subordinazione in due trattazioni recenti*, in *RIDL*, 1986, 17.

⁽¹¹²⁾ Case n. 30/1996 Constitutional Court. This approach to detecting a case of subordinate work was further applied in a small number of judgments both at the highest level by the national Corte di Cassazione (Cass. n. 19657/2019; Cass. n. 26813/2018; Cass. n. 14660/2017; Cass. n. 820/2007) and by first or second instance Courts (Trib. Lucca 18 gennaio 2018, n. 35; App. Genova 30 settembre 2013; Trib. Siena, 24 luglio 2012, n. 32; Trib. Siena 12 luglio 2012, n. 16; Trib. Siena, 27 aprile 2011, n. 257; Trib. Siena 15 ottobre 2010, n. 119; Trib. Siena 6 settembre 2010, n. 80). V.

judgment, two conditions are always bound with one another only in the case of subordination. One is the alienness of the result, which means that the final result of the work performed by each of the members of the workforce does not belong to any of them. The second element is the alienness of the organisation, which belongs to the employer and to which each employee has to integrate. The Court also clarified that this condition of ‘double alienness’ is implied in the circumstance for which the work performance is integrated into an organisation over which the employee has no control, because the said organisation is crafted for a purpose over which the employee has no legitimate interest.

This leads us to consider the relevance of the hetero-organisation as an intrinsic characteristic of subordinate employment. Indeed, case law also underlined that work performances are strictly interlinked with the employer’s organisation functionality. This means that an employee becomes an integral ‘particle’ of the employer’s technical, economic and administrative organisation⁽¹¹³⁾. Since hetero-direction was deemed to be a key element, and once it has been strictly defined as a technical power, the legislator decided not to make any change in the general definitions of both subordinate employment and self-employment, rather it used the hetero-organisation as a tool to expand protection over freelancers that were not completely independent.

At first, this happened by ensuring the same judicial protection provided to subordinate employment applied to a category of self-employed that was labelled as para-subordinate by the doctrine⁽¹¹⁴⁾. Art. 409 n. 3 of the Code of Civil Procedure, recently amended by Art. 15 law 81/2017, contains a definition of ‘coordinate and continuative work relationship’ indeed. This is the case of self-employed workers who perform a continuative service, mainly in person, for a client with whom they have a deal in order to coordinate tasks with the client’s organisation. The law specifies that this form of cooperation should not compromise the autonomy of the worker in organising their work.

Pietrogianni, *op. cit.*, describes the concept of ‘double alienness’ for an English audience endorsing its use to reconduct, in particular, the case of Uber drivers under the umbrella of subordination.

⁽¹¹³⁾ Cf. *ex multis*, Cass. Civ. 5921/80; 5210/78.

⁽¹¹⁴⁾ On the topic of ‘para-subordinate work’, *ex multis*, refer to G. Santoro Passarelli, *Il lavoro parasubordinato*, Franco Angeli, 1979; M. Pedrazzoli, *Prestazione d’opera e parasubordinazione*, RIDL, 1984, I, 506; V. Ballestrero, *L’ambigua nozione di lavoro parasubordinato*, L&D, 1987, 41; S. Leonardi, *Il lavoro coordinato e continuativo: profili giuridici e problematici*, RGL, 1999, I, 501; A. Perulli, *Lavoro coordinato*, Digesto, VI ed., disc. Priv.-sez. comm., Torino, 2000, L. Nogler., *La doppia nozione giuslavoristica di parasubordinazione*, MGL, 2000, 1024; C. Colantoni, *A proposito delle collaborazioni coordinate e continuative*, DRI, 2001, 29.

In other words, coordination means a necessary connection between execution (by the worker) and organisation (of the client) that does not imply directional powers.

The legal framework underwent several amendments, none of which were free of faults and interpretative conundrums, and lately art. 2 of the decree 81/2015 (amended soon after by law 128/2019) introduced the so-called 'hetero-organised work relationship'. The law provides that labour law regulations that apply to subordinate employment also cover those not-dependent collaborators who perform continuous activities on a prevalently personal basis which are organised by the employer. An amendment also added that those dispositions apply to those self-employed workers who deliver goods when platforms are in use to issue modality of work execution.

