

Hans LAUSCHKE

Doctoral Dissertation

RIGHTS AND SOCIAL GUARANTEES
FOR FREELANCE WORKERS –
STATUS QUO AND DEVELOPMENTS
OF LEGAL INSTRUMENTS IN
LITHUANIA IN COMPARISON WITH
OTHER EUROPEAN COUNTRIES

SOCIAL SCIENCES,
LAW (S 001)
VILNIUS, 2026



Mykolas Romeris
University

MYKOLAS ROMERIS UNIVERSITY

Hans Lauschke

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Scientific supervisor:

Prof. Dr. Rytis Krasauskas (Mykolas Romeris University, Social Sciences, Law, S 001).

The dissertation is defended at the Law Research Council of Mykolas Romeris University and Vytautas Magnus University:

Chairperson:

Prof. Dr. Salvija Mulevičienė (Mykolas Romeris University, Social Sciences, Law, S 001).

Members:

Prof. Dr. Tomas Davulis (Vilnius University, Social Sciences, Law, S 001);

Prof. Dr. Lina Mikalonienė (Mykolas Romeris University, Social Sciences, Law, S 001);

Prof. Dr. Raimundas Moisejevas (Mykolas Romeris University, Social Sciences, Law, S 001);

Dr. Tatiana Wrocławska (University of Lodz, Poland, Social Sciences, Law, S 001).

The doctoral dissertation will be defended in the public meeting of the Law Research Council at 9:30 am on 17th of April, 2026 in Mykolas Romeris University, Room I-414.

Address: Ateities g. 20, LT-08303 Vilnius, Lithuania.

MYKOLO ROMERIO UNIVERSITETAS

Hans Lauschke

LAISVAI SAMDOMŲ DARBUOTOJŲ TEISĖS IR
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TEISINIŲ INSTRUMENTŲ RAIDA LIETUVOJE,
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Mokslinis vadovas:

prof. dr. Rytis Krasauskas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001)

Mokslo daktaro disertacija ginama Mykolo Romerio universiteto ir Vytauto Didžiojo universiteto teisės mokslo krypties taryboje:

Pirmininkė:

prof. dr. Salvija Mulevičienė (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001).

Nariai:

prof. dr. Tomas Davulis (Vilniaus universitetas, socialiniai mokslai, teisė, S 001);

prof. dr. Lina Mikalonienė (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001);

prof. dr. Raimundas Moisejevas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001);

dr. Tatiana Wrocławska (Lodzės universitetas, Lenkijos Respublika, socialiniai mokslai, teisė, S 001).

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Adresas: Ateities g. 20, 08303 Vilnius, Lietuva.

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LIST OF ABBREVIATIONS

AEntG	Arbeitnehmerentsendegesetz [Employee Secondment Act] of 20 April 2009 (BGBl. I p. 799), last amended by Art. 1 of the Act of 28 June 2023 (BGBl. 2023 I No. 172)
AGG	Allgemeines Gleichbehandlungsgesetz [General Equal Treatment Act] of 14 August 2006 (BGBl. I p. 1897), last amended by Art. 15 of the Act of 22 December 2023 (BGBl. 2023 I No. 414)
ArbGG	Arbeitsgerichtsgesetz [Labor Court Act] in the version published on July 2, 1979 (BGBl. I p. 853, 1036), last amended by Art. 3 of the Act of 24 October 2024 (BGBl. 2024 I No. 328)
ArbSchG	Arbeitsschutzgesetz [Occupational Health and Safety Act] of 7 August 1996 (BGBl. I p. 1246), last amended by Art. 32 of the Act of 15 July 2024 (BGBl. 2024 I No. 236)
art.	article
AuR	Arbeit und Recht
BAG	Bundesarbeitsgericht [Federal Labor Court]
BeckRS	Beck-Rechtsprechung
Beschl. v.	Beschluss vom [Order of]
BetrVG	Betriebsverfassungsgesetz [Works Constitution Act] in the version published on 25 September 2001 (BGBl. I, p. 2518), last amended by Art. 1 of the Act of 19 July 2024 (BGBl. 2024 I No. 248)
BGB	Bürgerliches Gesetzbuch [Civil Code] in the version published on 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), last amended by Art. 14 of the Act of 23 October 2024 (BGBl. 2024 I No. 323)
BGBL	Bundesgesetzblatt [Federal Law Gazette]
BGH	Bundesgerichtshof [Federal Supreme Court]
BJLP	Baltic Journal of Law & Politics
BSG	Bundessozialgericht [Federal Social Court]
BUrlG	Bundesurlaubsgesetz [Federal Leave Act] in the amended version published in the BGBL. Part III, Section 800-4, last amended by Art. 3 (3) of the Act of 20 April 2013 (BGBl. I p. 868)
BVerfG	Bundesverfassungsgericht [Federal Constitutional Court]
BVerwG	Bundesverwaltungsgericht [Federal Administration Court]
CFA	Committee on Freedom of Association
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union

EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
ELLJ	European Labour Law Journal
EntgTranspG	Entgelttransparenzgesetz [Remuneration Transparency Act] of 30 June 2017 (BGBl. I, p. 2152), last amended by Art. 25 of the Act of 5 July 2021 (BGBl. I, p. 3338)
EPA 1975	Employment Protection Act 1975
ERA 1996	Employment Rights Act 1996
ErfK	Erfurter Kommentar zum Arbeitsrecht
EU	European Union
Eurofound	European Foundation for the Improvement of Living and Working Conditions
EuZA	Europäische Zeitschrift für Arbeitsrecht
EWCA	England and Wales Court of Appeal
DStR	Deutsches Steuerrecht
GG	Grundgesetz [Basic Law] for the Federal Republic of Germany in the corrected version published in BGBl. Part III, Section 100-1, last amended by Art. 1 of the Act of 20 December 2024 (BGBl. 2024 I No. 439)
HGB	Handelsgesetzbuch [Commercial Code] in the corrected version published in the BGBl. Part III, Section 4100-1, last amended by Art. 1 of the Act of 28 February 2025 (BGBl. 2025 I No. 69)
HinSchG	Hinweisgeberschutzgesetz [Whistleblower Protection Act] of 31 May 2023 (BGBl. 2023 I No. 140), last amended by Art. 16 of the Act of 27 December 2024 (BGBl. 2024 I No. 438)
HMRC	His Majesty's Revenue and Customs
ICJ	International Court of Justice
ICT	information and communication technologies
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILC	International Labour Conference
ILO	International Labour Organization
ILJ	Industrial Law Journal

JICL	Journal of International and Comparative Law
LAG	Landesarbeitsgericht [Regional Labor Court]
LAT	Lietuvos Aukščiausiasis Teismas [Supreme Court of Lithuania]
lit.	littera
LR ABĮ	Lietuvos Respublikos akcinių bendrovių įstatymas [Law on Companies of the Republic of Lithuania]
LR ATGTĮ	Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas [Law on Copyright and Related Rights of the Republic of Lithuania]
LR CK	Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinis kodeksas [Law on the Approval, Entry into Force and Implementation of the Civil Code of the Republic of Lithuania. Civil Code]
LR DK	Lietuvos Respublikos darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Lietuvos Respublikos darbo kodeksas [Law on the Approval, Entry into Force and Implementation of the Labor Code of the Republic of Lithuania. Labor Code of the Republic of Lithuania]
LR DSĮ	Lietuvos Respublikos darbo sutarties įstatymas [Law on Employment Contracts of the Republic of Lithuania]
LR DSSĮ	Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatymas [Law on Safety and Health at Work of the Republic of Lithuania]
LR GPMĮ	Lietuvos Respublikos gyventojų pajamų mokesčio įstatymas [Law on Personal Income Tax of the Republic of Lithuania]
LR ĮLIĮ	Lietuvos Respublikos įdarbinimo per laikinojo įdarbinimo įmones įstatymas [Law on Temporary Agency Work of the Republic of Lithuania]
LR KTK	Lietuvos Respublikos kelių transporto kodeksas [Road Transport Code of the Republic of Lithuania]
LR MVLGI	Lietuvos Respublikos moterų ir vyrų lygių galimybių įstatymas [Law on Equal Opportunities for Women and Men of the Republic of Lithuania]
LR PSĮ	Lietuvos Respublikos profesinių sąjungų įstatymas [Law on Trade Unions of the Republic of Lithuania]
LR SDĮ	Lietuvos Respublikos sveikatos draudimo įstatymas [Law on Health Insurance of the Republic of Lithuania]
LR UI	Lietuvos Respublikos užimtumo įstatymas [Law on Employment of the Republic of Lithuania]

LR VSDĮ	Lietuvos Respublikos valstybinio socialinio draudimo įstatymas [Law on State Social Insurance of the Republic of Lithuania]
LR VTĮ	Lietuvos Respublikos valstybės tarnybos įstatymas [Law on Civil Service of the Republic of Lithuania]
LRKT	Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania]
LSG	Landessozialgericht [Regional Social Court]
LTSR DĮK	Lietuvos tarybų socialistinės respublikos darbo įstatymų kodeksas [Labor Code of the Lithuanian Soviet Socialist Republic]
LVAT	Lietuvos vyriausiasis administracinis teismas [Supreme Administrative Court of Lithuania]
MilōG	Mindestlohngesetz [Minimum Wage Act] of 1 August 2014 (BGBl. I p. 1348), last amended by Art. 2 of the Act of 28 June 2023 (BGBl. 2023 I No. 172)
Mod. L. Rev.	The Modern Law Review
MuSchG	Mutterschutzgesetz [Maternity Protection Act] of 23 May 2017 (BGBl. I, p. 1228), last amended by Art. 1 of the Act of 24 February 2025 (BGBl. 2025 I No. 59)
n.	note
NMWR 2015	National Minimum Wage Regulations 2015
NJOZ	Neue Juristische Online Zeitschrift
NJW	Neue Juristische Wochenschrift
NJW-Spezial	Neue Juristische Wochenschrift Spezial
NZA	Neue Zeitschrift für Arbeitsrecht
NZA-Beilage	Neue Zeitschrift für Arbeitsrecht Beilage
NZA-RR	Rechtsprechungs-Report Arbeitsrecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
NZS	Neue Zeitschrift für Sozialrecht
NZV	Neue Zeitschrift für Verkehrsrecht
para.	paragraph
QBD	Queen's Bench Division
RdA	Recht der Arbeit
RESC	Revised European Social Charter
sec.	section
SEA	Single European Act

SER	Standard Employment Relationship
SGB IV	The Fourth Book of the Sozialgesetzbuch [Social Code IV] - Common Provisions for Social Insurance - in the version published on 12 November 2009 (BGBl. I p. 3710, 3973; 2011 I p. 363), last amended by Art. 6a of the Act of 25 February 2025 (BGBl. 2025 I No. 63)
SGB V	The Fifth Book of the Sozialgesetzbuch [Social Code V] – Statutory Health Insurance – (Art. 1 of the Act of December 20, 1988, BGBl. I p. 2477, 2482), last amended by Art. 1 of the Act of 25 February 2025 (BGBl. 2025 I No. 64)
SGB VI	The Sixth Book of the Sozialgesetzbuch [Social Code VI] – Statutory Pension Insurance - in the version published on 19 February 2002 (BGBl. I p. 754, 1404, 3384), last amended by Art. 11 of the Act of 18 December 2024 (BGBl. 2024 I No. 423)
SGB VII	The Seventh Book of the Sozialgesetzbuch [Social Code VII] – Statutory Accident Insurance – (Art. 1 of the Act of 7 August 1996, BGBl. I p. 1254), last amended by Art. 66 of the Act of 23 October 2024 (BGBl. 2024 I No. 323).
SLLERJ	Spanish Labour Law and Employment Relations Journal
SSCBA 1992	Social Security Contributions and Benefits Act 1992
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act 1992
TVG	Tarifvertragsgesetz [Collective Agreements Act] in the version published on 25 August 1969 (BGBl. I p. 1323), last amended by Art. 8 of the Act of 20 May 2020 (BGBl. I p. 1055)
UK	United Kingdom
UKSC	United Kingdom Supreme Court
Urt. v.	Urteil vom [Judgment of]
VCLT	Vienna Convention on the Law of Treaties
VMI	Valstybinė mokesčių inspekcija [State tax inspectorate]
ZEuP	Zeitschrift für Europäisches Privatrecht
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht
ZSR	Zeitschrift für Sozialreform
ZUM-RD	Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst
ZVgIRWiss	Zeitschrift für vergleichende Rechtswissenschaft

INTRODUCTION

“<...> differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment.” – Article 427 of the Peace Treaty of Versailles of 28 June 1919.

The nature of work has always been shaped by changing societal and economic conditions. Over a century ago, the Treaty of Versailles¹ acknowledged the challenges of achieving uniform labor standards across nations. Today, this challenge seems to persist – and so does the underlying truth behind the Treaty’s words. Yet, the quote also hints at a deeper, enduring issue: the ongoing struggle of legislators to keep pace with the evolving world of work.

Research problem. This struggle is especially evident in the case of so-called ‘freelance work’. As lifestyles and work structures continue to evolve, growing numbers of individuals find themselves in a space that does not fully align with traditional legal classifications making it a work type between and without borders. This raises fundamental questions about how traditional employment rights and social guarantees should or must apply to individuals who do not fit neatly into conventional legal categories. The term ‘freelance worker’ or ‘freelancer’ is not a legal term², but is commonly used to describe self-employed individuals who, based on a freelance (non-deliverable-oriented) service contract or (deliverable-oriented) contract to produce a specific work, carry out assignments independently and personally without being considered an employee of their work provider. While alternative terms like ‘solo self-employed’ could have certainly been used for the title of this dissertation, they risk being misleading, as they already imply a clearer distinction between self-employed status and other forms of work. Freelance worker does not necessarily mean the same as self-employed³, as the dividing lines between self-employment and employment are often blurred. Freelance worker is also not necessarily linked to the concept of ‘worker’ under EU or UK law. Therefore, for the purposes of this dissertation, a ‘freelance worker’ will be broadly described as a natural person who performs work for another natural or legal person, without employees of their own, in exchange for remuneration without being regarded as an employee of the other natural or legal person⁴. This is not limited

1 After whose Part XIII, the ILO was founded.

2 In various translations and jurisdictions, however, the term is sometimes used legally, e.g. in Germany under the terms ‘Freier’ and ‘freier Mitarbeiter’.

3 In part, the term is equated with self-employed in academia, e.g. Martin Maties, “§ 37 Arbeitsrechtliche Bezüge,” in *Handbuch IT- und Datenschutzrecht*, by Astrid Auer-Reinsdorff and Isabell Conrad (Munich: C.H. Beck, 2019), para. 35.

4 Expressly excluded from the review are: civil servants, regulated professions such as attorneys or bailiffs and other professions expressly defined as self-employed by legal definition.

to a specific economic sector or qualification⁵. The term can cover almost all sectors in which individual services can be outsourced and is intentionally chosen as it conveys a specific form of activity structure without implying any legal qualification. For clarity, this dissertation will – in contrast to the way this is typically understood in part⁶ – categorize work structures outside traditional employment law as ‘non-standard employment’, while ‘standard employment’ refers to clear employment relationships typically covered by employment law, even if more flexible, such as remote or project-based work, as long as they comply with relevant employment regulations.

The framework conditions under which a legal qualification takes place will be examined in the course of this dissertation. Such a qualification typically takes place methodically based on criteria derived from the characteristics of the legal relationships being distinguished from each other⁷. Different countries use various terms for this, such as ‘tests’ in the UK. To enable a cross-jurisdictional analysis of their function, this dissertation – following the methodology of ILC’s *Report V(1)* on the employment relationship from 2005⁸ – distinguishes between factors and indicators.

Subject of the research. This dissertation addresses a pressing scientific problem: the legal uncertainties and regulatory gaps in Lithuania regarding freelance workers due to the evolving nature of work in a social market economy.

Relevance of the topic and the research problem. This topic is relevant both globally and in Lithuania. The first reason is that the number of individuals working in such non-standard work arrangements can no longer be neglected. The phenomenon of freelance workers can be modeled statistically by examining the number of solo self-employed persons, i.e. self-employed persons without own employees. The *Joint Employment Report 2024* by the European Commission and the Council reveals in this context figures that raise more questions than it answers. In 2022, solo self-employed persons in Lithuania accounted for 10% of the total working population, significantly above the EU average, while Germany’s figure was highlighted with below 6%⁹. This

5 As the term ‘freelancers’ is sometimes used to describe only persons working in high skilled occupations being a subcategory of solo self-employed persons, e.g., “The Self-Employed Landscape 2022,” *IPSE*, accessed March 1, 2025, <https://www.ipse.co.uk/campaigns/the-self-employed-landscape/self-employed-landscape-2022>.

6 Marius Jarulaitis, “Nestandartiniai Darbo Santykiai Ir Jų Reguliavimas,” *Jurisprudencija* 8, no. 110 (2008): 83–89.

7 Ipolitas Nekrošius and Daiva Petrylaitė, *Darbo teisė: vadovėlis* (Vilnius: Teisinės informacijos centras, 2008), 13 ff.

8 According to the methodology of the report, the term ‘factors’ relates to qualitative criteria defined by law or court practice outlining the conditions for determining the legal relationship whereas ‘indicators’ are collected from the actual circumstances and reality of the case at hand to determine the presence of the factors in each individual case, cf. International Labour Office, *The Employment Relationship - Report V(1)*, International Labour Conference, 95th Session (Geneva: International Labour Office, 2005), n. 13.

9 European Commission, *Joint Employment Report 2024: Commission Proposal*. (Luxembourg: Publications Office of the European Union, 2023), 71, <https://data.europa.eu/doi/10.2767/17157>.

disparity is striking. Like Lithuania, Germany is an EU member state, which suggests that the overall employment and social security frameworks should be broadly similar. At the same time, Germany is Lithuania's most important non-neighboring trading partner¹⁰. Furthermore, Germany is by far the major partner of Lithuania for exports of services¹¹. Both economies are therefore closely intertwined despite a certain geographical distance. It can therefore be assumed that both face similar structural challenges. On the other hand, in 2022, Lithuania had a comparatively high share of 3.7% in agriculture, whereas Germany had only a share of 0.9% in the same period¹². In terms of sectors, the highest proportion of self-employment is traditionally found in this sector¹³. This suggests at first glance that the disparity seems to be related to the different economic structures of the two countries and the distribution of the labor force across the economic sectors. However, if one also looks at the figures from the UK in comparison, the sectorial reasons seem considerably less significant. In the UK with its common law background, the same legal EU framework applied at least until its final exit from the EU on 1 January 2021. The number of solo self-employed persons was with 12.5% in 2022¹⁴ even higher than in Lithuania, but with a lower share than Germany of 0,6% in agriculture, albeit with a higher proportion in the services sector (UK: 91.5%, Germany: 85.4%, Lithuania: 80.1%)¹⁵.

These overlapping but at the same time distinct figures indicate two things: The topic affects a considerable number of working individuals and the reasons for these discrepancies cannot be solely rooted in the economic structures of the countries. Instead, legal frameworks and regulations may have a substantial impact on the prevalence of freelance work. The latter hypothesis is driven by recent legal developments in Germany and the UK which have highlighted the evolving legal recognition of freelance workers. In Germany, the BAG granted so-called crowdworkers full 'employee' status in 2021¹⁶, while the UKSC ruled in favor of Uber drivers, recognizing them

10 "Informaciniai Pranešimai," *Official Statistics Portal*, accessed March 1, 2025, <https://osp.stat.gov.lt/informaciniai-pranesimai?articleId=13209829>.

11 "International Trade in Services in Q1 2024," *Bank of Lithuania*, accessed March 1, 2025, <https://www.lb.lt/en/news/international-trade-in-services-in-q1-2024>.

12 "Employment by Sector (%)," *World Bank Gender Data Portal*, accessed March 1, 2025, <https://genderdata.worldbank.org/en/indicator/sl-empl-zs?year=2022&employmentSector=Services>.

13 Eurofound, *Psychosocial Risks to Workers' Well-Being: Lessons from the COVID 19 Pandemic*. (Luxembourg: Publications Office of the European Union, 2023), 9, <https://data.europa.eu/doi/10.2806/350964>.

14 Due to the UK's withdrawal from the EU, the UK is no longer included in EU statistics. According to the report 'The Self-Employed Landscape 2022' by the IPSE, there were about 4.1 million solo self-employed persons in the UK in 2022. The total number of persons in employment in the UK during the same period was approximately 32.8 million. This means that around 12.5% of the working population were solo self-employed.