The national Corte di Cassazione already applied⁽¹¹⁵⁾ the previous drafting⁽¹¹⁶⁾ of this new disposition to a case related to Foodora riders. In this circumstance, the Court interpreted the law stating that it does not create a *tertium genus*. Indeed, according to the Court, the law has the effect of broadening labour law protection (to the extent that excludes only provisions that are, in the Court's wording, "ontologically incompatible" with the concrete case) when three characteristics stand out: work performed personally, continuity of the service, and hetero-organisation. The judgment does not solve all the issues that this new provision poses to the current legal framework, and the issues are twofold. First, the need for delineating differences between 'coordinate and continuative work' and a 'hetero-organised work relationship' emerges. Both, according to the law, are forms of independent work performed mainly personally and in a continuative way. Moreover, both imply a form of coordination that, only in the former case, has to follow a specific agreement between the parties. Furthermore, the legislation wording seems to imply a different level of coordination between the client and the collaborator, which is tighter in the case of a 'hetero-organised work relationship', since the law refers to coordination in the method of execution of work. The second issue is related to the distinction between subordination and hetero-organised work, since the latter is the form of self-employment that is closer to dependent work.

⁽¹¹⁵⁾ Cass. 1663/2020.

⁽¹¹⁶⁾ Before the latest amendment, the law provided that the work should have been performed exclusively on a personal basis and that the coordination with the external organisation could involve also timing and place of the performance.

On both sides of this conundrum, the debate is still open among Italian scholars, and it speaks to the inconsistency and poor drafting of the laws realised over the years. This is also probably due to different targets that governments of different political composition had in their mind in drafting the issued amendments.

Broadly speaking, the methods that were used in each of these legislative interventions are highly contestable, as the legislator chose not to operate on the general category on which the Italian system has been built (embedded in art. 2094 CC) to clarify its scope and therefore valorising, in this way, its inherent adaptive nature. Instead the preferred technique has always been to keep untouched the original concept of subordination embedded in the code, and conversely to carve out one of the main characteristics of subordination that was the most useful in order to extend pieces of protection over the area of self-employment that was more in need of protection. The result is a fragmented legal framework that lacks systematic consistency and opens the door to many possible interpretations and dilemma that case law will have to cope with shortly.

Section 3. Conclusions

3.1. Concluding remarks on the study

The analysis has revealed that the legal systems under scrutiny still show similarities that are due to the historical evolution of labour law across the whole of Europe and above all in the area of the civil law family. In continental Europe, and in the UK⁽¹¹⁷⁾, the principle of ‘primacy of facts’ is preferred over the formal acknowledgement of the contract when the relationship between the parties is assessed.

The contract of employment is considered to be a synallagmatic exchange of labour, on the one side, and a salary or wage, on the other. Self-employment has evolved as a residual category that collects all the workers that do not match the required criteria to be considered employees.

The hetero-direction served as the main parameter to which the investigation of circumstances has been entrusted for a long time, until it lost

⁽¹¹⁷⁾ It is worth mentioning that, in the UK, Courts have shown at least for some time a significant degree of deference to the written contract. *Sic* G. Davidov, M. Freedland and N. Countouris, *The subject of labour law: Employees and other workers*, in *Research Handbook in Comparative Labor Law*, (eds) Matthew Finkin & Guy Mundlak, Edward Elgar 2015.

the capability to regulate reality. In many countries it remains the most relevant factor, at least formally. Moreover, legal systems have evolved to confront economic and social reality but have not always moved along a homogeneous path. On one hand, a neo-liberal wave extensively insufflated flexibility, starting in the 1980s. On the other hand, the scope of the application of labour law was extended by means of a mix of sources⁽¹¹⁸⁾.

All the techniques operate on a specific area of self-employment whose ranks have been enlarged by the enterprise reorganisation of production and by their financialization, both beginning around 40 years ago.

A crucial role has been played in all the countries by case law, and it is easy to understand the reason why. Judges are always confronted with reality and have to provide responses on a case-by-case basis. Moreover, in many countries, general principles exist that are in favour of the weaker party of the contract as well as and constitutional principles that oversee labour and judges are bound to them. Courts started to elaborate new criteria to enucleate dependent employment and to attribute a particular case to the general category of subordination. This often happened by means of a typological technique or underlining circumstances that could shed light on the existing link with the employer organisation or the economic dependence of the self-employed worker. In some cases, once a stable case law was created on a specific position, the legislators decided to issue reforms that embedded this jurisprudence in their Codes. This happened, as described above, in Germany with the new definition in section 611(a) and also in France with Part VII of the Labour Code, which extended the scope of labour protection to some workers according to their profession.

It is clear that in all six countries there has been an attempt to cope with the issue related to the growing inadequacy of the concept of subordination in ensuring protection, when understood merely as a power to direct someone else's work. This process is tendentially easier in legal systems that do not have a legislative definition of subordination or that have crafted a broader one. However, in Slovakia, whose Labour Code embeds the strictest and demanding definition of 'dependent work', an attempt to enlarge the protection ensured by labour law and therefore restrain the use of bogus self-employment has been made by loosening the original version of the provision that defines the scope of the Code itself.