15 "Employment by Sector (%)."

16 BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, NZA, 2021, 552–62.

at least as ‘workers’¹⁷ and granting them partial employment rights in the same year. This decision in the UK attracted attention also in Lithuania¹⁸, especially since similar decisions have not been issued here, where the same company is active, but such transportation services are required by law to be performed by self-employed individuals¹⁹. These developments illustrate the need for a cross-jurisdictional analysis, as they underscore the growing recognition of freelance workers in non-standard employment arrangements. Therefore, Germany and the UK are perfectly suited for a comparison with Lithuania, a post-Soviet EU member state with a developing gig economy which represents an emerging regulatory environment where freelance worker protections seem to be still evolving. Since joining the EU in 2004, Lithuania has made considerable efforts to reform its employment law and bring it into line with European standards exemplified by the adoption of a new LR DK in 2017, which, among other things, aimed to liberalize employment relationships and create more flexible conditions in the labor market. However, the question remains: are these reforms adequate to address the emerging developments, and do countries like Germany or the UK offer additional insights or legal instruments²⁰ that could be applied to the Lithuanian context?

A second key reason for the relevance of this dissertation is that significant regulatory gaps persist, particularly in light of the rise of digital platform work. Since the 1990s, the EU has pursued a policy of promoting more diversity in employment contracting. In the three Directives on non-standard working arrangements, this is particularly evident²¹. Recently, the 2024 Directive on improving working conditions for platform workers (who could be seen as a subset of freelance workers) acknowledged the legal and social challenges posed by the misclassification of employment status, which limits access to crucial employment rights and social protections. The challenges require the most urgent action in this area²², but are not limited to platform work,

17 Uber BV & Ors v Aslam & Ors [2021] UKSC 5, para. 119.

18 Vilija Mačiulskytė, “Gyventojai vis dažniau įdarbinami kaip laisvai samdomi: paaiškino, ką jie praranda ir kuo tai gresia,” *TV3*, February 28, 2021, <https://www.tv3.lt/naujiena/verslas/gyventojai-vis-dazniau-idarbinami-kaip-laisvai-samdomi-paaiskino-ka-jie-praranda-ir-kuo-tai-gresia-n1083285>.

19 LR KTK, *e-TAR*, art. 18–1, accessed March 22, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.65AD818F5F9C/asr>.

20 Legal instruments, in the context of this dissertation, encompass a broad range of legal mechanisms, including laws, regulations, directives, legal constructs, and conceptual frameworks, as well as legal definitions. These instruments serve as fundamental tools for shaping, interpreting, and enforcing legal norms within a given jurisdiction. By examining their structure, purpose, and application, this dissertation will provide a comprehensive understanding of how legal instruments function within the broader legal system.

21 Simon Deakin, “New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014,” *Nova School of Law*, accessed August 16, 2021, https://www.fd.unl.pt/docentes_docs/ma/jja_MA_24419.pdf.

22 Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on Improving Working Conditions in Platform Work, *EUR-Lex*, accessed March 15, 2025, <https://eur-lex.europa.eu/eli/dir/2024/2831/oj/eng.recital.6>.

as increasingly precarious conditions are also seen to emerge in other non-standard forms of work²³. A Green Paper by the European Commission highlighted already in 2006 the growing uncertainty and blurred boundaries regarding the legal status of certain self-employed individuals, particularly the growing group of economically dependent self-employed persons²⁴. Furthermore, there are gaps in the international (EU) context itself due to apparent different legal classification concepts of the EU member states. In the course of the introduction of the Written Statement Directive 91/533/EEC, the European Commission noted in the so-called *REFIT* evaluation that due to different concepts of ‘employee’, ‘employment relationship’ and ‘employment contract’ in different member states, there is legal uncertainty regarding coverage of new and atypical work forms and this diversity of approaches becomes an obstacle for the full effectiveness of EU legislation²⁵. Moreover, the question is relevant whether certain individuals working in apparent intermediary relationships traditionally assigned to the independent domain should be granted similar rights as employees. As early as 1999, the so-called *Suipiot Commission* recommended in a report to create an intermediary status for dependent self-employed persons in the EU²⁶. Building on this, an expert report commissioned by the European Commission argued in 2003 for the creation of a main core of social rights at the EU level that would apply to all workers, i.e., not only to traditional employees, but also to economically dependent working individuals²⁷. After not being pursued for a while, this issue has gained new momentum with the latest legal developments mentioned related to platform work²⁸. Furthermore, in 2022, the European Commission issued guidelines which suggested exemptions from EU competition law restrictions with regard to collective agreements for solo self-employed individuals if they are ‘in a situation comparable to that of workers’²⁹. This illustrates the increasing recognition that at least certain freelance workers

23 “First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 1127 Final,” accessed March 15, 2025, <http://ec.europa.eu/social/BlobServlet?docId=23655&langId=en>.

24 “GREEN PAPER Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 Final” (Brussels: European Commission, November 22, 2006), 10, [https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2006\)0708_/com_com\(2006\)0708_en.pdf](https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0708_/com_com(2006)0708_en.pdf).

25 “REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC)” (Brussels: European Commission, April 26, 2017), 25, <https://ec.europa.eu/social/BlobServlet?docId=17615&langId=en>.

26 Cf. Alain Suipiot and Pamela Meadows, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford/New York: Oxford University Press, 2001).

27 Cf. Adalberto Perulli, *Wirtschaftlich abhängige Beschäftigungsverhältnisse/arbeitnehmerähnliche Selbständige: rechtliche, soziale und wirtschaftliche Aspekte* (Brussels: European Commission, 2003), https://www.labourline.org/GED_CUY/118355793653/D2398.PDF.

28 Cf. Directive (EU) 2024/2831.

29 European Commission, “Communication from the Commission - Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons 2022/C 374/02,” *EUR-Lex*, para. 20, accessed March 17, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_374_R_0002.

working on a self-employed basis require protection similar to those of employees. These discussions are crucial, especially when non-standard work is misused to reduce labor costs at the expense of freelance workers' rights, as it carries the risk for social dumping³⁰. When it comes concretely to guaranteeing rights and social guarantees in the EU, measures are being discussed, which show that the issue is under surveillance³¹. Furthermore, there are reports by EU institutions highlighting the issues of less social protection of self-employed individuals³². Although the EU's strategy goals for 2021-2024³³ did not give any indication of how these issues are to be addressed, various reports from EU institutions at least gave a teaser that the goal might not be to push back or prohibit such atypical work relationships (and in particular platform work), but rather to expand them in a regulated way³⁴.

In addition to these EU-wide concerns, practical experiences in member states highlight the urgency of the topic. Numerous COVID-19 outbreaks in meat companies drew attention to precarious working conditions that sometimes prevailed in Germany's meat processing industry where the share of freelance work was particularly high. Freelance workers, whose contractual relationships were to some extent similar to those of employees, were, however, not employed, but paid on a self-employed basis, e.g. per cut-up pig. In this way, it could be declared a deliverable-oriented contract to produce a work ('Werkvertrag'), but not a service contract of service ('Dienstvertrag') so that employment regulations did not apply. The precarious situation was seen to be caused by these work structures. Therefore, deliverable-oriented contracts to produce a work in slaughtering were completely banned and largely banned in the whole meat processing industry in 2021³⁵. In principle, however, such contracts remain permitted in Germany, which means that similar questions might continue to arise and may not all be resolved by a strict prohibition.

30 ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: International Labour Office, 2016).

31 "Draft Report on Fair Working Conditions, Rights and Social Protection for Platform Workers - New Forms of Employment Linked to Digital Development (2019/2186(INI))" (Legislative Observatory), accessed August 16, 2021, https://www.europarl.europa.eu/doceo/document/EMPL-PR-657498_EN.pdf.

32 European Commission, *Access to Social Protection for Workers and the Self-Employed: Best Practice Examples from EU member states*. (LU: Publications Office, 2018), <https://data.europa.eu/doi/10.2767/70549>.

33 Valerio De Stefano and Simon Taes, "Algorithmic Management and Collective Bargaining," *ETUI, The European Trade Union Institute, Foresight Brief #10-May*, 2021, <https://www.etui.org/publications/algorithmic-management-and-collective-bargaining>.

34 Alex J. Wood, "Algorithmic Management Consequences for Work Organisation and Working Conditions," JRC Working Papers Series on Labour, Education and Technology (Seville: European Commission, Joint Research Centre (JRC), 2021), <https://www.econstor.eu/bitstream/10419/233886/1/1757203559.pdf>.

35 Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz (Arbeitsschutzkontrollgesetz), *Bundesgesetzblatt Online*, art. 2, accessed March 1, 2025, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl120s3334.pdf.

This not only shows the current relevance, but also the extremely complex interplay of different regulations in relation to the topic of the dissertation. New regulatory gaps open up that can only be closed gradually. These regulatory gaps are mostly in favor of greater flexibility, which often benefits work providers. However, at the expense of freelance workers' rights and protection, since in this way not only are employment law regulations no longer applicable, but also individual risks and obligations are shifted onto them.

For these reasons, the topic of the dissertation is of particular relevance and makes it necessary to take a step back and look in detail at the question of which regulatory framework already covers working individuals on the boundary between 'employee' and 'self-employed person' and what measures have already been taken recently nationally and internationally to address this issue. This question arises particularly against the background of the fundamental problem of an employment relationship being often replaced or supplemented by self-employment. It causes regulatory gaps, the presence of which are often detrimental to all related stakeholders – the freelance worker as a person quite similar to an employee or as a false self-employed person (with its need for protection), work provider as a quasi-employer (with its need for flexibility) and the state (with its need for financial viability of its social security system)³⁶. As a result, it is important to thoroughly analyze the current regulatory framework of freelance work in general as well as in different jurisdictions in order to identify possible regulatory gaps in Lithuania and find solutions that strike an appropriate balance between the on-demand economy's need for flexible work arrangements as well as the rights and social guarantees of freelance workers.

Aim of the research. The aim of this dissertation is to determine the current status of employment and social security regulation for freelance workers in Lithuania, evaluate its compatibility with international, European, and constitutional standards, and propose necessary or feasible improvements based on comparative analysis with Germany and the UK.

Objectives of the research. To achieve the aim, the following objectives are pursued:

1. To analyze the challenges in accurately classifying freelance work relationships in relation to typical employment rights and social guarantees;
2. To identify legal instruments from Germany and/or the UK that could inform or improve Lithuania's approach on freelance work;
3. To assess whether Lithuania's legal framework for freelance workers aligns with higher-ranking law (EU, international, and constitutional law);
4. To formulate a proposal for instruments to address identified gaps in Lithuania but taking into account Lithuanian legal tradition.

Research Review. The topic of this dissertation is multifaceted, drawing on research conducted by scholars from various countries. Most of this research either

³⁶ The SER is still of fundamental importance for the financing of social security systems; cf. Jens Schubert, "Das Normalarbeitsverhältnis in der arbeits- und sozialrechtlichen Wirklichkeit," *NJW*, 2010: 2613.

addresses the subject from a broader perspective³⁷ or focuses only on partial aspects. The most comprehensive and up-to-date overview of international research in this field is provided by *Kocher*. In her work *Digital Work Platforms at the Interface of Labour Law*, she analyzes the extent to which formally self-employed individuals should be entitled to traditional employment rights under existing law or whether a fundamental paradigm shift in the core principles of employment law is necessary. She also examines the purposes of employment law as part of her analysis³⁸. This dissertation shares certain overlaps with her research; however, *Kocher's* focus is exclusively on platform work and takes a more interdisciplinary approach. She provides a general overview without conducting a detailed comparative analysis of individual jurisdictions, as this dissertation does. Additionally, *Kocher's* discussion of the purposes of employment law seems to assume that employment law inherently serves one or more specific purposes. This dissertation, by contrast, takes a grounded theory methodology and a contextual legal analysis approach, intentionally leaving open the question of whether aspects or protective regulations within both employment law and social security law may serve distinct purposes that only partially overlap.

Different (historical) purposes of specific aspects of employment and social security law have been examined by *Kendzia*³⁹ and *Rebhahn*⁴⁰, though research on these individual-purpose aspects remain limited⁴¹. In *Kendzia's* analysis, he references scholars such as *Nipperdey*, *Sinzheimer*, *Mückenberger*, and *Schmuhl*. While *Kendzia* primarily explores the objectives and justifications of employment and social security law from a German historical perspective, his findings have broader relevance beyond Germany. His research traces developments as far back as the 16th century, identifying the late 19th century as a key turning point in the emergence of structures comparable to those in place today. At that time, Germany was a pioneer in employment and social security law, leading Europe in legislative advancements that served as a model for the rest of the continent.

When considering the UK, the works of *Freedland* and *Adams-Prassl* are particularly

37 Cf. Eurofound, *New Forms of Employment: 2020 Update*. (Luxembourg: Publications Office of the European Union, 2020), <https://data.europa.eu/doi/10.2806/278670>; Valeria Pulignano et al., “Creative Labour in the Era of Covid-19: The Case of Freelancers,” Working Paper (Brussels: ETUI aisbl, 2021), <https://www.etui.org/sites/default/files/2021-03/Creative%20labour%20in%20the%20era%20of%20Covid-19%20the%20case%20of%20freelancers-2021-web.pdf>.

38 Eva Kocher, *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers* (Oxford/New York: Hart, 2022), 129–34.

39 Michael J. Kendzia, “Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland,” Discussion Paper (Institute of Labor Economics (IZA), August 2010), <https://docs.iza.org/dp5107.pdf>; Michael J. Kendzia, “Der Institutionalisierungsprozess des Lohnarbeitsverhältnisses vom Ersten bis zum Zweiten Weltkrieg in Deutschland,” Discussion Paper (Institute of Labor Economics (IZA), October 2010), <https://docs.iza.org/dp5231.pdf>.

40 Cf. Robert Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” *RdA*, 2009, 236–53.

41 *Ibid.*, 242.

significant⁴². Their analysis of the distinction between employment statuses and self-employment contributes significantly to the understanding and commenting on UK case law. Their insights are essential for differentiating freelance workers, and *Adams-Prassl*, in particular, has extensively examined issues related to algorithmic management in work⁴³. Furthermore, it is important to highlight *Countouris*, who has even already considered what a future-proof employment status might look like in the UK context – one that sufficiently addresses the challenges of the modern world of work⁴⁴.

In Germany, the debate surrounding the distinction between employment and self-employment presents a mixed picture. *Preis* advocates for a rigid distinction between different employment statuses⁴⁵, while other scholars such as *Juncker* and *Rebhahn* propose more nuanced perspectives, suggesting that national definitions, as applied by case law, should allow for a more flexible approach to accommodate especially non-standard employment relationships⁴⁶. In addition, *Wank* advocates the concept of the ‘lack of entrepreneurial opportunities’ more than 30 years, a concept which also plays a role in this dissertation and has gained recognition beyond Germany⁴⁷. *Wank’s* idea remains highly relevant in addressing the classification challenges of emerging work models⁴⁸. All these German authors, including *Preis*, do not limit their analysis to the legal qualification of standard employment but also explore non-standard employment – this is evident alone from the fact that German employment law recognizes a

42 Mark Freedland and Jeremias Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” *SLLERJ* 6, no. 1–2 (November 6, 2017): 16–29, doi:10.20318/sllerj.2017.3922; Guy Davidov, Mark Freedland, and Nicola Countouris, “The Subjects of Labor Law: ‘Employees’ and Other Workers,” in *Forthcoming in Research Handbuch in Research Handbooks in Comparative Law*, ed. Matthew Finkin and Guy Mundlak, Hebrew University of Jerusalem Legal Research Paper, No. 15-15, 2015, <https://ssrn.com/abstract=2561752>; Jeremias Adams-Prassl and Martin Gruber-Risak, “Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork,” *Comparative Labor Law & Policy Journal*, *Forthcoming* 37, no. 3 (2016): 619–51.

43 Cf. Jeremias Adams-Prassl, Reuben Binns, and Aislinn Kelly-Lyth, “Directly Discriminatory Algorithms,” *Mod. L. Rev.* 86, no. 1 (January 2023): 144–75, doi:10.1111/1468-2230.12759; Jeremias Adams-Prassl et al., “Regulating Algorithmic Management: A Blueprint,” *ELLJ* 14, no. 2 (June 2023): 124–51, doi:10.1177/20319525231167299.

44 Nicola Countouris, “‘Waiting for Godot’ – The Employment Rights Bill 2024 and the ‘Single Status of Worker’ Omission,” *Institute of Employment Rights*, March 11, 2025, <https://www.ier.org.uk/comments/waiting-for-godot-the-employment-rights-bill-2024-and-the-single-status-of-worker-omission/>.

45 Ulrich Preis, “§ 611 a BGB – Potenziale des Arbeitnehmerbegriffes,” *NZA*, 2018, 817 ff.

46 Abbo Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” *EuZA*, 2016, 184–206; Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive.”

47 European Commission, ed., *Transformation of Labour and Future of Labour Law in Europe: Final Report*, Employment & Social Affairs (Luxembourg: Office for Official Publications of the European Communities, 1999), 7 ff.

48 Cf. Rolf Wank, “Von Honorärärzten und Piloten – der ‘Beschäftigte’ in der BSG-Rechtsprechung,” *RdA*, 2020, 115.

hybrid position between traditional employees and self-employed individuals, known as ‘employee-like persons’.

Regarding Lithuania, which is in the focus of this dissertation, research on non-standard employment remains relatively marginal. Only a few scholars, such as *Globytė*⁴⁹ and *Davulis*⁵⁰, have explicitly addressed freelance work recently in publications. To date, the research has primarily focused on introducing greater flexibility into standard employment, including the creation of new, more flexible employment contract types⁵¹. Additionally, while the distinction between standard employment and self-employment has been a central theme, much of the research merely categorizes and describes the scope of the Lithuanian legal framework rather than fundamentally questioning it with regard to its compliance with higher-ranking law. Several publications have discussed the criteria for qualifying an employment relationship versus self-employment, including those by *Dambrauskienė*, *Nekrošius*, *Tiažkijus*, *Davulis*, *Martišienė*, and *Vaičiaitis*⁵². The question of introducing specific intermediate categories between traditional employees and self-employed individuals into Lithuanian law has so far been viewed more as a possibility than as a necessary response to legal developments⁵³.

49 About the Lithuanian concept of subordination in connection with platform work: Rūta Globytė, “The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania,” *BJLP* 17, no. 2 (2024): 61–76, doi:10.2478/bjlp-2024-00015.

50 About the legal framework for the activities of Uber in Lithuania, cf. Tomas Davulis, “Uber and taxis: a comparative law study in Lithuania,” in *Uber and Taxis: Comparative Law Studies*, ed. Rozen Noguellou and David Renders (Brussels: Bruylant, 2018), 293–307; Tomas Davulis, “Ar legalus yra maisto išvežiotojų ‘streikas?’,” July 15, 2020, <https://www.teise.pro/index.php/2020/07/15/t-davulis-ar-legalus-yra-maisto-isveziotuju-streikas/>; about the right to collective bargaining and the right to strike for the self-employed in Lithuania, cf. Tomas Davulis, “Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką,” in *Darbo teisės iššūkiai besikeičiančiame pasaulyje*, ed. Ingrida Mačernytė-Panomariovienė (Vilnius: Mykolo Romerio universitetas, 2020).

51 Justinas Usonis and Tomas Bagdanskis, “Problems of Introduction of Flexibility into Lithuanian Labour Law,” *Jurisprudencija* 18, no. 2 (2011): 595–612; Ingrida Mačernytė-Panomariovienė et al., “Some Aspects of Improving the Legal Regulation of Labour Relations: Thirty Years of Experience in the Baltic States,” *International Social Science Journal* 72, no. 246 (December 2022): 1237–53, doi:10.1111/issj.12385.

52 Cf. Genovaitė Dambrauskienė, “Civilinių ir darbo sutarčių sąveika,” *Jurisprudencija* 28, no. 20 (2002): 7–16; Genovaitė Dambrauskienė, “Lanksčių užimtumo formų taikymas Lietuvoje,” *Jurisprudencija* 25, no. 17 (2002): 19–25; Genovaitė Dambrauskienė, “Darbo teisės modernizavimo bei tobulinimo problemos,” *Jurisprudencija* 8, no. 110 (2008): 7–12; Ipolitas Nekrošius, “Lietuvos Respublikos darbo kodekso rengimo problemos,” *Teisė* 33, no. 1 (1999): 25–41; Viktoras Tiažkijus, “Darbo teisė ir valstybės tarnyba: panašumai ir skirtumai,” *Justitia* 1, no. 49 (2004): 46–56; Beata Martišienė, “Kriterijų, atskiriančių skirtingas darbo organizavimo formas analizė,” *Verslo ir teisės aktualijos* 5, no. 2 (2010): 405–18; Tomas Bagdanskis and Justinas Usonis, “Problems of Qualifying an Employment Relationship and Undeclared Work in Lithuania,” *Jurisprudencija* 18, no. 3 (2011): 1101–22.