⁽¹¹⁸⁾ The analysis conducted in the present study about the techniques used shares commonalities with the recent analysis in A. Perulli, *The legal and jurisprudential evolution of the notion of employee*, ELLJ, 11, 2, 117-130, 2020.

Another interesting technique is that of providing a presumption of the existence of an employment contract, which in the Netherlands is based on the length of work performed in favour of the other party, whereas in France it is based on the idea that some professions are more at risk of being exploited. Some other countries preferred instead to rely on the concept of economic dependence, and consequently crafted a hybrid genus between subordination and self-employment, which is based on criteria that are clearly thought to measure the capability of the self-employed to remain and operate on the market by themselves (i.e. lack of clients, percentage of earnings, continuity of service for the same client).

This approach creates two inconveniences. First of all, intermediate categories often simply offer a more accessible opportunity for misclassifying employees and therefore end up lowering protections for many workers⁽¹¹⁹⁾. Secondly, a *tertium genus* often has the effect of narrowing the area of subordination, which ensures the maximum standard of protection. This is the case for the ‘worker’ in the UK⁽¹²⁰⁾. Indeed, often this *tertium genus* is created starting from some of the criteria that judges also use to frame the area of subordination, thus the consequence is the watering down of protection for workers that share characteristics typical of subordinate work.

The peculiarity of the Italian case lies in the technique that has been used to operate on the border between self-employment and subordinate work. The focus is not on factors that are able to measure the economic dependence of self-employed workers directly in terms of earnings (as happens in Germany, for example), rather it is on the need for coordination with the business organisation, which creates a stable form of connection between the two parties. This parameter becomes the selective element to which the protection granted by labour law is fastened.

⁽¹¹⁹⁾ N. Countouris and V. De Stefano, *New trade union strategies for new form of employment*, ETUC, Brussels, 2019, 60.

⁽¹²⁰⁾ According to the analysis of the UK case-law related to riders in V. Pietrogiovanni, *L'importanza di chiamarsi lavoratori, ossia delle Corti del Regno Unito alla (p)rese con il lavoro a chiamata sulle piattaforme*, LLI, 2019, 5, 1, 65, the category of ‘worker’ did not prove to be able to shield those platform-workers from being exploited. On this point and the issue of the gig economy, cfr. also M. A. Cherry - A. Aloisi, *Dependent contractors in the gig economy: A comparative approach*, AML, 2016, vol. 66, p. 635-689.

3.2 The concept of subjection as a more inclusive conceptualization to redefining subordination and ensuring protection

Modern private law has been a consequence of the bourgeois revolution and the proclamation of the formal equality principle. At its starting point, the recognition of the equality principle aimed to replace a society based on status with a new one based on the contract⁽¹²¹⁾ which inevitably postulated that any person should be free to determine their condition on their own merit, and no longer because of their original social status.

The contract of employment is the outcome of a long-lasting elaboration, and it is theoretically based on an agreement between two free and equal parties, with the employee ceding only their work while, in reality, it conceals a concrete hierarchical relationship of subjection and power. Labour law, as well as the welfare state promulgated in all the European countries in the 20th century, was also finalised to balance the differences in power and conditions between the counterparts of the employment relationship and more broadly in favour of the socially disadvantaged. Both can be considered tools to reach a more substantial form of equality, with the difference being that labour law is centred on the contract of employment, and it works through the lens of the contract, whereas the welfare state and social protection operate on a broader scenario. Both try to align law outlined with empirical facts⁽¹²²⁾ but original settings entail path dependency effects that need to be considered.

As has been noted⁽¹²³⁾ prominent labour law scholars, such as Sinzheimer and Kahn Freund, were aware of the difference between the structural dependency on wage and salary, due to social conditions and the specific subordination experienced vis-a-vis a particular employer. It is important to remember the distinction between these two kinds of vulnerability, first because of the difference in the tangible way they materialise, and second because the tools the legal framework should operate with can be different too.

⁽¹²¹⁾ The reference is clearly to the influential work of Henry Summer Maine, *Ancient Law*, John Murray, 1861.

⁽¹²²⁾ In this regard, the development of trade union law can also be seen as a second step stemming from the striving of the workers who rejected the original denial of a social dimension among the workforce in the firms.

⁽¹²³⁾ Davidov G., *Subordination vs Domination: Exploring the Differences*, IJCLL&IR, Forthcoming; Hebrew University of Jerusalem Legal Research Paper No. 17-27, 2017. Available at SSRN: <https://ssrn.com/abstract=2969141>

The issue with the concept of economic dependence is that it is ambiguous on this point. It creates different legal regimes for different categories of workers (and therefore it modulates rights) based on a situation – economic dependence – that can be experienced transversely by employees, self-employed and even small entrepreneurs.

A different and more recent proposal⁽¹²⁴⁾ suggested making a distinction between individuals *genuinely operating a business on their own* account and individuals who are *engaged by another to provide labour* in order to attach labour law protection to the latter condition. This perspective relies mainly on the business-test since the selective criterion would be limited to verifying that the person should not genuinely operate a business on their own⁽¹²⁵⁾. In other words, whereas traditionally labour law standards were attached to the employee status, this option would ensure the same protection to all workers who cannot be 'assimilated' with the legal definition of 'entrepreneur'. Therefore, following this path, the problem seems to shift from defining the dividing line between dependent and self-employed work to identifying the inherent characteristics related to the status of the entrepreneur. Since the proposal also seems to disconnect the protection from the contract, different technical tools linking labour standards are in need of being further discussed.

To contribute to the current debate, this article started from the idea that the current economic and social scenario needs labour law to align once again with reality since what has happened in those last 40 years is, in very simple terms, the successful attempt to use all the possible means to escape from the protections ensured by the concept of subordination pursued by those who in the position of using the work of others.

From this perspective, the same concept of subordination needs to be deeply revised or, more properly, should be replaced. This is necessary because the concept is weighed down by its original crafting or its consolidated interpretation.

As the analysis has shown, since the power to direct someone else's work lost its ability to define all cases of subordination, the case law in many countries developed a way to enlarge the original selective criteria. In the face of this challenge, general categories and elements that the case law elaborated in many European countries are a precious resource that deserves to be better valued by both legislators and scholars.

⁽¹²⁴⁾ Leveraging the work of Mark Freedland, Countouris & De Stefano, 2019, *op. cit.* proposed the concept of 'personal work relation'.

⁽¹²⁵⁾ See, *ivi*, 65.

According to the analysis conducted above⁽¹²⁶⁾, parameters in use in different countries can be connected to a small number of broader categories. They measure the power to direct someone else's work (hetero-direction), the degree of integration in the organisation of the putative employer (hetero-organisation), who bears the business risk or, more broadly, the economic dependence (business test or economic realities test). It is possible to elaborate further on those criteria and overcome the limits of the case law technique to outline a new concept to couples with the labour law protection. I suggest using the idea of 'subjection'. As underlined in the introduction, forms of the subjection of workers to an employer (formally a client) are also pursued by means of civil and commercial forms of contracts (workers that are formally self-employed or independent contractors can also be 'subjected'). The connection with the purposes and results pursued by the employer/company is not necessarily ensured by the technical subordination today. The external market works well as an effective functional substitute once the law allows this form of exploitation. Longer is this form of connection with the needs of an external entity (i.e. a single client, for instance); more the workers became incapable of finding new clients on the market. It is not by chance that continuity in putting work at the disposal of the employer is one of the factors commonly used by national courts to identify subordinate work, whereas countries that acknowledge a *tertium genus* investigate whether the worker has one only client or whether most of their revenue comes from just one client.

Years ago, with a different social and economic scenario, Collins argued that there are two sources of subordination: one due to the inequality of market bargaining power; the other due to the bureaucratic structure of the organisation. Of course, when a company is vertically integrated, the organisation can be seen as a bureaucratic structure. Today, instead, the hetero-integration has to be seen in regards to the employer business. The subjection is integrated into a structure that is built within the external market and does not pertain simply to the internal market of the company as it would have been in the past. Understood in this way, the hetero-integration comes to basically overlap in functional terms with the 'double alienness' concept elaborated by the Italian Constitutional Court⁽¹²⁷⁾.

⁽¹²⁶⁾ On this point cf. G. Davidov M. Freedland and N. Kountouris *op.cit.*; G. Casale (ed). *Op.cit.*; N. Countouris, *The Changing law of the employment relationship: comparative analyses in the European context*, Ashgate, 57-83.

⁽¹²⁷⁾ See n. 112 above.