53 Cf. Tomas Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” *Teisė* 104 (2017): 13, doi:10.15388/Teise.2017.104.10842.

In particular, the doctoral dissertation defended by *Martišienė*, titled *Darbo santykių reguliavimo civiliniai teisiniai aspektai* [Civil Aspects of Legal Regulation of Labour Relations]⁵⁴ should be highlighted with regard to this dissertation. It focuses on the distinction between Lithuanian employment and civil law, the application of civil law norms to employment relations and the distinction between dependent and independent employment. Furthermore, *Povilaitienė*'s defended doctoral dissertation *Darbo sutartis ir kitos teisinės darbo panaudojimo formos* [Employment contract and other legal forms of work]⁵⁵ seeks to find universal characteristics or criteria for the existence of an employment contract to distinguish it from other types of contracts under Lithuanian law, such as the Lithuanian author's contract. In this context, *Martišienė* and *Davulis* brought the element of 'financial risks' into the discussion to varying degrees⁵⁶, which overlaps to some extent with *Wank*'s concept of 'lack of entrepreneurial opportunities'.

Internationally, research on distinguishing various forms of employment from self-employment surged in the late 1990s and early 2000s, coinciding with the ILO's discussions on 'contract labor' and the EU's exploration of new forms of work. *Supiot* made significant contributions in this area⁵⁷, drawing also on country reports and ILO publications from the 1997/1998 discussions on contract labor up to the adoption of ILO's Recommendation No. 198 in 2006. Numerous scholars from various countries have examined the possible criteria for identifying employment relationships, including *Risak*, who addressed the challenges of independent work from both global and European regulatory perspectives⁵⁸.

With regard to the interpretation of various fundamental rights instruments, such as the ECHR and the RESC, German commentaries are particularly valuable⁵⁹, as they offer extensive analysis – especially concerning the personal scope of application under individual provisions and, in some cases, the potential extension of such protections to working individuals beyond traditional employees.

Furthermore, *De Stefano* has specifically explored the personal scope of ILO

54 Beata Martišienė, *Darbo santykių reguliavimo civiliniai teisiniai aspektai* (Vilnius: Vilniaus Universiteto leidykla, 2012).

55 Ieva Povilaitienė, *Darbo sutartis ir kitos teisinės darbo panaudojimo formos* (Vilnius: Vilniaus Universiteto leidykla, 2012).

56 Beata Martišienė, "Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai," *Teisė* 80 (2011): 138–45, doi:10.15388/Teise.2011.0.156; Tomas Davulis, *Lietuvos Respublikos darbo kodekso komentaras* (Vilnius: VĮ Registrų centras, 2018), 134; Davulis, "Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.," 13.

57 Supiot and Meadows, *Beyond Employment*.

58 ILO, ed., *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198* (Geneva: International Labour Organization, 2013).

59 Cf. Christian Calliess et al., *EUV/AEUV* (Munich: C.H. Beck, 2022); Dirk Ehlers, ed., *Europäische Grundrechte und Grundfreiheiten* (Berlin: De Gruyter, 2014), doi:10.1515/9783110363166; Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* (Munich: C.H. Beck, 2021).

instruments and their legal interaction⁶⁰. *Wank* has contributed extensively to the teleological interpretation of the EU's worker concept⁶¹, and *Risak* has also provided a thorough analysis of this concept, advocating for a similar teleological approach⁶². *Ziegler* laid the foundation for the current (German) scholarly consensus⁶³ that EU employment law encompasses multiple EU worker concepts⁶⁴. *Pottschmidt* deserves recognition for her pioneering work on the legal status of 'employee-like persons' in Europe, making significant contributions to this field⁶⁵.

The dissertation builds further on existing research that has examined new employment forms from various scientific perspectives or addressed partial aspects of this dissertation's topic⁶⁶. As an opposing concept, the 'Standard Employment Relationship' (SER) has been described by different scholars and was partly used for conclusions on non-standard employment⁶⁷. Furthermore, false self-employment remains a perennial issue in case law, literature, and legal practice⁶⁸.

Novelty of the research. This dissertation aims to break new ground by addressing these issues from a broad but strictly legal perspective. Moreover, due to the rapid development in this legal field and technological advancements that have facilitated the spread of new work forms, many aspects of the subject require at least reassessment. The implementation of Lithuania's new LR DK in 2017 marks a turning point in Lithuanian employment law. While commentators like *Davulis*⁶⁹ and *Bagdanskis*⁷⁰ have analyzed the distinction between employee and self-employed status, their commentaries

60 Valerio De Stefano, "Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards," *International Labour Review*, no. forthcoming (2021), <https://ssrn.com/abstract=3790766>.

61 I.a., Rolf Wank, "Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen," *EuZA*, 2018, 327–45; Rolf Wank, "Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff," *EuZA*, 2023, 22–49.

62 Martin Gruber-Risak and Thomas Dullinger, *The Concept of "Worker" in EU Law: Status Quo and Potential for Change*, 140 (Brussel: ETUI, 2018).

63 At least in Germany.

64 Katharina Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht* (Baden-Baden: Nomos, 2011); building on this, cf. Thomas Hohe, *Arbeitnehmerbegriffe im Recht der Europäischen Union: Ein Plädoyer für eine funktionale Begriffsbildung* (Baden-Baden: Nomos, 2022), doi:10.5771/9783748935377.

65 Daniela Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten* (Baden-Baden: Nomos, 2006).

66 ILO, *Non-Standard Employment around the World*.

67 Simon Deakin, "New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014," 1.

68 Joachim Holthausen, "Statusfeststellung und Scheinselbstständigkeit – Ein Praxisbefund über Etikettenschwindel, Umgehungs-, Schein- sowie verdeckte Rechtsgeschäfte und ihre Folgen," *RdA*, 2020, 92.

69 Davulis, *LR DK komentaras*.

70 Tomas Bagdanskis, Vilius Mačiulaitis, and Mantas Mikalopas, *Lietuvos Respublikos Darbo Kodekso Komentaras: Individualieji Darbo Santykiai* (Vilnius: Rito projects, 2018), 52 ff.

primarily describe the legal situation without critically questioning it. Although there are numerous publications that attempt to explain and justify the existence and purpose of the ‘employment status’ as a whole⁷¹, few focus on the individual components and specific norms of employment and social security law⁷². This dissertation will break down employment and social security law into constituent parts to provide more detailed insights.

Regarding social security law, several publications have addressed the question of social security for self-employed individuals. *Schoukens* offers a comprehensive international comparative analysis⁷³. However, this analysis remains a general overview of several countries without delving into in-depth analysis of specific countries’ framework conditions, which could explain the similarities and differences observed.

Despite academic recognition of the different forms of solo self-employment, which have been divided into various clusters necessitating different regulatory approaches⁷⁴, a summary and consolidation of all these individual questions to find universal approaches that go beyond certain specific forms as ‘platform work’ is missing so far.

As this dissertation provides a purely legal analysis, the outcome will not be influenced by whether all or certain freelance workers should, for subjective or political reasons, be afforded greater protection. Rather, it focuses on whether existing or emerging legal developments require adjustments to the regulatory environment in Lithuania. Furthermore, this dissertation contributes novel insights by focusing specifically on Lithuania and comparing its regulatory environment with that of Germany and the UK. Existing scholarship and policy debate tend to center on Western and Eastern European models in isolation. By extending the comparative framework to include structural and historic diversity, this dissertation provides a more nuanced understanding of how a legal system like Lithuania’s can or must adapt to freelance work. Furthermore, this dissertation uniquely integrates doctrinal legal analysis with a functionalist approach to classification. It aims to clarify which legal mechanisms are

71 Cf., e.g., Kocher, *Digital Work Platforms at the Interface of Labour Law*, 129–34; Simon Deakin and Frank Wilkinson, “Labour Law and Economic Theory: A Reappraisal,” in *The Legal Regulation of the Employment Relation*, by Hugh Collins, Paul Davies, and Roger Rideout (London: Kluwer Law International, 2000), 29–62; Simon Deakin, “The Comparative Evolution of the Employment Relationship,” in *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, by Guy Davidov (London: Bloomsbury Publishing PLC, 2006), 101; Hugh Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” in *The Legal Regulation of the Employment Relation*, by Hugh Collins, Paul Davies, and Roger Rideout (London: Kluwer Law International, 2000), 7 ff.; Alain Supiot, “Was ist ein Arbeitnehmer?,” in *Das europäische Sozialmodell: auf dem Weg zum transnationalen Sozialstaat*, ed. Hartmut Kaelble and Günther Schmid (Berlin: edition sigma, 2006), 423 ff.

72 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 242.

73 Paul Schoukens and Charlotte Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers: An Analysis Based upon the EU Recommendation on Access to Social Protection* (Leuven: Acco, 2021).

74 Cf. Katharina Uffmann, “Aktuelle Fragen der Solo-Selbständigkeit,” *RdA*, 2019: 360–71.

necessary for effectively regulating freelance work in a way that balances the need for flexibility with the imperative of legal protection and certainty – taking also into account Lithuania’s unique legal tradition.

In conclusion, this research is both timely and necessary. As freelance work continues to expand, legal systems must respond proactively. This dissertation offers a comprehensive legal analysis to guide such a response in Lithuania and, by extension, contributes to the broader European debate on modern employment and social security law.

The research presented in this dissertation has been disseminated through three scientific publications:

- Hans Lauschke, “Lithuania’s Binary Worker Classification Vs. A Teleological Interpretation of the EU’s ‘Worker’ Concept by Germany and the UK,” *BJLP* 17, no. 2 (2024), 142-167, DOI: 10.2478/bjlp-2024-00019
- Hans Lauschke, “Savarankiškai Dirbančių Asmenų Prašymų Nagrinėjimas Lietuvos Darbo Ginčų Komisijose ‘Sic-Non’ Bylose [The Examination of Applications from Self-Employed Persons by the Lithuanian Labour Dispute Commissions in ‘Sic-Non’ Cases],” *Jurisprudencija* 31, no. 2 (2024), 436-452, DOI: 10.13165/JUR-24-31-2-13
- Hans Lauschke, “The Applicability of ILO’s Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally,” *Teisė* 135 (2025), 85-104, DOI: 10.15388/Teise.2025.135.5

Methodology of the research. The title of this dissertation is deliberately vague and does not allow straightforward subsumption. Instead of imposing rigid legal definitions at the outset, it adopts an exploratory and context-sensitive approach. Rather than treating the terms ‘freelance worker’, ‘rights’ and ‘social guarantees’ as fixed narrowly defined concepts, their meanings will emerge and might even change through the legislative review, comparative legal analysis and policy discourse in this dissertation. This approach aligns grounded theory methodology and contextual legal analysis, both of which emphasize the importance of allowing conceptual frameworks to develop in response to empirical and comparative findings.

The aim is to explore how and under what conditions a freelance worker – who exists somewhere at the dividing line of a traditional employee and a fully and genuine self-employed individual – should or must fall under the respective scope of application of employment law and (comprehensive) social security law. Based on this categorization, the central question is whether and under what circumstances such a working individual in Lithuania and the selected comparison countries Germany and the UK could or must be entitled to rights and social guarantees that are typically reserved for employees working in an employment relationship under an employment contract. The term ‘typically’ is used deliberately in this context, as terms such as ‘employee’, ‘employment relationship’ or ‘employment contract’ evoke immediately certain associations among scholars and laypersons alike. However, these concepts do not, in themselves, constitute universal legal classifications without considering the specific

legal context in which they are examined. This research therefore adopts a legal pluralism perspective, acknowledging that multiple overlapping legal sources – international law, EU law, national law and case law – shape the legal treatment of freelance workers. By adopting an iterative conceptual approach, this dissertation ensures that its analysis remains flexible and responsive to legal complexities, rather than being restricted by premature categorization. This approach will allow for a more precise and contextually relevant discussion of freelance workers' rights and social guarantees. This dissertation therefore begins as a blank slate, with initially drawing only a rough sketch on the notions of 'rights' and 'social guarantees' as its starting point.

In this dissertation, the term 'rights' refers broadly to employment law rights that typically apply to employees working in an employment relationship under an employment contract if the respective personal scope of application is opened. Rights are in this context legal entitlements that working individuals hold by law, and which have an impact on employment contracts or collective agreements. They typically relate to the treatment, conditions, and protections certain working individuals are entitled to. Therefore, the focus of the analysis is to examine the scope of application established by national or international employment law norms or bundle of norms in each individual case. No definitive classification of employment law rights will be established at this stage. For methodological purposes, individual employment law and collective employment law are considered separately.

'Social guarantees' refer broadly to safeguards provided by the state or social security systems to protect working individuals from broader life risks. They are part of the social welfare system and are intended to provide working individuals with financial support and services during times of need, whether related to employment or personal circumstances. Therefore, in this dissertation, the term 'social guarantees' refers to (comprehensive and compulsory) social security which in its entirety with all its branches typically covers only employees working in an employment relationship under an employment contract. These guarantees typically encompass various forms of social security, such as health insurance, pension schemes, unemployment benefits, and other mechanisms aimed at ensuring financial stability and social participation. As with employment rights, the focus of the analysis is to examine the scope of application established by national or international social security law norms or bundle of norms in each individual case. However, as with employment law rights, the precise scope of social guarantees requires further clarification. The term itself is not a fixed legal concept but rather depends on the specific legal and social context in which it is applied. Therefore, only the course of this dissertation will define and contextualize the concept of social guarantees within relevant legal systems. At this stage, no rigid classification of social guarantees will be established.

Research sources. Given the subject matter of the dissertation, it relies on qualitative research. The entire research process is, therefore, centered around the analysis of legislation, case law, explanatory memoranda, draft laws, legal commentaries, statistics, conclusions reports and scientific literature. The dissertation utilizes legal research methods, including document and information analysis, comparative and analogical

reasoning, as well as systematic, teleological, and generalization approaches.

This dissertation draws on a wide range of legal and academic sources, which, given the relevance of the topic, are becoming increasingly numerous. It is based mostly on international and national legal acts (international laws and legal acts, and laws and legal acts of the EU, Lithuania, Germany as well as the UK) of old and current versions in comparison as well as decisions of international, EU and national courts and institutions. Furthermore, the dissertation also considers legal commentaries and explanatory memoranda. Thirdly, the dissertation draws on academic publications, articles and non-fiction books (especially on sub-areas of the dissertation's topic).

The information collected will be processed through a systematization process, leading to generalizations and conclusions on effective instruments for the protection of rights and social guarantees of freelance workers.

Limitations of the research. Since the aim of the dissertation is to examine the legal situation in relation to Lithuania, international legal acts that have little or no relation to Lithuania are considered only to a limited extent. German and UK law is also analyzed only to the extent that it serves as a comparison with Lithuanian law under the dissertation's topic.

Regulated professions, such as attorneys, are excluded from the research. Since freelance workers generally perform work on the basis of a contract under private law in return for which they receive remuneration, this dissertation also does not deal with unpaid work or the work of civil servants and does not address special situations (e.g., domestic servants) or regulations, such as the work of minors (protection of minors).

Unless it is necessary for a broader understanding of the personal scope of employment law, special procedural law and its access will not be discussed within this dissertation. All three countries under review have specific procedural systems with regard to employment and/or social security law. In Lithuania, e.g., there is a mandatory preliminary procedure for labor disputes through the Labor Disputes Commissions ('Darbo ginčų komisijos'). In Germany, employment law falls under a specialized jurisdiction exercised by the labor courts, the regional labor courts, and the BAG. Similarly, in the UK, labor disputes are adjudicated by special employment tribunals. Likewise, specific areas of law, such as insolvency law and any resulting issues that may arise for freelance workers in the event of the insolvency of their work provider, are also excluded from the scope of this dissertation.

It must be noted that also this dissertation is subject to the evolving nature of work and the resulting dynamic development of the legal landscape. Ongoing reform processes are currently taking place in the UK that are relevant to the content of this dissertation; however, their outcomes remain uncertain and can only be addressed in a preliminary manner within the scope of this dissertation.

Interpretation of legal sources. As regards the document analysis, the following methods of interpretation are used for the interpretation of laws and individual norms, which are based on the canones according to *Savigny*, supplemented by further elements:

- *Grammatical interpretation.* Individual norms are interpreted on the basis of the wording, the words and the sentence structure. This form of interpretation takes precedence over other forms of interpretation. The wording of the law must therefore not be exceeded in the interpretation, i.e., the wording is the limit of interpretation.
- *Systematic interpretation.* Individual norms are interpreted according to the relationship with each other. The interpretation is carried out with the aid of a classification of the norm or the law in the overall context of the legal order. Norms are basically interpreted in such a way that they do not contradict other norms or laws. Due to the fundamental equality of legal purposes, a norm is interpreted in such a way that it is in harmony with the purposes of other norms. In the case of conflicting purposes, an appropriate relationship is established between them. In addition, the systematics of the norm in question in which it is located shall be used for interpretation.
- *Teleological interpretation.* Individual norms are interpreted according to their objective meaning and purpose. Clarity is sought about the true intentions of the legislator when enacting or non-enacting individual norms. In addition, it examines the extent to which not only individual norms, but also entire laws or areas of law serve a certain essential purpose, which is reflected in the interpretation of individual norms.
- *Historical interpretation.* Individual norms are interpreted according to the contextual view of the legal tradition in which the norm or the law is inserted. The aim is to determine the will of the historical legislator. In some cases, a subjective teleological interpretation is used, i.e. it is based on the purpose that the historical legislator had in mind when enacting the norm.
- *Constitutional (as well as international and European law) compliant interpretation.* Individual norms are interpreted in such a way that any contradiction with higher-ranking law is avoided.
- *Comparison method.* This method is used to compare the laws and case law of different countries (Germany, UK) with Lithuanian law in the center of the dissertation's assessment. This method allows to identify the differences that exist in different countries in the context of legal rights and social guarantees for freelance workers and to identify respective effective instruments.

Certain legal subjects require a separate interpretation focus.

Special approach for the interpretation of CJEU's case law. Due to the CJEU's approach of not taking into account documents even if they were put on record in the Council when drafting a provision, unless they are reflected in the provision⁷⁵ and its refusal to consider the minutes of the Commission, the Council or Parliament that are not reflected in the legislation⁷⁶, when analyzing the CJEU's reasoning, a special focus

75 CJEU, Judgment of 26 February 1991, *The Queen/Immigration Appeal Tribunal*, C-292/89, EU:C:1991:80, para. 18.

76 CJEU, Judgment of 17 April 2008, *Quelle*, C-404/06, EU:C:2008:231, para. 32.

is given to the CJEU's own recent interpretation and established case law.

Special approach for the interpretation of international instruments not falling under the jurisdiction of the CJEU. Regarding international law, there exists a complex framework of multilateral and bilateral agreements that could, directly or indirectly, impact issues related to employment and social security law in Lithuania. Building on the assumption that these instruments, due to their limited number of participants or their specific focus on the topics addressed in this dissertation, provide the most concrete guidelines for the subject matter, this dissertation will focus on the ECHR, the RESC, and various ILO instruments. The interpretation of such instruments and their personal scope of application is generally guided by Art. 31-33 VCLT. According to Art. 31 VCLT, treaties must be interpreted 'in good faith' and based on 'the ordinary meaning' of their terms, considering their context and purpose. Art. 32 VCLT permits the use of 'supplementary means of interpretation', such as the treaty's preparatory work and the circumstances of its conclusion (so-called 'travaux préparatoires'). These supplementary sources can either confirm the interpretation derived from Art. 31 VCLT or clarify meaning when the primary interpretation is ambiguous or leads to an unreasonable outcome. This means that an interpretation takes generally place based on the wording, systematic context, and purpose. However, there is debate over whether the subjective understanding of the parties of an international treaty should be considered or whether an objective interpretation should take precedence that focuses more on the purpose of the provisions while accounting for evolving circumstances⁷⁷. The VCLT does not explicitly favor one approach over the other. International law has developed a nuanced approach: factors such as a large number of signatories, the establishment of an independent organization, and the treaty's long duration would support a more objective interpretation⁷⁸. Conversely, the fewer the contracting parties, the more subjective criteria may influence the interpretation. These principles also apply to the ECHR, the RESC, and ILO instruments, which will be reviewed in this dissertation. However, the interpretation of these legal sources varies in certain nuances.

The ECtHR has the authority to interpret the ECHR. To do so, it often relies on Art. 31 para. 3 lit. c VCLT, emphasizing that the ECHR should not be interpreted

77 Klaus Lörcher, "Arbeitsrecht in europäischer Perspektive: Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte (Zu den EGMR-Urteilen v. 12.11.2008, Demir und Baykara, und 21.4.2009, Enerji Yapi-Yol Sen)," *AuR* 57, no. 7/8 (2009): para. 6; Gabriele Buchholtz, *Streiken im europäischen Grundrechtsgefüge: Zum Harmonisierungspotenzial des Art. 6 Nr. 4 ESC in der Anwendung des EGMR und des EuGH* (Tübingen: Mohr Siebeck, 2015), 136 ff.; Matthias Dumke, *Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskampfrecht: Vorgaben, Vereinbarkeit und Umsetzung* (Frankfurt am Main: PL Academic Research, 2013), 22 ff.

78 Jens Schubert, "Teil I.," in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 16; Lörcher, "Arbeitsrecht in europäischer Perspektive: Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte (Zu den EGMR-Urteilen v. 12.11.2008, Demir und Baykara, und 21.4.2009, Enerji Yapi-Yol Sen)," para. 6; Dumke, *Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskampfrecht*, 24.

in isolation, as if it exists in a vacuum⁷⁹. Given the multitude of international legal sources, the ECtHR follows an approach of harmonizing the ECHR with other rules of international law, recognizing it as part of the broader legal framework. Any potential conflicts should be resolved in a way that prioritizes coherence and alignment whenever possible⁸⁰. As a result, for the ECtHR, it generally does not matter whether a state has ratified the source of interpretation itself⁸¹. For the ECtHR, the consensus of member states – which can evolve over time – plays a crucial role in interpretation. Therefore, the ECtHR occasionally engages in comparative legal analysis⁸². The ECtHR applies this evolving consensus to the respondent member state, which then can argue its national particularities⁸³. According to Art. 46 ECHR, member states must abide the ECtHR's final judgments⁸⁴.

The interpretation of the RESC is also conducted in accordance with the VCLT⁸⁵. When applying the VCLT principles to the RESC, it is important to note that only the English and French versions are legally binding, with neither language taking precedence over the other⁸⁶. The institutional legal bodies responsible for applying the RESC are the ECSR and the Committee of Ministers, which publish their Conclusions and Recommendations. These documents represent highly respected expert opinions; however, they do not carry the same authoritative interpretative power as decisions of the ECtHR or the CJEU, as they are not legally binding⁸⁷. The legal force of ECSR de-

79 ECtHR, Judgment of 27 May 2014, *Marguš v. Croatia* (No. 4455/10), para. 129.

80 *Ibid.*, para. 170.

81 ECtHR, Judgment of 12 November 2008, *Demir and Baykara v. Turkey* (No. 34503/97), para. 78 ff.

82 Thomas Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution," *International and Comparative Law Quarterly* 68, no. 1 (January 2019): 105, doi:10.1017/S0020589318000416; ECtHR, Judgment of 25 April 1978, *Tyrer v. the United Kingdom* (No. 5856/72), para. 31.

83 ECtHR, Judgment of 7 November 2013, *Vallianatos and Others v. Greece* (Nos. 29381/09 and 32684/09)," para. 92; ECtHR, Judgment of 18 December 1987, *F v. Switzerland* (No. 11329/85)," para. 33; in this regard, cf. Daniel Matthias Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats," *Europarecht*, 2015, 152.

84 European Convention on Human Rights, art. 46, accessed March 17, 2025, https://www.echr.coe.int/documents/d/echr/convention_ENG.

85 Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: M. Nijhoff, 2009), 439; ECtHR, Judgment of 21 February 1975, *Goldner v. United Kingdom* (No. 4451/70), para. 29; ECSR, Decision on the Merits: *European Council of Police Trade Unions (CESP) v. France*, Complaint No. 101/2013, para. 82.

86 European Social Charter (Revised), part VI art. O, accessed March 20, 2025, <https://rm.coe.int/168007cf93>; Vienna Convention on the Law of Treaties, art. 33, accessed March 17, 2025, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

87 Schubert, "Teil I.," para. 22; However, some scholars argue, with reference to the 1991 Turin Protocol, that the ECSR has the authority to provide a binding interpretation of the RESC, cf., e.g., Lörcher, "Arbeitsrecht in europäischer Perspektive: Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte (Zu den EGMR-Urteilen v. 12.11.2008, Demir und Baykara, und 21.4.2009, Enerji Yapi-Yol Sen)," para. 27; Monika Schlachter, "Beamtenstreik im Mehrebenensystem," *RdA*, 2011, 346.

decisions over member states remains somewhat ambiguous. Although these decisions are not directly enforceable, states are nevertheless expected to give them due consideration and act in accordance with them⁸⁸. Because both RESC decisions and ECtHR judgments are directed at states, their impact on the situation of freelance workers would be largely indirect, shaping conditions through state action rather than through direct individual remedies.

For a systematic interpretation, the text of the RESC itself must be considered, regardless of whether a member state has ratified or opted into specific provisions⁸⁹. The terms of the RESC are generally autonomous concepts, i.e., they have, in principle, the same meaning across all member states. However, as with the ECHR, comparative legal insights can be taken into account⁹⁰. Furthermore, member states are given discretion in implementation where multiple options for implementation exist⁹¹. Other international treaties can be relevant for interpreting the RESC⁹². Consequently, the ECHR can be used as a key reference for interpreting the RESC⁹³. However, it is important to note that social rights were deliberately excluded from the ECHR, making a blanket reliance on the ECHR for interpreting the RESC unjustified; instead, its applicability must be assessed on a case-by-case basis⁹⁴. Since the RESC is a treaty focused on regional human rights, whereas the ILO establishes globally applicable standards, ILO instruments can only be used to interpret the RESC to a limited extent⁹⁵. This is due to two factors: first, the set of contracting states differs; second, the divergence in social and economic conditions within Europe is significantly smaller, leading to a greater potential for consensus in establishing legally binding social standards compared to the ILO⁹⁶. Nevertheless, the ECSR, when interpreting the RESC, occasionally refers to

88 Cf. Andrea Spagnolo, “They Are not Enforceable, but States Must Respect Them: An Attempt to Explain the Legal Value of Decisions of the European Committee of Social Rights,” *European Papers - A Journal on Law and Integration* 7, no. 3 (2022): 1495-1516, doi: 10.15166/2499-8249/623.

89 Schubert, “Teil I.,” para. 17.

90 Rolf Birk, “Arbeitsrecht und Rechtsvergleichung – Die Kontrolle der Einhaltung der Europäischen Sozialcharta,” *ZVglRWiss* 124, 2001, 55 ff.

91 Schubert, “Teil I.,” para. 21.

92 Vienna Convention on the Law of Treaties, art. 31 para. 2.

93 Dumke, *Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskammerrecht*, 38; “Recommendation Rec(2003)19 of the Committee of Ministers to member states on Improving Access to Social Rights,” September 24, 2003, para. 8, <https://search.coe.int/cm?i=09000016805dee6f>.

94 Jean-François Akandji-Kombé, “The Material Impact of the Jurisprudence of the European Committee of Social Rights,” in *Social Rights in Europe*, ed. Gráinne De Búrca, Bruno De Witte, and Larissa Ogertschnig (Oxford: Oxford University Press, 2005), 91 ff., doi:10.1093/acprof:oso/9780199287994.003.0006; Dumke, *Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskammerrecht*, 38 ff.

95 Schubert, “Teil I.,” para. 19.

96 Ibid.

ILO instruments⁹⁷ – similarly as the ECtHR for the interpretation of the ECHR. What is clear, however, is that the RESC should not be systematically interpreted through the lens of EU law, even though it influences EU law according to Art. 151 TFEU⁹⁸. When interpreting the RESC teleologically, reference can be made to the RESC’s preamble, which states that it aims to achieve “greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and of facilitating their economic and social progress”⁹⁹. For this reason, the RESC is regarded as a ‘living instrument’, meaning its interpretation can evolve as social realities and legal frameworks evolve¹⁰⁰.

ILO instruments are also generally interpreted in accordance with Art. 31-33 VCLT. Unlike the RESC, they sometimes have more than just two language versions with occasionally divergent translations. For instance, the English version of Recommendation No. 198 uses both terms ‘employee’ and ‘worker’, whereas the German version only includes the term ‘Arbeitnehmer’ (employee). The terminology used can vary depending on the context, specific wording, and objectives of each instrument. Such variation may be attributed to the fact that, with a large number of member states involved, these instruments often constitute mere compromises, relegating the goal of maintaining uniform and consistent terminology to a lesser priority¹⁰¹. Accordingly, the *travaux préparatoires* are essential for identifying the object and purpose of an instrument, shedding light on how consensus over particular terminology was reached and facilitating an interpretation that takes into account the instrument’s context, object, and purpose¹⁰². ILO instruments may exert significant indirect influence on states that have not ratified them when used as interpretative tools for the ECHR and the RESC. Under Art. 37 of the ILO Constitution, the only authoritative and legally binding interpretations of ILO Conventions may be provided by the ICJ. In contrast, the conclusions and recommendations of ILO bodies are not legally binding¹⁰³. However, similarly as the ECSR and the Committee of Ministers regarding the RESC, ILO bodies

97 ECSR, Decision on the Merits: *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Collective Complaint No. 41/2007, para. 37; ECSR, Decision on the Merits: *European Council of Police Trade Unions (CESP) v. France*, Complaint No. 101/2013, 82 ff.

98 Treaty on the Functioning of the European Union, *EUR-Lex*, art. 151, accessed March 15, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT>; On and interaction with EU law, see: Sebastian Krebber, “AEUV Art. 151 (ex-Art. 136 EGV) [Ziele und Mittel abgestimmter und gemeinsamer Sozialpolitik],” in *EUV/AEUV*, by Christian Calliess et al. (Munich: C.H. Beck, 2022), para. 28.

99 RESC, preamble.

100 ECSR, Decision on the Merits: *Transgender Europe and ILGA-Europe v. the Czech Republic*: Complaint No. 117/2015, para. 75.

101 Cf. De Stefano, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 6.

102 *Ibid.*, 7.

103 Cf. “General Survey on Promoting Employment and Decent Work in a Changing Landscape” (Geneva: ILO, 2020), 11; BAG, Urt. v. 28.06.1973 - 5 AZR 568/72, NJW, 1973, 719.

hold significant authority. They played a significant role, e.g., in ECtHR cases¹⁰⁴, which demonstrates once more that ILO instruments, even when not legally binding, can have an indirect influence on states – even on those that have not ratified them. This also highlights the close interconnection between the ECHR, the RESC, and ILO instruments, which must be examined in relation to one another throughout this dissertation.

Structure of the dissertation. The dissertation begins by considering the inherent tension between the principle of ‘freedom of contract’ and the existence of specific rights and protections for certain groups of working individuals. Although ‘freedom of contract’ is a fundamental principle recognized under Lithuanian, German, UK, and EU law, it is restricted in the employment context due to the inherent power imbalance between employers and employees. This *first* chapter outlines briefly how these restrictions can be legally justified, providing a foundation for the subsequent chapters. Furthermore, the chapter analyzes the potential aims and purposes behind the idea of granting certain rights (through employment law) and social guarantees (through social security law) to a specific group of working individuals (typically employees), thereby enabling a teleological interpretation of existing legal norms at a later stage. The chapter also references the concept of the SER as a potential guiding principle of employment and social security law and explores the extent to which its development allows conclusions to be drawn about which individuals (beyond traditional employees) should or must be entitled to particular rights and social guarantees.

The *second* chapter addresses the different concepts and terms that emerge when discussing the rights and social guarantees of freelance workers. Concepts that are fundamentally tied to the legal status of the working individual. It explores the unique characteristics of freelance workers that complicate the task of accurately determining their legal status in order to ensure that they receive sufficient rights and social guarantees.

The *third* chapter offers an analysis of the criteria used in Lithuanian, German, and UK law, as well as by the CJEU, to assess the legal status of working individuals. In this context, it also examines the so-called ‘general’ EU worker concept and the controversies surrounding it. The characteristics identified are then compared, and interim conclusions are drawn.

The *fourth* chapter begins with an overview of the hierarchy of norms in Lithuanian employment law, setting the groundwork for a systematic interpretation of existing legal norms in later stages. Building on this, it analyzes the requirements established by higher-ranking sources of law (such as the ECHR, the RESC, ILO instruments, EU law, and the Lithuanian Constitution). Based on this analysis, an assessment is made regarding whether Lithuanian criteria for determining employment status sufficiently incorporate these higher-ranking requirements when it comes to the legal treatment of freelance workers. Conclusions are then drawn on the extent to which Lithuanian national law meets these requirements.

104 ECtHR, *Demir and Baykara v. Turkey*.

The *fifth* chapter presents a comparative analysis of German and UK law as far as it applies to certain working individuals who, based on their employment status in Lithuania, would not be afforded protection under Lithuanian employment law. It examines whether and how legal instruments from these jurisdictions could or should be adopted in Lithuanian law. An interim conclusion is drawn regarding the feasibility and necessity of transferring approaches or legal mechanisms from German or UK law into the Lithuanian context.

The *sixth* chapter builds on the findings of the previous chapters by analyzing whether social security considerations for working individuals can simply mirror employment law considerations or whether distinct approaches are required. This is followed by an examination of how Germany, the UK, and Lithuania address these issues and whether these jurisdictions extend certain social security protections to freelance workers.

The *final* chapter of the dissertation provides conclusions regarding the legal situation of freelance workers in Lithuania and their access to employment law rights and social security guarantees. It evaluates the practical application of the legal instruments discussed throughout the dissertation to the Lithuanian context – identifying where changes are required or recommended – and offers proposals to the Lithuanian legislator, courts and authorities on how to better provide rights and social guarantees of freelance workers in line with higher-ranking laws while respecting Lithuania’s own legal traditions.

Annex 1 provides *de lege ferenda* proposals for the Lithuanian legislator.

Statements defended in the dissertation. The following statements are defended in the dissertation:

1. Traditional legal distinctions between employment and self-employment are insufficient to adequately classify modern forms of freelance work.
2. The existing Lithuanian legal framework contains regulatory gaps with regard to the protection of freelance workers.
3. Higher-ranking legal sources may require broader protection of freelance workers than currently provided under Lithuanian law.
4. Legal systems such as Germany and the UK may provide alternative regulatory approaches that are more effective in addressing the challenges posed by freelance work.

1. SPECIAL RIGHTS AND SOCIAL GUARANTEES FOR A SPECIFIC GROUP OF WORKING INDIVIDUALS, AND THEIR PURPOSE

The existence of certain rights and social guarantees which apply to a specific group of working individuals stands in direct tension with the fundamental principle of ‘freedom of contract’. This principle is recognized in Lithuanian, German, UK and by EU law. Accordingly, individuals are generally free to decide whether and with whom to enter into a contract, as well as to determine its content. Likewise, the contracting parties are typically free to choose the form in which they conclude the agreement – whether in writing, orally, implied, or with notarization. Under EU law, freedom of contract is part of the freedom to conduct a business under Art. 16 CFR¹⁰⁵. In Lithuanian civil law, freedom of contract is explicitly established in Art. 6.156 LR CK. Furthermore, this principle is enshrined in the Constitution of the Republic of Lithuania. Art. 46 para. 1 of the Constitution states that the Lithuanian economy is based on the right to private ownership, the freedom of individual economic activity, and entrepreneurial initiative, which inherently includes the principle of freedom of contract¹⁰⁶. In German law, freedom of contract is not explicitly codified but derives from the fundamental principle of ‘private autonomy’. It is an essential aspect of the broader principle of individual self-determination in Germany which is fundamentally protected by Germany’s constitution in Art. 1 GG in conjunction with the general freedom of action under Art. 2 para. 1 GG¹⁰⁷. Regarding the UK, freedom of contract is a fundamental common law principle in contract law, historically developed through case law. As early as in the 19th century, the courts emphasized that contracts should generally be enforced if they do not violate the law or public policy¹⁰⁸ and that contracting parties are free to determine their own terms¹⁰⁹. This special status of the freedom of contract necessitates that any restrictions on it must be justified. The German constitutional court BVerfG aptly articulated this principle: “Insofar as private autonomy is unable to exert its regulatory force because one contracting party, by virtue of its superior position, can unilaterally impose contractual terms, state regulations must intervene to restore balance in order to ensure the protection of fundamental rights”¹¹⁰.

For a traditional employee, the workplace typically constitutes the foundation of their livelihood and standard of living, determining their social status and often serving as the basis for social interactions. Accordingly, the employment contract is an

105 “Explanations relating to the Charter of Fundamental Rights,” *EUR-Lex*, explanation on Article 16, accessed April 10, 2025, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214(01)).

106 Cf. LRKT, 2009 m. kovo 3 d. atskiroji nuomonė ‘Dėl nacionalinio investuotojo steigimo teisėtumo’.

107 BVerfG, Beschl. v. 04.06.1985 - 1 BvL 12/84, *NJW*, 1986, 243–44; BVerfG, Beschl. v. 13.05.1986 - 1 BvR 1542/84, *NJW*, 1986, 1859–61.

108 *Printing and Numerical Registering Co v Sampson* [1875] 19 Eq 462.

109 *Parker v South Eastern Railway Co* [1877] 2 CPD 416.

110 BVerfG, Beschl. v. 06.06.2018 - 1 BvL 7/14, 1 BvR 1375/14, *NJW*, 2018, para. 42.

extremely significant legal transaction for them. However, particularly during periods of high unemployment, the employer – typically the economically stronger party – is often in a superior bargaining position. Under these conditions, the unrestricted application of freedom of contract could have unfavorable consequences for employees. Employees might lack the ability to easily switch employers or to assert pressure for better contractual terms if they are dependent on a certain position. Therefore, the freedom of contract is restricted to a certain extent and employment (as well as social security law) undoubtedly impose certain restrictions on it. These restrictions, on the one hand, require justification and, on the other hand, may be necessary. This raises two key questions: first, how such restrictions can be legally justified, and second, whether and to what extent they are necessary – the answer to the latter can also be sought in the law. The justification for these restrictions can primarily be derived from a teleological interpretation – that is, by considering the purpose of a regulation. Their necessity, however, may stem from higher-ranking legal sources, particularly constitutional law, EU law, and international norms.

Justification for deviations from freedom of contract can be derived from the purposes of the following sources¹¹¹:

- Individual employment law rights;
- Collective employment law rights;
- European employment and social security law rights;
- Comprehensive social security guarantees.

For the necessity of deviating from freedom of contract due to mandates from higher-ranking law and its personal scope of application, the following legal sources must be examined:

- International law;
- EU law;
- Constitutional law.

Certain working individuals – typically employees – are subject to a special regime of legal norms that grant them special rights and social guarantees. In order to assess whether such a regime should or must also apply to freelance workers, the first question that hovers over everything is why these individuals are subject to this special regime at all. The following chapter serves to analyze the legal purpose and aim of granting special rights and social guarantees typically only to employees but not to self-employed individuals. To approach this issue, it is essential to explore the assumptions which employment and social security law adopt when granting specific rights and social guarantees to certain working individuals. In this context, an examination of the so-called ‘Standard Employment Relationship’ (SER) might provide guidance. The SER was and is an important concept in labor market research and serves as a basis

111 One risk of teleological interpretation is the possibility of subjective evaluations, since the purpose of a norm always depends on interpretative decisions; to counteract this problem, the analysis is based on existing academic research that has systematically examined these purposes and developed objectifiable criteria.

for the development of labor market standards and policies, initially in Germany, but was then extended to other systems including the UK¹¹². It is a comprehensive contractual and statutory employment relationship and usually characterized by¹¹³:

1. Permanent full-time employment;
2. Employer's right to issue instructions;
3. Service provision during fixed working hours on weekdays and during the day;
4. Service provision at a fixed place of work (in the organization, i.e. away from home);
5. Fixed job descriptions;
6. Fixed wages and salaries;
7. Essentially 'uninterrupted' employment biographies;
8. Protection against dismissal;
9. Social security.