Even if we consider the integration test (or hetero-organisation test) as the most promising criterion among those already in place in the legal orders under scrutiny in terms of capability to unify different situations – which are homogeneous in terms of the subjection of the worker – nonetheless the potential of this criterion can be reduced by some factors. In all the legal systems under scrutiny, subordination conceived as direction and control still plays a central and diriment role. Therefore, the potential is lost whenever the integration test is regarded only as a pale shadow of the main test and so as a different manner to measure the capability to control and direct the work. The criterion also loses its potentially unifying character once it is used to define the outline of intermediate categories of semi-dependent workers that are nonetheless placed in the autonomous work *genus*. Moreover, there are two other related problems. The first is that the borders of the business of a company or employer are not always clearly evident. For this reason, the idea of the ‘double alienness’, which can be considered a sort of specular image from the employee’s side, is an easier criterion to determine the state of subjection in at least some cases. Of course, the author is well aware that many Constitutions recognise the relevance of the economic freedoms – this is even more marked in the EU legal framework – and therefore an extension of the labour law protections that compromise economic freedoms could be considered unlawful. In this case, the relevance of other constitutional rights and principles should oppose this point of view.

As mentioned, a second test can be the so-called business test. It also has flaws when used as the only crucial test. The significant use of self-employment is a signal that points out how the business-risk test can actually be used to circumvent the protections granted to subordinate employment when a person is engaged to provide labour integrated into an artefact or service, which can be potentially refused by the client. For instance, nowadays a company in need of a new logo or brand identity, or a newspaper looking for exciting stories to publish on a daily basis, can launch a contest for freelancers by means of professional *ad hoc* platforms. In both cases, the freelance holds all the economic risk if the company or newspaper does not opt to use their piece of work. The two mentioned examples are not exactly interchangeable since the former can be regarded as an *una tantum* job based on a selection of the best project, while the latter case is a typical example of outsourcing of the core business of a company, which in the case of enclosed kinds of platforms entails continuity in the relationship with a cluster of workers in competition with one another.

If the hetero-direction criterion is still useful in more ‘traditional’ cases of subordination, the point is that although the business test and the hetero-integration test were developed to move beyond the strict use of the hetero-direction test, they never reached the level to be considered as stand-alone tests. Indeed, they are used mostly in a kind of overall judgment that gives the Courts a significant level of discretion in evaluating the single concrete case.

The ABC test developed for the first time in Wisconsin (USA) in 1935 could be seen instead as one possible way of taking advantage of the parameters that case-law has employed in the USA, but also in Europe, as the study demonstrates. This test had a rebirth recently because it proved both to be able to avoid misclassification problems and to include workers as employees covered by some protective statutes⁽¹²⁸⁾. Both Massachusetts⁽¹²⁹⁾ and California embedded this test in a bill (in the latter State, Assembly Bill No. 5, CHAPTER 296 followed the California Supreme Court decision in *Dynamex*)⁽¹³⁰⁾.

Despite some small differences in the wording of the laws, the three conditions of the tests are designed in the same way. An individual performing a service or work is considered to be an employee unless: a) they are free from direction and control in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) the person performs work that is outside the usual course of the hiring entity’s business; (c) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Moreover, under this test, it is the responsibility of the employer to prove that the worker does not fulfil any of the conditions that basically resemble the three categories discussed above. In this way, each can be considered a stand-alone condition that, once it occurs, will trigger the application of labour law. As underlined in the analysis provided, this scheme is not completely alien to the European legal context, both because of the case-law of the European countries and because of the European landmark

⁽¹²⁸⁾ In these terms see R. Bales and C. Garden, *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*, Cambridge University Press, 2019, p. 146. They also clarify how this test is able: a) to include agents who are either controlled or dependent; b) shift the burden of proof to the employer; and c) has the added advantage that it simplifies the legal arguments and thus increasing predictability. In the common law systems, and particularly in the US, the possibility to predict the outcome in a potential trial is of particular relevance when deciding whether to embark on a judicial proceeding.

⁽¹²⁹⁾ MASS. GEN. LAW. ANN. Chapter 149, Section 148B(a) 1-3, 2014

⁽¹³⁰⁾ California Supreme Court issued a unanimous decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (April 2018) 4 Cal.5th 903.

judgment quoted in section one. Moreover, presumption mechanisms aimed at reversing the burden of proof on the employer are already in use both in the Netherlands and in French labour law. Of course, a test like this is an equivalent, in functional terms, of a different technique that is in use in the Civil Law area which implies the reconnection of a given concrete case to a general and abstract rule.

A final consideration concerns the self-employed workers who are genuinely independent and not subject to another entity. Their direct voice should be heard more carefully since they are organised and able to strive for their positions, as the broader study conducted within the 'SHARE' project observed. Indeed, the absence of a condition of subjection does not mean that they are not *in re ipsa* in a condition of vulnerability when certain conditions are met, as for instance, in cases of incapacity to work due to sickness or disability. Another issue is related to the pension system, since often self-employed workers struggle to pay the minimum assessment base and therefore run a significant risk of receiving an inadequate pension once they retire. European states have already implemented provisions to partially overcome some of these welfare-related issues, but there is still room for improvement.

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