The SER originated during the Industrial Revolution but only emerged in full form later, evolving at different speeds, under varying influences, and through distinct phases across countries. As a result, its specific characteristics differ according to national contexts, reflecting diverse experiences of industrialization and variations in industrial relations frameworks¹¹⁴. However, its development is considered to be closely linked to the development of the welfare states¹¹⁵. In Germany, the term was introduced and defined by *Mückenberger* in the 1980s¹¹⁶, identifying its peak in the 1970s. In the UK, the case law tradition makes it far more difficult to establish a historical starting point for a comprehensive SER, however, its manifestation also took place there in the 1970s. The Employment Protection Act 1975¹¹⁷ could be seen as a fixed point, which granted one essential statutory protection for working individuals that had been missing until then. The distinction between the SER and atypical forms of employment in Germany was shaped primarily by the legal system, whereas in the UK, it was initially driven more by developments within the collective bargaining system. Over time, however, this distinction also came to be influenced by increasing state intervention in the UK¹¹⁸. Despite these different developments, it is clear from this characterization that

112 Cf. Ulrich Mückenberger and Simon Deakin, "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market," *ZIAS*, no. 3 (1989): 153–207.

113 Cf. Ulrich Preis, "§ 611a Arbeitsvertrag," in *ErfK*, by Rudi Müller-Glöge et al. (Munich: C.H. Beck, 2021), para. 144.

114 Simon Deakin, "Addressing Labour Market Segmentation: The Role of Labour Law," Working Paper (Cambridge: Centre for Business Research, University of Cambridge, 2013), 5, <https://www.cbr.cam.ac.uk/wp-content/uploads/2020/08/wp446.pdf>.

115 Cf. Kendzia, "Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland," 36.

116 Cf. Ulrich Mückenberger, "Der Wandel des Normalarbeitsverhältnisses unter Bedingungen einer 'Krise der Normalität,'" *Gewerkschaftliche Monatshefte*, no. 4 (1989): 211.

117 Cf. Employment Protection Act 1975, c. 71, accessed March 1, 2025, <https://www.legislation.gov.uk/ukpga/1975/71/enacted>.

118 Cf. Mückenberger and Deakin, "From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market."

the SER is understood as an employment relationship operating under market economy conditions, yet subject to state regulation.

In Lithuania, the development of the SER was completely different due to Lithuania's Soviet history. The manifestation of the SER in Lithuania may be linked¹¹⁹ to the introduction of the LTSR DĮK in 1972¹²⁰. However, it must be noted that this Soviet standard employment relationship differed significantly from the SER as we understand it today, as it regulated almost all working conditions in detail and left little room for flexible contractual arrangements between the parties to the employment contract – the working [person] ('dirbantysis'), which included workers and servants, on the one hand and the (almost exclusively state-owned) companies, institutions or organizations on the other hand¹²¹. Moreover, the Soviet standard employment relationship included a fundamental duty and guaranteed right to work¹²². The principle of 'from each according to his ability, to each according to his work' applied, so work was as well the duty and moral obligation of every able-bodied citizen, according to the principle 'he who does not work, does not eat'¹²³. Working individuals exercised the right to work by concluding an employment contract, whereby they undertook to work in a particular specialty, qualification or capacity, in accordance with internal working procedures; and the undertaking, institution or organization undertook to pay the working individual a wage and to ensure the terms and conditions of employment as laid down in employment law, the collective agreement and the agreement between the parties¹²⁴. Workers and servants had¹²⁵:

1. the right to wages guaranteed by the state in proportion to the quantity and quality of the work performed;

119 An earlier reference point could also be chosen, though anything prior to 1940 is difficult to justify. The foundations of Lithuania's employment law developed only gradually, and many issues were left unaddressed by specialized labor legislation. Following the Soviet occupation of Lithuania, the 1922 Labor Code of the Russian Soviet Federative Socialist Republic was imposed on 1 December 1940, marking the emergence of employment law as a distinct legal field. As a codified act, the Code delineated the major areas of employment regulation and provided a coherent framework governing employment. However, although it formally applied to all persons working under employment contracts, working individuals' rights were declared in principle, but their practical ability to exercise those rights remained severely constrained, cf. Ingrida Mačernytė-Panomariovienė, "Individuali darbo teisė: jos atsiradimas, reikšmė ir reglamentavimo raida", in *Lietuvos teisė 1918–2018 m.: šimtmečio patirtis ir perspektyvos*, edited by Vytautas Sinkevičius and Lyra Jakulevičienė (Vilnius: Mykolo Romerio universitetas, 2017), 411-414.

120 Cf. LTSR DĮK, *e-TAR*, accessed April 17, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.30F1FD3C8FF0>.

121 *Ibid.*, art. 18.

122 *Ibid.*, art. 2.

123 LTSR DĮK, preamble.

124 *Ibid.*, art. 18.

125 *Ibid.*, art. 2.

2. the right to rest in accordance with the laws on the limitation of the working day and the working week as well as on paid annual leave;
3. the right to healthy and safe working conditions, free vocational and further training;
4. the right to organize trade unions, to participate in the management of production; and
5. the right to material support at public expense in old age as well as in the event of sickness and incapacity for work under the national social security scheme.

The Soviet standard employment relationship thus had similar features to the SER in Germany or the UK, but fully state-imposed¹²⁶ and therefore practically every employment relationship represented a kind of SER. The modern form of the SER only emerged between 1991 and 1994 in Lithuania, when numerous reforms attempted to shift from centralized and comprehensive state regulation to a more liberal (market-based) regulation, enabling the parties of employment relationships to determine the working conditions themselves through real agreements, while the state – similar to Germany or the UK – only set guard rails. In this context, the LR DSI from 1991 should be mentioned in particular, which coined a definition of the employment contract¹²⁷ that later also found its way into Lithuania’s first LR DK 2002¹²⁸ which entered into force in 2003. Accordingly, the development of the SER akin to the German or UK models can be situated, at the latest, with the introduction of the LR DK 2002. Yet, it retains a unique character, informed by Lithuania’s long-standing tradition of employment law codification, which underscores the legislator’s efforts to regulate these relationships of considerable social significance in a detailed, comprehensive, and systematic manner¹²⁹.

It is debatable whether the SER should be viewed as an ideal to be pursued through employment and social security law, or rather as merely a ‘stereotypical’ form of the employment relationship. According to *Giesecke*, the SER can, on the one hand, have a purely descriptive meaning in that it empirically refers to the actual ‘typical’ (in the sense of the majority prevailing) employment pattern¹³⁰. On the other hand, the SER can be understood as a normative concept that functions as an orientation basis for

126 Rytis Krasauskas and Ingrida Mačernytė-Panomarioviėnė, “Social Partnership as a Method of Legal Regulation of Employment Relations: The Case of Lithuania,” *BJLP* 15, no. 2 (2022): 6, doi:10.2478/bjlp-2022-0008 – “one of the most characteristic examples of the total dominance of state law-making in the area of employment relations.”

127 LR DSI, *e-TAR*, accessed April 17, 2025, art. 3, <https://www.e-tar.lt/portal/lt/legalAct/TAR.2CE9084B15DA>.

128 LR DK 2002, *e-TAR*, accessed April 17, 2025, art. 93, <https://www.e-tar.lt/portal/lt/legalAct/TAR.31185A622C9F>.

129 Davulis, *LR DK komentaras*, 33.

130 Johannes Giesecke, *Arbeitsmarktflexibilisierung und soziale Ungleichheit: sozio-ökonomische Konsequenzen befristeter Beschäftigungsverhältnisse in Deutschland und Großbritannien* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2006), 56.

legal regulations in the field of employment and social security law¹³¹. Laws, collective agreements and judicial norms would all tacitly assume a ‘normal’ or ‘typical’ case of the employment relationship¹³². Following this opinion by *Däubler*, the SER can be seen as the aim of employment and social insurance law. The social insurance and the tax systems are financed primarily through, and the employee’s social security entitlements also arise typically from continuous full-time employment. Based on this, *Mückenberger* described the SER as the employment relationship that optimally fulfils the criteria to which the current legal system (at that time) attaches advantageous regulations¹³³, and brought the term ‘optimal working relationship’ into play¹³⁴. Literature agrees at least on one thing: the SER is a fiction. It is not based on what is the typical prevailing model in the world of work in reality. Rather, it is built on the division of labor between the sexes and the family form of the male provider model¹³⁵ and therefore ignores the realities of an increasing proportion of working individuals. It would therefore be more accurate to regard the SER as a ‘guiding employment relationship’. How different the SER can be, becomes clear from a practical example. If the SER, according to *Däubler*, actually represents the ‘normal’ or ‘typical’ (and maybe even universal) employment relationship, at which laws, collective agreements and judicial norms are tacitly aimed, the regulations would have to be essentially identical in Lithuania, the UK and Germany, as a final consequence, if in the absence of a collective agreement, only the necessary minimum and no regulations deviating from the statutory law were agreed in the employment contract. Undoubtedly, in the absence of deviation, the employment relationship in all three jurisdictions would be one of indefinite duration. Full-time employment would also be tacitly agreed. However, there would be massive differences in detail as to what would be understood by the term ‘full-time’. If no working hours were agreed in Lithuania, the employee’s working hours would be 40 hours per work week (unless employment law norms provide for a reduced working time for certain employees)¹³⁶. In the UK, on the other hand, working time would be subject to the employer’s right to issue instructions and would in principle correspond to the maximum of 48 hours per week averaged over a period of 17 weeks¹³⁷. In Germany, case law has ruled that if no working time has been agreed, it is to be assumed that

131 Ibid.

132 Wolfgang Däubler, “Perspektiven des Normalarbeitsverhältnisses,” *AuR* 36, no. 10 (1988): 302.

133 Ulrich Mückenberger, “Die Krise des Normalarbeitsverhältnisses,” *ZSR* 31, no. 7 (1985): 424.

134 Ibid., 432.

135 “Bericht zur Berufs- und Einkommenssituation von Frauen und Männern” (Bundesministerium für Familie, Senioren, Frauen und Jugend, 2001), 115, https://www.boeckler.de/pdf/wsi_frauenbericht_lang.pdf.

136 LR DK, *e-TAR*, art. 112 no. 3, accessed April 17, 2025, <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89/asr>.

137 The Working Time Regulations 1998, No. 1833, reg. 4, accessed March 22, 2025, <https://www.legislation.gov.uk/ukSI/1998/1833>.

the working time usual in the company of the employer is to be taken as a basis¹³⁸. Thus, the SER is suitable as a way of approaching the question of what aims employment law and social security law are pursuing, but it is only of limited help for a legal classification, the formulation of the distinction from self-employed work or even for determining universal approaches to regulation, as its individual characteristics differ in content depending on the (national) context. This already shows that there seem to be also different views on what exactly is ‘normal’ or ‘typical’ in different countries. Yet, looking at the different developments of the SER can help to better understand the differences in the development of employment law in Lithuania, Germany and the UK. Historically, employment law in Germany and the UK developed from an originally completely unregulated area, to which more and more regulations were added to selectively improve the level of protection for employed persons. The development in Lithuania, on the other hand, was the opposite. In Lithuania, the Soviet standard employment relationship, which was almost completely regulated down to the last detail, was transformed into a market economy employment relationship with more contractual freedom, i.e. regulations with a supposedly higher and stricter level of protection were initially dropped rather than added. Since the early 1990s, reforms of national employment protection laws have focused on relaxing existing provisions to allow for greater contractual diversity¹³⁹.

Therefore, the SER does only provide rudimentary universal answers to the question of why certain working individuals receive special protection. However, the analysis so far raises the hypothesis that if the SER itself is merely a fiction that takes on different forms from different perspectives, then perhaps all subsequent questions that supposedly align with some forms of SER are also based solely on fictional assumptions. Building on it, one might even argue that traditional employment and social security law, including its personal scope(s) of application, seem to be only politically intended systems designed to stabilize and shape economic and social conditions¹⁴⁰. Conditions, however, which are not always and everywhere identical.

Without doubt, the legal framework of employment and social security law in general deliberately privileges a particular form of personal work to deter people from engaging in other forms¹⁴¹. Partly for political reasons. This may seem to be the case at first glance for contemporary Lithuanian employment law, which traces its origins to

138 BAG, Urt. v. 15.5.2013 – 10 AZR 325/12, NZA-RR, 2014, para. 21.

139 OECD, “Employment Protection Regulation and Labour Market Performance,” in *OECD Employment Outlook 2004*, by OECD, OECD Employment Outlook (Paris: OECD Publishing, 2004), 71, doi:10.1787/empl_outlook-2004-4-en.

140 Cf. Ulrich Zachert, “Legitimation Arbeitsrechtlicher Regelungen Aus Historischer Und Aktueller Sicht,” *RdA*, 2004, 1; Simon Deakin, “Does the ‘Personal Employment Contract’ Provide a Basis for the Reunification of Employment Law?,” *ILJ* 36, no. 1 (2007): 75 ff.

141 Cf. Nicola Countouris, *The Changing Law of the Employment Relationship* (Hampshire: Ashgate Publishing, 2007), 85.

the LTSR DİK¹⁴². However, also Soviet employment law ideas have roots that extend far beyond the existence of the Soviet Union. Therefore, the following will focus on examining these roots more closely, as literature contains numerous different explanatory theories. The question is whether protections by employment and social security law exist today, just because they are established instruments that carry a presumption of correctness within themselves due to its demonstrable track record of success¹⁴³ and thus just follow the principle ‘never change a running system.’ Or whether deeper reasons form their basis justify that certain distinguishing characteristics of the relationship result in some individuals receiving such protection and others not. The simple answer would be: Some individuals receive this protection, because they require it. In general, the purpose of protection is seen as the protection of occupation and livelihood in employment law, and the protection of livelihood in social security law¹⁴⁴. However, these purposes in its generality do not help further, because every working individual – regardless of whether employed or self-employed – has this need to a certain extend.

Thus, further considerations require a historical and theological analysis of what purposes employment law and comprehensive social security protections for a certain group of working individuals served and still serve today. To get a detailed picture, a distinction will be made in the following between individual and collective employment law, (national) social security law, as well as employment and social matters dealt with by EU law.

1.1. Individual employment law

Individual employment law serves several general purposes. One purpose is that it serves to appropriately balance the conflicting interests of employers and employees¹⁴⁵. However, other less regulated contractual relationships may have similarly conflicting interests and do not have such a regulatory framework. Furthermore, it must be noted that employment law typically only contains occasional protective norms for the employer, which could be seen as serving such a balancing of interests. One example of this are statutory notice periods applying also to employees who wish to terminate the employment relationship¹⁴⁶.

From its origins, employment law has been about establishing ‘employment status’

142 Cf. LTSR DİK.

143 Cf. Odo Marquard, *Abschied vom Prinzipiellen: philosophische Studien* (Stuttgart: P. Reclam jun, 1982), 16.

144 Martin Maties, “BGB § 611a Arbeitsvertrag,” in *Beck-Online.GROSSKOMMENTAR*, ed. Beate Gsell et al. (Munich: C.H. Beck, 2024), para. 94.

145 Cf. Rolf Wank, *Auslegung und Rechtsfortbildung im Arbeitsrecht* (Baden-Baden: Nomos, 2013), 32.

146 Cf., e.g., LR DK, art. 55 para. 1.

as the central concept from which to develop the corresponding rights¹⁴⁷. Some scholars argue that the decisive nature of this status is justified, as the employment relationship constitutes a socialized wage relationship that resembles a system of control through ‘submission of the individual’s will’: *Nipperdey* highlighted the employer’s duties of loyalty and care within the employment relationship by the employment contract¹⁴⁸. A characteristic which does not exist to this extent in other contractual relationships. According to *Sinzheimer*, unlike other types of civil law contracts, the employee under an employment contract does not purely exchange a service. Instead, through the employment contract, the working individual enters into a relationship of control, characterized by the work provider’s right to issue instructions, thereby necessitating special considerations¹⁴⁹.

Historically speaking, a key starting point for employment status can be seen in the approaches to addressing the social question of the 19th century, which many contemporaries perceived as the central issue of that era¹⁵⁰. *Schmuhl* highlights that the transition of society into a new era was marked by several dominant trends and identified six fundamental issues of that time: population growth, urbanization, migration, industrialization, the formation of social classes, and the emergence of the welfare state¹⁵¹. During this time, wages became the only source of livelihood for an increasingly large portion of the population. As a result, irregular work often led to limitations in living conditions¹⁵². Thus, labor became wage labor and the market dependence of the labor force replaced traditional ways of working and living¹⁵³. Furthermore, while employers had typically access to capital, such as means of production, funds, or goods, and entering into an employment contract was primarily a way to increase or multiply their capital investment, wage-dependent working individuals, on the other hand, were compelled to submit to an employment relationship because their only asset was their labor¹⁵⁴. The work thus represented an existential necessity for them, leading to a power dynamic despite the voluntary nature of the employment contract itself, as it contained a form of personal relationship based on the mentioned mutual loyalty¹⁵⁵. Consequently, historically, employment law seemed to serve more to mitigate the

147 “GREEN PAPER Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 Final,” 5.

148 Kendzia, “Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland,” 8.

149 Ulrich Zachert, “Legitimation Arbeitsrechtlicher Regelungen Aus Historischer Und Aktueller Sicht,” 4.

150 Hans-Walter Schmuhl, *Arbeitsmarktpolitik und Arbeitsverwaltung in Deutschland 1871 - 2002: zwischen Fürsorge, Hoheit und Markt* (Nuremberg: Inst. für Arbeitsmarkt- u. Berufsforschung d. Bundesanstalt für Arbeit, 2003), 6.

151 *Ibid.*, 8.

152 Kendzia, “Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland,” 13.

153 *Ibid.*, 8.

154 *Ibid.*

155 *Ibid.*

economic dependence of the working individual.

However, this is not considered the sole reason for the existence of employment law. As *Kendzia* highlights, early initiatives to introduce employment standards were also driven by employers themselves with the aim to retain skilled working individuals, thereby safeguarding the quality of work processes against high fluctuation and absenteeism rates¹⁵⁶. This suggests that from the outset, the focus was not necessarily solely on addressing social issues; rather, the employment status also provided (and might continue to provide) economic benefits for employers through greater predictability of and safer access to the available labor force.

Further reasons are found by some scholars in the theory of regulation¹⁵⁷, i.e., that employment rights are not only understood as a moral or social achievement, but as necessary legal interventions to regulate the labor market and correct market failures¹⁵⁸. A market failure can arise in particular if there is too much labor force available on the market, putting working individuals in a poor bargaining position, e.g. regarding remuneration. In other words, aspects that do not arise necessarily from the contractual relationship itself but are determined by external factors and already exist before any contract is initiated. A market failure could therefore justify e.g. minimum wage guarantees.

It is therefore questionable what the specific initial main purpose of the special protection for certain working individuals based on a fixed status was, and whether such a general purpose even existed. Today, it is widely accepted that the primary focus is on protecting vulnerable working individuals. However, the causes of this vulnerability are disputed. There are only a few widely accepted theories that link specific protective norms directly to grounds for protection¹⁵⁹. One reason can be seen in the differences to other legal relationships that result from the already mentioned power imbalance between the employee and the employer manifested in a so-called 'double economic dependence'¹⁶⁰. On the one hand, the resources essential for work do not belong to the working individual. This makes them dependent on the employer to provide these resources. On the other hand, employees only have their labor power to offer to make a living¹⁶¹. Although not explicitly mentioned in Lithuanian law, the LAT has recognized this power imbalance in certain aspects, acknowledging that the employee is socially and economically the weaker party¹⁶². Also, in both German¹⁶³ and

156 Ibid., 35.

157 Cf. Hugh Collins, "Justifications and Techniques of Legal Regulation of the Employment Relation," 7 ff.; Simon Deakin and Frank Wilkinson, "Labour Law and Economic Theory: A Reappraisal."

158 Rebhahn, "Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive," 242.

159 Ibid.

160 Cf. Martin Risak and Thomas Dullinger, "Der ArbeitnehmerInnen-Begriff im EU-Arbeitsrecht – Status quo und Veränderungspotenzial," *RdA*, 2018: 207.

161 Cf. Ibid.

162 LAT, 2011 m. gruodžio 22 d. nutartis civilinėje byloje Nr. 3K-3-541/2011.

163 BVerfG, Beschl. v. 23.11.2006 - 1 BvR 1909/06, *NJW*, 2007, 286–88.

UK¹⁶⁴ jurisprudence, a power imbalance and a structural subordination of employees are recognized by the courts. However, special protection to balance power in contractual relationships is not only found in employment law. Commercial agents law, e.g., also contains protective mechanisms to balance out a dependence, e.g. via the commercial agent's claim for compensation against the company or association¹⁶⁵. Some kind of subordination or dependence seems to be a fundamental reason why certain individuals require special protection, as today, subordination or dependence are regarded as the decisive factor used in all European countries to establish employment status¹⁶⁶. However, both are very general terms as some form of subordination or dependence can occur under any kind of contract, as the power distribution in contractual relationships is never exactly identical. Basically, every economic contract is associated with a sometimes more and sometimes less pronounced economic dependence, otherwise there would be no need for a contract. It is therefore appropriate to examine subordination and dependence more closely and to clarify the fundamental forms they may take to justify certain employment law protections. This will be done in the following. Since the question of meaning and purpose, i.e., teleological interpretation always carries a certain risk of too subjective evaluations, to prevent this dissertation from drawing its own subjective and possibly premature conclusions by its author, the following analysis is based mostly on existing academic research of other scholars that has systematically examined these purposes and developed objectifiable criteria.

1.1.1. Personal dependence and organizational subordination

In most legal systems, reference for a distinction of the different legal relationships is not made to the already mentioned economic reasons but to the organizational way in which the work is performed, i.e. a personal dependence or organizational subordination of the working individual. First and foremost, an employment contract typically grants the employer not only the ongoing right to define the specifics of work that are initially described only in broad terms, but also the authority to direct and control the employee's labor at the place and time established either by the contract or through subsequent instructions. This framework enables the employer to exercise a degree of control over the individual performing the work¹⁶⁷. It is argued that such personal dependence or organizational subordination should be offset by some form of compensation or balance¹⁶⁸. Thus, employment law rights could be seen as mere compensation for the personal dependence or organizational subordination and the fact that a

164 *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para. 17(4).

165 Cf. Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the member states Relating to Self-Employed Commercial Agents, *EUR-Lex*, accessed March 21, 2025, <https://eur-lex.europa.eu/eli/dir/1986/653/oj>.

166 ILO, *Regulating the Employment Relationship in Europe*, 36.

167 Cf. Supiot, "Was ist ein Arbeitnehmer?," 423 ff.

168 Deakin, "The Comparative Evolution of the Employment Relationship," 101.

working individual works constantly in ‘possession’ of the work provider¹⁶⁹. This compensation approach can be justified by the fact that, from a historical perspective, employers relied on permanently retaining working individuals because they needed them to be readily available on-site to perform the work tasks¹⁷⁰. However, this employer interest could become increasingly marginalized with the advancement of digitalization, as a work provider could easily tap into an almost limitless pool of working individuals, especially for simple and non-material tasks, without them needing to be within physical reach. Moreover, the working individual would be easily replaceable in case of limited qualification requirements with regard to the work to be performed. Of course, the interest of the work provider in retaining a certain working individual remains relevant for certain highly qualified working individuals or for tasks of a material nature.

However, since the employment relationship seems to extend beyond a mere exchange of work for remuneration, that is, beyond a simple transaction of services¹⁷¹, employment law seems to exist not only to ensure some kind of compensation, but also to ensure protection against the arbitrary exercise of managerial authority during the term of the contract. Furthermore, personal dependence or organizational subordination can also manifest as a disadvantage in negotiating contractual terms¹⁷², and can be caused by an existing information asymmetry in the contractual relationship, as the working individual typically has less information about the structure of the employment relationship – in particular at the time of contract formation¹⁷³. However, such information asymmetry involves further risks. The working individual must typically perform their work within the employer’s organizational structure and typically at the designated workplace set by the employer. This external determination, while not unique to employees, is also considered to pose a higher risk for them – in particular due to the employer’s right to issue and the employee’s obligation to follow instructions¹⁷⁴. Risks can also exist if the right to issue instructions is lacking or not very pronounced. *Supiot* therefore formulated a broader understanding of subordination, which can also encompass the integration of the working individual into a collective organizational framework designed by and for others, even when they retain a certain degree of autonomy in the performance of their duties¹⁷⁵. Ultimately, information asymmetry could play into this aspect as well, because the working individual is integrated into a system that they did not create themselves and are therefore dependent on the information provided by the work provider. The working individual only has

169 Simon Deakin and Frank Wilkinson, “Labour Law and Economic Theory: A Reappraisal,” 48 ff.

170 Kendzia, “Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland,” 35.

171 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 242.

172 *Ibid.*, 241.

173 Elke J. Jahn, *Zur ökonomischen Theorie des Kündigungsschutzes: Volatilität der Arbeitsnachfrage und duale Arbeitsmärkte* (Berlin: Duncker & Humblot, 2002), 120 ff.

174 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 242.

175 *Supiot and Meadows, Beyond Employment*, 12.

access to the information that was actively made available to them. Dangers can arise from this system that therefore only the work provider can fully foresee and avert. These risks are not reflected in all aspects of individual employment law but are particularly present in occupational health and safety. Through information asymmetry, the greater potential for preventing accidents and injuries related to the work, which risks lie in the work process and the working environment defined and created by the work provider itself, is essentially with the work provider – which can be seen as a key aspect of the existence of occupational health and safety law¹⁷⁶. Also *Supiot* identifies as structural reasons for special regulations not only a subordination of will, but also the protection of physical safety¹⁷⁷.

It is further argued that employees, particularly when providing their labor to an employer over an extended period, often make decisions and investments (such as acquiring company-specific skills or moving close to the workplace) based on the expectation of the continued existence of the employment relationship¹⁷⁸, whereby this can also lead to economic dependence and reinforce the impression that personal and economic dependence go hand in hand and are not competing concepts. Such purposes could easily be connected to the regulations on general protection against dismissal but must be distinguished from the dismissal protection granted to certain groups of working individuals which may serve additional protective purposes. In particular, the dismissal protection for mothers is designed not only to safeguard the mother herself but also her child. It aims to prevent risks, overburdening, and health hazards, while also ensuring measures are in place to protect against discrimination¹⁷⁹. Consequently, very similar individual regulations may pursue different purposes that do not necessarily have to overlap.

Ultimately, it can be inferred that personal dependence or organizational subordination can arise from various factors and that the literature is far from unanimous on this issue. However, reasons based solely on the employer's right to issue instructions under the employment contract fall short and do not fully capture the broader consequences of personal dependence or organizational subordination. Therefore, it might be true to regard it “insufficient as a principal benchmark to determine a genuine employment relationship as distinct from commercial relationships”¹⁸⁰. Instead, there might also be a necessary need for protection against unilateral changes to the contract

176 Cf. Genovaitė Dambrauskienė, “48 straipsnis,” in *Lietuvos Respublikos Konstitucijos komentaras. 1 dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 429.

177 Alain Supiot, “Pourquoi Un Droit Du Travail,” *Droit Social*, no. 6 (1990): 485 ff.

178 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 244.

179 Cf. Ronny Heinkel, “§ 189 Zweck, Geltungsbereich und Mitteilungspflichten,” in *Münchener Handbuch zum Arbeitsrecht Gesamtwerk. Band 2: Individualarbeitsrecht II*, ed. Heinrich Kiel, Stefan Lunk, and Hartmut Oetker (Munich: C.H. Beck, 2024), para. 1.

180 ILO, *The Employment Relationship: An Annotated Guide to ILO Recommendation No. 198* (Geneva: ILO, 2008), 33.

terms¹⁸¹. Additionally, it is important to consider that the employee submits to a system that they did not create, do not fully understand, and have therefore no control over – even if there is no direct control exercised by the work provider. Furthermore, the original spirit and purpose of employment law seems primarily to redress the inherent economic and social inequalities in the employment relationship, making some working individuals particularly vulnerable¹⁸². It is therefore necessary to delve even deeper into the question of why, despite the seemingly many reasons whereby the economic sphere even seems to predominate, so much focus is placed on personal dependence or organizational subordination for defining a special status from which all rights are derived. It is noted by *Rebhahn* that in the initial development phase of employment law, the organizational sphere was deemed quite effective in justifying the associated legal consequences, as the focus was primarily on workplace protection, especially against hazards and excessive working hours, as well as on regulations regarding termination¹⁸³. Interestingly, it is noted by scholars that in Germany, the jurisprudence used initially indeed economic dependence as the primary criterion for distinguishing employment relationships and shifted only in the 1930s to focusing on personal dependence, driven by an extension of the personal scope of the then Labor Court Act (*‘Arbeitsgerichtsgesetz’*) to include economically dependent individuals who were similar to employees as a mere catch-all provision (*‘Auffangtatbestand’*) – a shift that is partly viewed in the literature as a misunderstanding¹⁸⁴. Consequently, it gives once more the impression that employment law primarily aimed to mitigate economic dependence, which is based on the fact that the employee relies on their steady income¹⁸⁵. It is therefore necessary to take also a closer look at economic dependence in the next step.

1.1.2. Economic dependence

As already outlined, working individuals cannot only be in need of protection because of the existing power imbalance, but also because the employment relationship (or several employment relationships) usually forms the economic basis of the working individual’s livelihood. Thus, vulnerability can manifest itself as an economic vulnerability¹⁸⁶. As some decades ago, personal and economic dependence were seen to go hand in hand due to minor differences in work and life models, it could be assumed that nearly all employees were simultaneously both personally and economically

181 Cf. Adrián Goldin, “Labour Subordination and the Subjective Weakening of Labour Law,” in *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, by Guy Davidov (London: Bloomsbury Publishing PLC, 2006), 120.

182 Cf. i.a. Günther Löschnigg, *Arbeitsrecht* (Vienna: ÖGB Verlag, 2017), para. 1/002.

183 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 241.

184 Martin Maties, “BGB § 611a Arbeitsvertrag,” para. 90 ff.

185 *Ibid.*, para. 95.

186 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 241.

dependent on their employer and only a very few working individuals in personal work relationships were in contracts that did not lead simultaneously to both types of dependence¹⁸⁷. If personal and economic dependence were originally interconnected in most cases, it did not really matter which type of dependence was used for distinction. It seems logical that personal dependence came into focus for rather practical reasons, as it is more objectively measurable¹⁸⁸. With the emergence of new forms of work and also a diversification of living models, however, economic and personal dependence no longer necessarily coincide. As a result, economic dependence is once again coming into focus.

As a rule, most adult persons are typically dependent on the income received by their work or the work of their breadwinner to be able to earn a living – except in cases where there are sufficiently high assets that virtually work for the individual. In practice, economic dependence is difficult to measure objectively, because it is almost exclusively in the individual sphere of the working individual. The work provider can only influence this to a limited extent or has only a limited possibility to assess economic dependence because it does not know the working individual's personal (economic) circumstances, usually cannot know them and in some cases is not allowed to know them (e.g., for data protection reasons). Against this background, too much protection by law through a distinction by economic dependence based on too little information could lead to an unreasonable disadvantage for the work provider. Furthermore, voluntary higher remuneration or the granting of additional benefits by the work provider can even increase the economic dependence of the working individual on this particular work provider. Thus, the work provider's possibilities of exerting influence on economic dependence are almost exclusively to the effect that it could create less dependence of the working individual by reducing orders or lowering the remuneration paid for the work performed, but again at the expense of more precarious conditions for the working individual and at the same time creating artificial disadvantages for themselves. When considering this, recourse can be taken to the research on the so-called dual labor market, i.e. a division of the market into a 'primary' segment consisting of high wages, good working conditions, employment stability, chances of advancement, and equity and due process in the administration of work rules¹⁸⁹, and a 'secondary' segment of low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often arbitrary and capricious supervision¹⁹⁰. In the latter segment, the risk is particularly high that individuals may fall into self-employment without actually wanting to, further

187 Ibid.

188 Cf. Risak and Dullinger, "Der ArbeitnehmerInnen-Begriff im EU-Arbeitsrecht – Status quo und Veränderungspotenzial," 207.

189 Peter B. Doeringer and Michael J. Piore, "Internal Labour Markets and Manpower Analysis" (Cambridge: Harvard Univ., Cambridge, Mass., Massachusetts Inst. of Tech., 1970), 271, <https://files.eric.ed.gov/fulltext/ED048457.pdf>.

190 Ibid., 271, 272.

exacerbating their precarious situation. The *Council Recommendation on Access to Social Protection for Workers and the Self-Employed* noted in 2019 that “one out of five self-employed persons is self-employed because he or she cannot find a job as an employee”¹⁹¹. When considering economic dependence, it would therefore not be enough to look at whether the working individual is existentially dependent on the one income that they receive from the work provider, but also at how secure this income is in the event of a shift from the primary segment to the secondary segment because of a sudden shift of supply of labor on the market.

It must be considered whether the work relationship is rather precarious, or whether the working individual could even be in a more powerful economic position and can partially dictate the economic conditions of the relationship to the work provider, especially due to a shortage of labor on the market in certain sectors. Such working individuals would naturally have a lower economic need for protection than working individuals in precarious circumstances and possibly also a lower interest in protection. The more economic power the working individual has vis-à-vis the work provider, the more a working individual may also be willing to break out of the inflexible corset of employment law to perform their activities vis-à-vis the work provider independently, e.g. because they can then choose certain tasks/projects more freely and reject others that are less attractive. From a certain degree of economic power of the working individual, it can lead to them being able to make this possible for themselves without financial sacrifice, because the work provider is necessarily dependent on this one working individual due to a severe shortage of labor on the market.

In contrast, precariously working individuals can only compensate for reductions in income (e.g. through a reduction in their remuneration) by expanding the labor in the market relevant to them – an expansion with temporal and physical limits. For them there is also the danger of undercutting competition. There is thus a considerable need for economic protection for this kind of individual. Two examples will illustrate this. If solely economically dependent self-employed individuals do not have any protection against dismissal or any restrictions as far as the limitation of contracts is concerned, the work provider could very easily use their superiority over these working individuals by terminating the contractual relationship or by threatening to terminate the contract. There could also be an undercutting of competition in the price of the work or service offered by the (self-employed) working individual if not regulated by law, while employees would be entitled to the payment of at least a statutory minimum wage (if applicable under national law). This raises the elementary question of whether in practice both parties, i.e. the working individual on the one hand and the work provider on the other hand, deliberately do not form a relationship as an employment relationship because both actually want this and have a mutual interest in it or one party is forced by its economic situation. However, an equally existing interest of both

191 Council Recommendation of 8 November 2019 on Access to Social Protection for Workers and the Self-Employed (2019/C 387/01), *EUR-Lex*, recital 12, accessed March 30, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.387.01.0001.01.ENG&toc=OJ:C:2019:387:TOC.

parties could only be assumed if the working individual has the same or more economic power as the work provider, i.e. if there is no economic dependence. In the case of a precarious relationship, it is less likely that the working individual does make this decision intentionally. This once again illustrates the strong interconnection between economic dependence and personal dependence or organizational subordination – a working individual may be compelled to adopt certain behaviors for economic reasons, even in the absence of direct instructions from the work provider.

When considering economic dependence, it would therefore be important to also distinguish between a precarious relationship and a relationship that is economically secure for the working individual. Precarious relationships usually arise where there is an oversupply of labor on the market and high qualifications are not required to perform the work. An economically secure relationship with high economic power for the working individual arises usually where there is a shortage of labor on the market and a high level of qualification is usually required to perform the work. Where to draw the dividing line is not easy, especially as the borderline between precarious circumstances and economically secure circumstances can change due to changes in economic development. In times of economic crisis, e.g., there may be a sudden surplus of skilled working individuals on the market with regard to a certain profession. The use of AI may contribute to the emergence of a surplus of certain highly skilled working individuals (e.g. programmers) in the future who have previously faced a shortage. Corresponding regulations that address the measurement of economic dependence would therefore also have to include these factors if they are to provide legal certainty for all stakeholders. Employment protection regulations must offer protection regardless of macroeconomic fluctuations or take into account these fluctuations.

Ultimately, it appears that economic dependence would be the most suitable criterion for establishing a clear boundary, but it faces limitations in practical implementation. On the one hand, there would be questions about where exactly to draw the line, and this boundary would inevitably have a degree of arbitrariness. On the other hand, economic dependence is difficult to measure, and it is unclear what should be included concretely. One could derive economic dependence from the specific contractual relationship alone. In this case, the assessment would focus solely on the need for protection arising from the level of remuneration provided under the contract and from the dependence created by the exclusive engagement of a person's labor by a single work provider¹⁹². But also then, the means of influence would largely be removed from the work provider's control. The work provider could only reduce the demand for the working individual's labor or decrease remuneration to lessen economic dependence, which might further exacerbate the working individual's precarious situation if they cannot find other sources of income. Alternatively, one might consider the overall economic dependence, but this is hardly feasible due to the vast diversity of individual life models and the need for complete transparency and disclosure of at least financial status. Again, it would be unclear where to set the boundary: should only income and

192 Cf. BAG, *Beschl. v. 21.02.2007 - 5 AZB 52/06, NZA, 2007*, para. 12.

possibly existing assets be considered, or should individual life situations also be taken into account, such as whether the working individual is a single parent or has a costly mortgage? This theoretical criterion, while potentially suitable, would likely be associated with new injustices in practice.

1.1.3. Lack of entrepreneurial opportunities

A concept that appears to link personal and economic dependence is the notion of a ‘lack of entrepreneurial opportunities.’ Already in 1966, *Wiedemann* pointed out that the rationale behind many of the employment laws of that time should not be viewed as solely relating to organizational subordination. Instead, it lies in the loss of free economic discretion and dependence on the employment relationship as a means of subsistence, thus involving considerations that extend beyond a personal dependence¹⁹³. *Wiedemann*’s ideas were later taken up by *Wank*. His considerations are based on the premise that the special rights of employees initially stem from their economic dependence, however, understood as their lack of entrepreneurial independence or lack of entrepreneurial opportunities. The underlying concept is that a working individual, lacking the ability to make entrepreneurial decisions on their own account, requires employment law protection. This need for protection just manifests in their subordination to instructions and integration within the organization¹⁹⁴. This means that because the working individual is primarily subject to instructions and integration within the organization, they are restricted in their ability to market their labor elsewhere¹⁹⁵. Consequently, legislation, using the distinction criteria of personal dependence or organizational subordination, aims to extend the protection of employment law to all working individuals who are subject to external control and, as such, are dependent, but possess only their own labor to provide for themselves and their dependents¹⁹⁶ – labor which has temporal and physical limits. *Wank*’s approaches have also attracted attention and approval abroad¹⁹⁷. It brings a new perspective into the concepts of personal and economic dependence. Accordingly, personal dependence or organizational subordination would merely be an indicator to assess the existence of a lack of entrepreneurial opportunities as a form of economic dependence. This shows again that there is a connection between personal and economic dependence, and they do not constitute opposing concepts: An individual who submits to the instructions of another in terms of time, place, and content of the work – thus being personally dependent – loses the ability to utilize their labor for their own economic

193 Herbert Wiedemann, *Das Arbeitsverhältnis als Austausch- und Gemeinschaftsverhältnis* (Karlsruhe: C.F. Müller, 1966), 13 ff.

194 Wank, “Von Honorarärzten und Piloten – der ‘Beschäftigte’ in der BSG-Rechtsprechung,” 115.

195 Martin Maties, “BGB § 611a Arbeitsvertrag,” para. 96.

196 Cf. Ulrich Preis, “BGB § 611a Arbeitsvertrag,” in *ErfK*, by Rudi Müller-Glöge et al. (Munich: C.H. Beck, 2025), para. 8–12.

197 European Commission, *Transformation of Labour and Future of Labour Law in Europe*, 7 ff.

benefit elsewhere¹⁹⁸. Furthermore, this integration and the associated constraints not only impose limitations on the working individual's ability to shape their personal life but also pose risks to their health¹⁹⁹. Working individuals who offer their labor to mainly one work provider forego alternative earning opportunities (an aspect of economic dependence). They thus rely on a certain level of income continuity. Looking at the historical emergence of employment status already discussed, the concept of the 'lack of entrepreneurial opportunities' can certainly be derived historically and can serve as a theoretical foundation or as an approach to return to these origins. Building on this, one could argue that the focus on personal dependence has just prevailed due to reasons of practicability²⁰⁰, because personal dependence and any form of economic dependence went hand in hand for a while. The reason for this being that dependent work relationships orientated towards a SER were supposedly the standard case in reality (including the assumptions behind it: division of labor between the sexes and the family form of the male provider model²⁰¹) and as personal dependence could largely be determined on the basis of the objective organizational structure of the work that can be easier assessed. If the original aim of employment law was to solve the social question and to cushion economic dependence, one could argue that this question is currently arising again and that similar solutions need to be discussed. But population growth, urbanization, migration, industrialization, the formation of social classes, and the emergence of the welfare state²⁰² are not the main driving factors anymore, but instead digitalization, globalization, shortage of skilled working individuals due to demographics and flexibilization come into focus.

Nevertheless, it must also be recognized that case law to date has essentially continued to rely mainly on some form of personal dependence or organizational subordination and that this has so far proved its worth, even if there are doubts²⁰³. On the other hand, it must also be acknowledged that not all working individuals who are considered employees and are protected by employment law are necessarily inferior in all respects (e.g. professional football players²⁰⁴) and that employment law therefore partly protects also those who are strong and independent in the market and not only those who are weak²⁰⁵. Thus, employment law does not necessarily differentiate based on whether a working individual is in a strong or weak position due to their knowledge, work experience, or specialization. There are special protections for

198 Martin Maties, "BGB § 611a Arbeitsvertrag," para. 96.

199 Matthias Kreft, *Grundfragen von Arbeitszeitdauerregulierungen* (Aachen: Shaker, 2001), 24 ff., 90 ff.

200 Risak and Dullinger, "Der ArbeitnehmerInnen-Begriff im EU-Arbeitsrecht – Status quo und Veränderungspotenzial," 207.

201 "Bericht zur Berufs- und Einkommenssituation von Frauen und Männern," 115.

202 Schmuhl, *Arbeitsmarktpolitik und Arbeitsverwaltung in Deutschland 1871 - 2002*, 8.

203 ILO, *Annotated Guide to ILO Recommendation No. 198*, 33.

204 Cf. CJEU, Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463.

205 Rebhahn, "Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive," 241.

certain groups of working individuals, such as young workers or expectant mothers. However, apart from these exceptions, employment law generally treats all employees equally based on their status. Therefore, the aim of employment law to date seems more to create a form of 'generalized justice' encompassing those in need of protection, whereby including individuals who do not require such protection in specific cases²⁰⁶. However, this in turn makes it less comprehensible why employment law is not applied to a non-negligible number of working individuals who are presumably in some way vulnerable.

1.2. Collective employment law

The distinction between individual employment law and collective employment law is first for systematic reasons, to facilitate the presentation of the legal relations between the different persons and groups relevant. However, in some parts of literature, the distinction is made beyond formal classification by a content-based distinction, where all general positions are assigned to the collective domain, while only those legal positions that are substantively defined on an individual basis belong to the individual domain²⁰⁷. Furthermore, collective employment law regulates the legal relationships of groups of working individuals on the one hand and one or a group of employers on the other. It determines whether and under what conditions these parties can make regulations for the content of individual employment relationships²⁰⁸ and what means they may use to enforce them. Therefore, collective employment law has a direct influence on the individual employment relationship. Individual and collective employment law are not unrelated to each other, but generally jointly determine the rights and obligations of the parties to the employment contract. Whenever a regulation established by these parties defines the contractual content of the employment relationship, it can also systematically influence the individual employment relationship in the same way as a provision created by law or an individual employment contract. As a result, individual and collective employment law form a symbiotic relationship. It could be stated that the purpose of collective employment law additional to those of individual employment law essentially consists in enabling, realizing and enforcing these individual protective interests of individual employment law in the collective, through participation in trade unions, co-determination in companies through works councils, through collective bargaining or through a right to strike²⁰⁹. The goals of in-

206 Ibid.

207 Marie Luise Hilger, *Das betriebliche Ruhegeld. Zugleich ein Beitrag zum Recht der betrieblichen Arbeitsbedingungen* (Heidelberg: Verlags-Gesellschaft Recht und Wirtschaft, 1959), 228–29.

208 Philipp Fischinger, “§ 215 Kollektives Arbeitsrecht als Arbeitsverfassungsrecht,” in *Münchener Handbuch zum Arbeitsrecht*, by Christian Arnold et al., ed. Heinrich Kiel, Stefan Lunk, and Hartmut Oetker (Munich: C.H. Beck, 2022), para. 5.

209 Cf. Genovaitė Dambrauskienė, “51 straipsnis,” in *Lietuvos Respublikos Konstitucijos komentaras. I dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 463.

dividual employment law can be fully achieved only through collective representation, which enables the working individuals to engage as equal partners in negotiations²¹⁰. The collective assertion of individual rights compensates for the discussed power imbalance that would exist if contracts were negotiated individually, as the employer has typically the already discussed greater economic potential and the ability to manage the labor supply²¹¹. In this sense, collective employment law generally, and the right to strike particularly, serves the protection of working individuals' rights like individual employment law – although rather indirectly. At the same time, various components such as collective bargaining, participation in trade unions, and co-determination in companies reveal additional purposes. For instance, collective bargaining aims to establish industrial peace, as it helps to prevent or end strikes²¹². In this regard, the state as a stakeholder also has an interest in maintaining a harmoniously functioning system of collective representation in employment law relationships²¹³. Furthermore, it is argued that collective representation is a cornerstone of democracy in the workplace²¹⁴. Co-determination in the employer's organization, such as through works councils, enhances workplace democracy by facilitating information and consultation²¹⁵. It is argued that such democratic participation in the workplace also leads to political and economic equality among members, which is a condition for a fair society and therefore has effects beyond the employer's operation²¹⁶. At the same time, empirical arguments suggest that democratic structures in the workplace lead to higher productivity, a higher labor force participation rate, and more innovation, which are also in the employer's interest²¹⁷. Collective representation can furthermore protect individuals from potential retaliation for raising their concerns or grievances²¹⁸, which should at least in theory also be in the employer's interest. In Lithuania in particular, the aim of works councils is to guarantee the exercise of collective rights also for those who are

210 Cf. Rytis Krasauskas, "Kolektyvinės darbo teisės normų ištakos," in *Kolektyvinė darbo teisė: vadovėlis*, ed. Rytis Krasauskas (Vilnius: Mykolo Romerio Universitetas, 2013), 19.

211 Tomas Davulis and Ipolitas Nekošius, "50 straipsnis," in *Lietuvos Respublikos Konstitucijos komentaras. 1 dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 449–50.

212 Kenneth G. Dau-Schmidt, "Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan under the Bargaining Model," *Tulane JICL* 8, no. 1 (2000): 117.

213 Davulis and Nekošius, "50 str.," 449–50.

214 Stan De Spiegelaere et al., "Democracy at Work," in *Benchmarking Working Europe 2019* (Brussels: ETUI, 2019), 85.

215 "Democracy in the Workplace: Strengthening Information and Consultation," Economic Report Series (London: Trades Union Congress, 2014), 10, https://www.tuc.org.uk/sites/default/files/Democracy_In_The_Workplace_2014_.pdf.

216 De Spiegelaere et al., "Democracy at Work," 70.

217 *Ibid.*, 74.

218 *Ibid.*, 85.

not members of a trade union²¹⁹.

Moreover, it should be noted that while individual employment law follows the system of restricting the existing freedom of contract, collective employment law largely follows a different logic. It largely permits a practice and exempts it from sanctions that is already generally prohibited. This means that individual employment law typically restricts what is generally allowed, while collective employment law allows what is generally restricted. This can first be illustrated by an apt historical example. The history of trade unions in the UK began at the end of the 17th century, making the British trade union movement the oldest in the world²²⁰. The power of trade unions was deliberately kept minimal because any union activity was regarded as an unreasonable restraint of trade²²¹. A similar development can be observed in Germany²²². Therefore, it could be argued that the implementation of individual employment law and the orientation towards the SER originally served the purpose of curbing the collective aspirations of the workforce and transferring them to state control. However, this principle is still evident even today. In principle, UK law continues to regard the organization and conduct of strikes as inherently unlawful, but it grants immunity from liability under certain conditions²²³. Even though collective measures have long become fundamental rights²²⁴, this systematic approach can still be observed in principle outside the UK. For instance, prohibitions such as Art. 101 of TFEU can be cited. It prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade between member states and have the aim or effect of preventing, restricting, or distorting competition within the single market²²⁵. However, the CJEU ruled that collective agreements between employers and trade unions, which solely regulate working conditions, do exceptionally not fall under Art.

219 Rytis Krasauskas, "Lietuvos darbo tarybų teisinio statuso ypatumai," *Jurisprudencija* 29, no. 2 (2022): 217, doi:10.13165/JUR-22-29-2-02.

220 Nikolaus Bardenhewer, *Der Firmentarifvertrag in Europa: ein Vergleich der Rechtslage in Deutschland, Großbritannien und Frankreich* (Baden-Baden: Nomos, 2006), 37.

221 Anne Davies, *Perspectives on Labour Law*, Law in Context (Cambridge/New York: Cambridge University Press, 2004), 4; Simon Deakin and Gillian Morris, *Labour Law* (Oxford/Portland: Hart Publishing, 2012), 788; Gillian Morris and Timothy J. Archer, *Collective Labour Law* (Oxford: Hart, 2000), 43.

222 Kendzia, "Der Institutionalisierungsprozess des Lohnarbeitsverhältnisses vom Ersten bis zum Zweiten Weltkrieg in Deutschland," 4.

223 Deakin and Morris, *Labour Law*, 1060; Angela Harth and Andrew Taggart, "Kollektives Arbeitsrecht in Großbritannien," in *Arbeitsrecht in Europa*, ed. Martin Henssler and Axel Braun (Cologne: Otto Schmidt, 2011), para. 108; Anja Jeschke, *Der europäische Streik: Konturen und Entwicklungsperspektiven eines gemeineuropäischen Streikrechts* (Baden-Baden: Nomos, 2006), 98 ff.

224 Cf., e.g., the right to strike: Charter of Fundamental Rights of the European Union, *EUR-Lex*, art. 28, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016P%2FTXT>; Lietuvos Respublikos Konstitucija, *e-TAR*, art. 51, accessed April 13, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.47BB952431DA/asr>; GG, art. 9 para. 3.

225 TFEU, art. 101 para. 1.

101 TFEU²²⁶. This principle can also be recognized in other national laws, e.g. in Lithuania. For instance, the right to strike is heavily regulated, i.e. who may strike, when and how²²⁷ with corresponding claims for damages in the event of an illegal strike²²⁸. At the same time, if it is a legal strike, sanctions or possible negative consequences under individual employment or social security law are lifted²²⁹. Therefore, the legal regulation of collective action must not be seen as a mere weakening of statutory employment rights but can also be seen as a strengthening of them through a targeted balancing of interests as a prerequisite for a functioning society²³⁰. Furthermore, the right to strike must be recognized as essential, as without it, collective bargaining loses its power and would turn into ‘collective begging’²³¹.

At the same time, however, elements have been added to collective employment law in recent times that even encourage collective measures, e.g. in Lithuania the obligation to initiate the election of a works council by the employer with an average number of employees of more than twenty²³² and collective participation obligations in the event of dismissal²³³. This demonstrates that collective employment law now serves multiple purposes that are not mutually exclusive. On one hand, it recognizes rights to collective action and democratic participation in the workplace, and it even promotes the latter as a means of protecting certain working individuals. At the same time, it continues to have a regulatory effect by channeling collective measures into orderly processes or by attempting to prevent or end them through collective bargaining. Therefore, the significance of at least some elements of collective employment law go well beyond the sole purpose of protecting the working individual but with having the individual’s protection in focus.

1.3. EU employment and social law

Accordingly, employment law (individual employment law and indirectly collective employment law) is primarily working-individual’s protection law. EU employment law must be separated from this. It can be assigned neither directly to individual nor to collective employment law, as it pursues its own purposes. With the expansion of EU competences, the objectives of EU law in the area of employment as well as social security have also changed considerably time and again so that one could

226 CJEU, Judgment of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430, para. 59–64.

227 LR DK, art. 243–253.

228 *Ibid.*, art. 254.

229 *Cf. ibid.*, art. 250 para. 1.

230 Dambrauskienė, “51 str.,” 462.

231 K.D. Ewing and John Henty, “The Dramatic Implications of Demir and Baykara,” *Canadian Labour and Employment Law Journal* 15 (2010): 180.

232 LR DK, art. 23 para. 2.

233 *Ibid.*, art. 57 para. 3.

derive these general purposes from these developments of competences which evolved through a combination of legislation and judicial decisions. The starting point for the legislation can be set with the Rome Treaty (1957), which established the EEC²³⁴. In addition to the introduction of the instrument of freedom of movement for workers²³⁵, it was recognized that there is a need to promote improved working conditions and an improved standard of living for workers, to make possible their harmonization²³⁶. There was no general legislative power, but the Rome Treaty did already cover specific social and employment issues, e.g., that men and women should receive equal pay for equal work²³⁷ or a provision on paid leave schemes²³⁸. The focus, however, was on the objective of creating a single market. In this context, the Rome Treaty provided at least some competence to act in relation to social and employment issues if doing so could be justified by reference to the single market²³⁹. Therefore, from the beginning (and until today), the rules on the single market and the emerging social and employment protections were closely tied together²⁴⁰.

In 1974, the first Social Action Programmes (SAP) were launched to promote and harmonize social policies across member states²⁴¹. Influenced by the SAP, the SEA²⁴² of 1987 introduced a legal basis for health and safety at work and emphasized securing workers' rights alongside market integration²⁴³. The Maastricht Treaty²⁴⁴ of 1993 transformed the EEC into the EU, establishing the foundation for a social dimension focused on social protection, employment rights, and combating social exclusion²⁴⁵. It introduced the 'Social Chapter', empowering social partners to influence legislation and adopt collective agreements²⁴⁶, later incorporated into the EU Treaties. The Amsterdam Treaty of 1999 further strengthened the social dimension by explicitly including provisions related to employment and labor market policies – however, the

234 Treaty Establishing the European Economic Community, *EUR-Lex*, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT>.

235 *Ibid.*, art. 48.

236 *Ibid.*, art. 117.

237 *Ibid.*, art. 119.

238 *Ibid.*, art. 120.

239 *Cf. ibid.*, art. 100.

240 *Cf. ibid.*, art. 118.

241 Council Resolution of 21 January 1974 concerning a social action programme, *EUR-Lex*, accessed March 30, 2025, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31974Y0212%2801%29>.

242 SEA, *EUR-Lex*, accessed March 15, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT>.

243 *Ibid.*, art. 21.

244 Treaty on European Union, *EUR-Lex*, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11992M%2FTXT>.

245 *Ibid.*, art. 1 protocol on social policy.

246 *Ibid.*, protocol on social policy.

competence in the field of employment remained rather limited²⁴⁷ and was more aimed to encourage member states to share best practices and coordinate policies in areas such as employment and social inclusion²⁴⁸. The Council was ordered to promote such coordination²⁴⁹. However, while initially, most employment and social legislation needed to be justified by reference to its effect on the single market, this was now no longer the case as social and employment policy got its own legal basis. In 2000, the CFR was officially proclaimed which established a framework for workers' employment and social rights, although not yet with Treaty status.

But not only legislation alone, also the case law of the CJEU has had a lasting impact on the distribution of competences between the EU and the member states. One of the most important cases in this regard is *van Gend & Loos* in 1963²⁵⁰, in which the CJEU established the doctrine that EU law is an independent legal order *sui generis*, detached from the law of the member states. This meant a departure from the previously prevailing view that EU law was ordinary international law. The judgment is of great significance, as the CJEU also justified that the subjects of EU law are not only the member states, but also the individual citizens. The latter can directly invoke rights to which they are entitled by virtue of EU legislation. Based on this doctrine, the CJEU developed in 1964 in the case *Costa*²⁵¹ the further doctrine of the primacy of EU law over the law of the member states – including their constitutional law. Yet, until 2009, EU law did not contain any written fundamental rights. Accordingly, the CJEU initially rejected fundamental rights review of measures taken by the EU at that time²⁵². In the case *Stauder*, however, it stated that the general principles of the EU's legal order contained fundamental rights which it had to ensure that they were respected²⁵³. In the subsequent cases *Internationale Handelsgesellschaft mbH*²⁵⁴ and *Nold*²⁵⁵, the CJEU expanded its fundamental rights jurisprudence, drawing in particular on the ECHR and the constitutional traditions common to the member states as sources of EU fundamental rights. Important to mention is also the case *Mangold*²⁵⁶. This judgment was

247 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 3 lit. i, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FTXT>.

248 *Ibid.*, art. 109r.

249 *Ibid.*, art. 109s.

250 CJEU, Judgment of 5 February 1963, *van Gend & Loos*, C-26-62, EU:C:1963:1.

251 CJEU, Judgment of 15 July 1964, *Costa*, C-6-64, EU:C:1964:66.

252 Cf. CJEU, Judgment of 4 February 1959, *Stork & Cie*, C-1/58, EU:C:1959:4; CJEU, Judgment of 15 July 1960, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH*, C-36, C-37, C-38-59 and C-40-59, EU:C:1960:36.

253 CJEU, Judgment of 12 November 1969, *Stauder*, C-29-69, EU:C:1969:57.

254 CJEU, Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH*, C-11-70, EU:C:1970:114.

255 CJEU, Judgment of 14 May 1974, *Nold*, C-4-73, EU:C:1974:51.

256 CJEU, Judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709.

significant because it confirmed the principle of direct effect of EU law and extended it effectively to EU secondary law. Over time the EU has also repeatedly used its competence in the area of free movement to take action in areas of social policy where it had only limited competence. Worth to mention are the case *Viking*²⁵⁷, which established the principle that the EU competence in the area of freedom of establishment can trump member states' competence in the area of social policy. Furthermore, since the case *Laval*²⁵⁸, the EU's competence in the area of freedom to provide services can do the same. The principles established in the cases *Viking* and *Laval* were later confirmed in the case *Rüffert*²⁵⁹. This shows that the competences and therefore also the purposes of EU employment and social law are not only changing or being supplemented by new allocations of competence, but also by decisions of the CJEU, which effectively grants itself and the EU new competences and has thus a greater influence on national law. A lack of competence in social policy was often partly circumvented, which also meant that legal concepts developed in other areas of regulation had to be 'tweaked' to a certain extent.

A decisive milestone with regard to the competences to the EU, was the entry into force of the Lisbon Treaty in 2009. The Lisbon Treaty further enhanced the EU's competence in the areas of employment and social matters. The European Parliament and the Council may adopt measures to support and complement the actions of EU countries in certain areas, such as the fight against social exclusion. It may also adopt minimum requirements in the form of directives, namely legislation which enables EU countries to also adopt additional stricter provisions²⁶⁰. The Lisbon Treaty furthermore incorporated the CFR into the primary law of the EU. The CFR did not extend the EU's competence on fundamental rights. However, due to the practice of the CJEU more and more areas are influenced or covered by the CFR which will become relevant for this dissertation and be discussed in more detail at a later stage. In particular, the EU's anti-discrimination requirements need to be highlighted which aim to ensure fair and equal treatment of men and women in the workplace and to prevent discrimination on the grounds of ethnic origin, religion or belief, disability, sexual orientation or age²⁶¹. Today's legal basis for the EU's activities related to employment is laid down in Art. 151 to 161 of the TFEU²⁶². EU employment law requirements include minimum standards

257 CJEU, Judgment of 11 December 2007, *Viking Line*, C-438/05, EU:C:2007:772.

258 CJEU, Judgment of 18 December 2007, *Laval*, C-341/05, EU:C:2007:809.

259 CJEU, Judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189.

260 The EU supports and complements the activities of the member states in the fields listed under TFEU, art. 153.

261 Cf. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, *EUR-Lex*, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.

262 TFEU, art. 151–161.

for working time²⁶³, standards on protection at the workplace²⁶⁴ or standards on youth employment protection²⁶⁵. The area is subject to so-called shared competence, i.e. both the EU and the member states can legislate in this area²⁶⁶. In principle, responsibility for social policy lies with the individual member states. Secondary EU law primarily aims to promote employment, harmonize living and working conditions across the EU, ensure adequate social protection, foster social dialogue, enhance a high level of employment, and combat social exclusion²⁶⁷. In terms of employment law, rather than focusing primarily on individual protection, the main objective is to establish comparable minimum standards across the EU's single market²⁶⁸. Art. 153 TFEU, which forms the basis for these employment law directives, should be emphasized in this regard²⁶⁹. However, a shift is evident. The CJEU has clarified that for instance the equal pay provision should no longer be seen primarily as a tool to ensure fair competition among employers within the single market, but rather as an obligation for all employers to comply with the principle of equal pay for broader social objectives²⁷⁰. In the area of social security, regulations have been enacted that contribute to the creation of an EU-wide employment market and promote the free movement of workers, i.e., the EU has made provisions to ensure that mobile EU citizens do not lose their social protection when they move to another EU country²⁷¹. But despite the mentioned limitations in competences, the EU has always strived to accompany economic integration also 'socially', to compensate for disadvantages of individuals and to promote social cohesion in the EU. A relatively new form of instrument of EU social policy can be seen in the European Pillar of Social Rights²⁷². It consists of 20 principles aimed at promoting fair and equitable social outcomes across the EU, focusing on equal opportunities, access to the labor market, fair working conditions, and social protection. Although not

263 Cf. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 Concerning Certain Aspects of the Organisation of Working Time, *EUR-Lex*, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088>.

264 Cf. Council Directive of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work (89/391/EEC), *EUR-Lex*, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01989L0391-20081211>.

265 Cf. Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work, *EUR-Lex*, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01994L0033-20190726>.

266 TFEU, art. 5.

267 *Ibid.*, art. 151.

268 *Ibid.*

269 *Ibid.*, art. 153.

270 CJEU, Judgment of 10 February 2000, *Deutsche Telekom*, C-50/96, EU:C:2000:72, para. 57.

271 Cf. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, *EUR-Lex*, accessed March 15, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0883-20190731>.

272 European Commission, *European Pillar of Social Rights* (Luxembourg: Publications Office of the European Union, 2017), <https://data.europa.eu/doi/10.2792/95934>.

legally binding, it provides a policy framework to guide EU social initiatives, serving as a reference for member states to align their labor market and social standards with the Pillar's objectives over time. However, it does not grant the EU additional competences in social policy, nor are member states legally required to implement its provisions.

It is therefore challenging to pinpoint a single, specific purpose or predict potential expansions of purposes by the CJEU. Initially, EU law was more focused on developing a functioning single market rather than protecting workers, though this goal is becoming increasingly significant. However, identifying these purposes within individual norms is often difficult, as EU legal acts frequently offer only basic statements of intent in their recitals. As a result, true purposes often become clearer only through the legislative history of the relevant secondary legislation, such as advisory documents and legislative justifications. This complicates predictions about CJEU case law, particularly due to its practice of not taking into account documents even if they were put on record in the Council when drafting the provision, unless they are reflected in the provision²⁷³ and refuses to consider the minutes of the Commission, the Council or Parliament that are not reflected in the legislation²⁷⁴. An attempt must therefore be made in each individual case to determine the objective and purpose of individual EU instruments or bundles of instruments. Given their varying objectives and the outlined historical contexts in which they were developed, these instruments do not always align with or fully overlap with other instruments.

1.4. Social security law

Similar to employment law, social security law is intrinsically tied to the status of the working individual and, for certain working individuals, is typically closely connected to a system of compulsory insurance. However, it should not be automatically assumed that the objectives of employment law and social security law are the same. In a more specific sense, *Manes* defines social security as a state-mandated insurance and collective term for a system encompassing various types or branches of insurance²⁷⁵. The division into the various branches may vary from country to country and there may be overlaps²⁷⁶. Regulation (EC) No 883/2004, which lists the following branches in its Art. 3, can serve as a guidance to the branches of social insurance in general²⁷⁷:

- sickness benefits;
- maternity and equivalent paternity benefits;
- invalidity benefits;

273 CJEU, *The Queen/Immigration Appeal Tribunal*, para. 18.

274 CJEU, *Quelle*, para. 32.

275 Alfred Manes, *Sozialversicherung* (Berlin: De Gruyter, 1928), 6–10.

276 E.g., ILO Convention No. 102 groups together nine branches of social security – medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

277 Regulation (EC) No 883/2004, art. 3.

- old-age benefits;
- survivors' benefits;
- benefits in respect of accidents at work and occupational diseases;
- death grants;
- unemployment benefits;
- pre-retirement benefits;
- family benefits.

Social insurance is characterized by two major elements²⁷⁸:

- the social component, which is not based on the character of the insured person (age, state of health, etc.) when calculating general premiums; and
- the insurance itself.

Such insurance with general premiums is considered to be only feasible if there is a compulsory insurance requirement, which gives the insured person a legal entitlement to the corresponding insurance benefits²⁷⁹. It is important to note, however, that in some countries, certain branches of social insurance permit high-income individuals to opt out of mandatory coverage or to switch to private insurance plans. This policy is historically rooted in the assumption that individuals with higher earnings possess the financial capacity to determine their own level of protection. In contrast, middle- and lower-income groups are typically not afforded such options. A significant drawback of this opt-out model is that it undermines the sustainability of social security systems, as the contributions of high-income earners are essential to maintaining the system's overall viability²⁸⁰. This already illustrates that in the field of social insurance, the financial sustainability of the system plays a crucial role – something that is irrelevant in employment law.

When it comes to the question of the purpose of social security law for certain working individuals, one can again look for this in history. Germany was regarded as a pioneer in the establishment of compulsory state social insurance in Europe and the world²⁸¹. Therefore, it makes sense to examine as a starting point the German development of social security when determining its purpose. The period from 1885 to 1915 is considered the crucial phase of social insurance in Western Europe, during which a shift occurred. Poverty was no longer seen solely as an individual failure, but rather as a societal issue²⁸². This also resulted from the dissolution of the dependence relationship between the feudal lord and their subjects. Social health became a 'private personal problem' and individuals were expected to solve these issues on their

278 Bruno Molitor, *Soziale Sicherung, Theorie der Sozialpolitik* (Munich: Vahlen, 1987), 11–12.

279 Ibid.

280 Cf. Schoukens and Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers*, 38.

281 Jens Alber, *Vom Armenhaus zum Wohlfahrtsstaat. Analysen zur Entwicklung der Sozialversicherung in Westeuropa* (Frankfurt am Main: Campus Verlag, 1982), 19–29.

282 Kendzia, "Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland," 20.

own²⁸³, which an increasing number of individuals were unable to do. The German development of social security is often associated with German chancellor *Bismarck's* social legislation²⁸⁴. However, this is where the consensus in scholarship ends. There are divergent conclusions regarding *Bismarck's* true motives and different founding myths of social insurance²⁸⁵. On the one hand, it is argued that the government under *Bismarck* intended to demonstrate to the propertyless classes, which were the most numerous within the population, that the state is both a necessary and benevolent institution²⁸⁶. Consequently, the introduction of social insurance was primarily intended to weaken the increasingly influential social democratic and revolutionary movements²⁸⁷. *Bismarck's* aim would have been allegedly to turn workers into some kind of private-public servants²⁸⁸. Accordingly, he would have hoped for a certain loyalty to the state²⁸⁹. Similar narratives exist in the workers' culture of remembrance. Of course, it is mentioned that the social reforms were decisively forced from below²⁹⁰. However, the legislature's true motives were also seen in detaching and alienating the social democratic working class from their organizations and establish social security as an institution of the state²⁹¹. Accordingly, both views agree that the initial introduction was more linked to political reasons and was less driven by compassion and charity. However, *Alber* cites other reasons for the introduction of social insurance. On the one hand, it can be seen as a response to the changing work and life patterns brought about by industrialization and urbanization. On the other hand, it was a consequence of democratization processes and the lack of legitimacy of the political elite²⁹². The truth likely lies somewhere in between. However, the legal structure of employment

283 Ulrich Mückenberger, *Arbeitsprozess, Vergesellschaftung, Sozialverfassung* (Bremen: Universität Bremen, 1985), 17–18.

284 Kendzia, "Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland," 20.

285 Wilfried Rudloff, "Die Sozialversicherung in der Erinnerungskultur der Gewerkschaften – ein Erinnerungsort?" (Düsseldorf: Hans Böckler Stiftung, 2021), 5, https://www.boeckler.de/fpdf/HBS-008092/p_ek_ap_30_2021.pdf.

286 Kendzia, "Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland," 21.

287 Günther Rosenstock, *Versicherungstechnische Probleme in der Geschichte der Bismarckschen Sozialgesetzgebung* (Koszalin: C.G. Hendess, 1934), 3.

288 Volker Rosenchel, *Geschichte der deutschen Sozialpolitik 1880-1980* (Frankfurt am Main: Suhrkamp Verlag, 1983), 25–26; Jürgen Boeckh, Ernst-Ulrich Huster, and Benjamin Benz, *Sozialpolitik in Deutschland: Eine Systematische Einführung* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004), 63.

289 Kendzia, "Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland," 21.

290 Hans O. Hemmer and Wolfgang Hindrichs, "Nicht Stillstand, sondern Fortschritt in der Sozialpolitik soll unser Kampfziel sein. Grunddaten zur Geschichte sozialer Reformen in Deutschland," *Gewerkschaftliche Monatshefte* 32 (1981): 406.

291 Kendzia, "Der Institutionalisierungsprozess des Lohnarbeitsverhältnisses vom Ersten bis zum Zweiten Weltkrieg in Deutschland," 10.

292 Alber, *Vom Armenhaus zum Wohlfahrtsstaat. Analysen zur Entwicklung der Sozialversicherung in Westeuropa*, 119.

relations has since been largely determined by the prevailing political and social power dynamics and is thus subject to certain fluctuations²⁹³. This historical perspective thus has rather anecdotal relevance for today's situation anyway. In this respect, historical explanations, unlike in employment law, are likely to be misleading.

Today, the main purpose is seen as the provision of social guarantees for the individual. However, while employment law protects the individual (individual employee), social security law protects in addition the solidarity community of all insured contributors²⁹⁴. Furthermore, unlike employment law, which decides by the correct classification of contract types the subsequent scope of its protection, the question of the need for protection of working individuals in social security law arises in the broadest sense in connection with protection against the general life risks that (can) occur in the course of working life²⁹⁵. Against this background, distinguishing from employment law is crucial, despite overlaps. In social security law in general, the type of employment law status often determines protection. Based on the concept of 'lack of entrepreneurial opportunities', for Germany, it is partly argued that the purpose of employment law according to the German norm text is to protect all working individuals who are dependent and lack means other than their own labor to provide for themselves. The aims of employment and complementary social security law would be essentially identical and include: protecting the structurally weaker party, safeguarding economic stability, social protection in cases of illness, disability, and need for care, limiting hazardous work, ensuring recovery, and promoting participation²⁹⁶. Consequently, according to *Wank*, both areas of law are equally concerned with the protection of the working individual and would therefore only differ in terms of the following additional purposes²⁹⁷:

1. Employment law: protection against arbitrariness on the part of the employer;
2. Social security law: protection of the solidarity community of contributors.

Wank drew his conclusions mainly from the German legal text. If these explanations were applied to the Lithuanian legal text on the Lithuanian employment contract, the results would be different, as the Lithuanian concept does not refer to an economic dependence in the broader sense, but mainly to the submission to the instructions and regulations at the workplace²⁹⁸, which are determined by the employer, so that the purpose in Lithuania is either different or, if it is identical in its core, has been

293 Mückenberger, *Arbeitsprozess, Vergesellschaftung, Sozialverfassung*, 7–9.

294 Deutscher Bundestag, Wissenschaftliche Dienste des Deutschen Bundestages, "Sozialrechtlicher Begriff der Beschäftigung und arbeitsrechtliche Arbeitnehmereigenschaft in Abgrenzung zur selbständigen Tätigkeit, Sachstand WD6-3000-028/20" (Deutscher Bundestag, 2020), 4, <https://www.bundestag.de/resource/blob/708268/d74213283bc79d6fc1ce3b4f8d46fd01/WD-6-028-20-pdf-data.pdf>.

295 Preis, "§ 611 a BGB – Potenziale des Arbeitnehmerbegriffes," 823.

296 Cf. Preis, "BGB § 611a Arbeitsvertrag," para. 8–12.

297 Wank, "Von Honorarärzten und Piloten – der 'Beschäftigte' in der BSG-Rechtsprechung," 111.

298 Cf. Chapter 3.3.3.2. of this dissertation.

incompletely implemented by the Lithuanian legislator. Furthermore, *Wank's* view falls short insofar as social security law offers protection that can extend far beyond an existing employment relationship and, e.g., in the case of pension insurance, only has a limited connection to this contractual relationship – namely only insofar as the person working has acquired a part of the entitlements through this employment relationship. Except, however, if one assumes that uninterrupted employment biographies according to the SER would still be the typical prevailing model. Furthermore, unemployment benefits are designed to provide financial protection for individuals who are willing and available to work but are unable to find employment due to inefficiencies in the labor market²⁹⁹, i.e., there is a link to an existing employment relationship but the protection purposes are multifaceted and can also extend beyond the individual employment relationship, especially if the employment relationship is followed by a longer period of unemployment.

When basing the search for specific purposes on an empirical comparative analysis of the legislation of different countries, as attempted by *Schoukens* and *Bruynseraede*³⁰⁰, the specific purposes of these benefits are not always clearly identifiable. Health care benefits are typically accessible regardless of the nature of one's work or the form in which it is performed. In contrast, eligibility for sickness benefits is often subject to various time-based thresholds. Coverage for workplace accidents and occupational diseases is frequently limited to dependent employees, even though no clear rationale exists for excluding other working individuals working in the same hazardous work environments. Old-age pensions, on the other hand, are often tied to gainful employment, the payment of contributions, a qualifying period, or a combination of these factors. This link is largely justified by the need to ensure the financial sustainability of pension systems, particularly considering demographic changes, thereby safeguarding the broader community of contributors³⁰¹.

Another argument against the universal validity of *Wank's* asserted congruence between employment law and social insurance law is also that there are different interest dimensions regarding the correct distinction between employed and self-employed status in terms of a correct distinction. This is due to the fact that there are different stakeholders in the correct or incorrect categorization of the contractual relationship. While the work provider may have an interest in escaping the tighter corset of employment law, in the majority of cases the working individual is likely to have an interest in its application so that they could enjoy greater protection. There is a slight shift in social security law. In the short term, the working individual may have the same or similar interest as the employer in escaping the usually higher social security contributions for employees – in order to have more net income from the gross remuneration³⁰². In

299 Schoukens and Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers*, 55.

300 *Ibid.*, 58 ff.

301 *Ibid.*

302 Freedland and Prassl, "Employees, Workers and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom," 28.

the long term, however, this means disadvantages for the working individual in terms of later pension insurance claims or in case of occurrence of life risks that are not necessarily related to the particular employment relationship. In addition, the state is a strong stakeholder in social security law with its need for financial viability of its social security system. As far as tax law is concerned, both employer and working individual could have a similar or even equal interest in classifying the work as self-employed, as it is only the state as a stakeholder that has an interest in the correct categorization as an employment relationship or self-employed for tax purposes.

Therefore, even though the purposes of employment and social security law show many overlaps, parallelism is not necessarily given. This can already be seen by the fact that Lithuanian law bases the question of compulsory social insurance not only on persons who are in an employment relationship, but in addition also to persons in a relationship that essentially corresponds to an employment relationship³⁰³. This is even clearer in German law. German law uses mostly the term 'Arbeitnehmer' (employee) in employment law and the term 'Beschäftigter'³⁰⁴ in social security law. According to the wording, both words can be synonymous, however, the legal definition of the term 'Beschäftigter' is often broader by listing other groups in addition to employees³⁰⁵. And also in the UK, employment law uses the terms 'limb (b) workers' or 'employees' while in social security, the term 'employed earner' plays the crucial role – while UK's employment law is currently based on a trinary system having more than one employment status, social security is based on a binary divide. Despite many practical overlaps, the definitions in employment and social security law need not always align due to their different purposes. Additionally, the scope of freedom of action varies between these legal fields. In social security law, parties typically cannot negotiate the application of the law in any of the countries examined in this dissertation, whereas employment law allows for at least some degree of flexibility. It is also notable that usually different judicial branches are responsible for these areas, which may interpret certain terms differently – which is particularly evident in Germany³⁰⁶. It is therefore imperative to at least consider the dimension of social guarantees of freelance workers separately from employment law rights issues.

303 LR VSDĮ, *e-TAR*, art. 4, accessed March 16, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.0F9036415DBD/asr>.

304 The term 'Beschäftigter' can also be translated as 'employee'. To avoid misunderstandings, the German term is used exclusively throughout this dissertation.

305 SGB VI, sec. 1.

306 In Germany, the social courts are responsible for social security matters, while the labor courts, which have developed different legal concepts, are responsible for labor law matters. In Lithuania, on the other hand, attempts are made to maintain a certain uniformity and to find cross-jurisdictional definitions, see in this regard: cf. Martišienė, "Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai." In the UK, the picture is more complex, while social security law ('employed earner') and employment law ('employee') use different terms, both terms are based on the concept of 'contract of service'.

2. DIFFERENT SHAPES OF WORK AND THEIR CLASSIFICATION

Depending on the nature of the contractual relationship between the individual performing the work and work provider, different rights may arise. Before engaging in a comparative analysis of the criteria used under German, UK, Lithuanian, and higher-ranking law to distinguish such relationships – and thereby determine the applicability of employment law to one group but not the other – it is necessary to first examine the general opposing classifications in greater detail. This will provide a foundation for analyzing where the line should be drawn and how freelance workers must be positioned.

2.1. ‘Genuine’ self-employment

While social security law often provides some approaches to directly defining self-employed individuals, employment law in most jurisdictions is characterized by the peculiarity that self-employed status can typically only be determined negatively – that is, by verifying the absence of employment status³⁰⁷. This complicates the determination of when a working individual is genuinely self-employed rather than employed. Moreover, the classification of a person as self-employed under social security, tax law, or even national employment law does not necessarily preclude their recognition as a ‘worker’ under EU law³⁰⁸. An additional complexity arises from the principle ‘primacy of facts’, which applies in Lithuania, Germany, the UK, and under EU law. This principle dictates that, in determining the existence of an employment contract, the actual circumstances and conduct of the parties take precedence over the form or the stated intentions expressed in the (written) contract³⁰⁹. This requires looking beyond the formal terms of the contract to its practical implementation and focusing on the factual relationship between the parties. As a result, a contractual relationship between the parties might be or might become an employment relationship if the parties acted as they were in an employment relationship even if they were not fully aware about the legal consequences. Particularly in the context of the emergence of new forms of work, often labelled as ‘platform work’ or ‘work on demand’, this topic is becoming increasingly important. However, with appropriate creativity, nearly any work performance

307 Although there might be hints in the law.

308 Cf. CJEU, Judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, para. 36.

309 Lithuania: LAT, 2001 m. sausio 31 d. nutartis civilinėje byloje Nr. 3K-3-123; LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002; EU: CJEU, Judgment of 14 October 2010, *Union Syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, para. 29; CJEU, Judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, para. 29; CJEU, Judgment of 10 September 2015, *Holterman*, C-47/14, EU:C:2015:574, para. 46; CJEU, Judgment of 20 November 2018, *Sindicatul Familia Constanta*, C-147/17, EU:C:2018:926, para. 42; Germany: BAG, Urt. v. 29.08.2012 - 10 AZR 499/11, *AP BGB § 611 Abhängigkeit* Nr. 124: para. 15; BAG, Urt. v. 15.02.2012 - 10 AZR 301/10, *AP BGB § 611 Abhängigkeit* Nr. 123: para. 13, 20; BAG, Urt. v. 20.05.2009 - 5 AZR 31/08, *AP BGB § 611 Arbeitnehmerähnlichkeit* Nr. 16: para. 19; UK: *Autoclenz Ltd v Belcher* [2011] UKSC 41.

can be structured as either an employment contract, a services contract, or even a contract to produce a work. A simple illustration would be a freelance gardener tasked with maintaining a large park alone, requiring daily mowing. This arrangement could clearly fit within a services contract. Nevertheless, it might also qualify as an employment contract if certain conditions, such as a certain level of subordination or dependence, are met. For instance, if the work provider can instruct the gardener on when and where to mow or assign certain tasks, it leans towards an employment relationship. Alternatively, the contract could resemble a contract to produce a work if the gardener has autonomy over when and how to mow which areas of the lawn using their own tools, but the contract stipulates that the working individual owes individual square meters of mowed area as a result and is also paid per square meter. Situations may also evolve where there is initially no doubt that a services contract or a contract to produce a work exists, but as the duration of the contractual relationship continues, it deepens and may transition into an employment contract due to the emergence of subordination or dependence, without immediate awareness from either party. Here, so-called ‘false self-employment’ comes into play.

2.2. ‘False’ self-employment

As it is sometimes difficult to make a clear distinction between an employment relationship and self-employment, it is not uncommon for so-called ‘false self-employment’ to exist unnoticed, i.e. that a civil service contract relationship is formally declared between a work provider and a self-employed person, but which is in fact a disguised employment relationship with, e.g., a certain level of subordination or dependence. It can exist where one or both parties consciously or unconsciously conceal the true nature of the legal relationship. If the designation as a self-employed person does not correspond to the actual appearance of a self-employed person, but i.a., e.g., the subordination or dependence reaches too high a degree, the contractual relationship could be considered an employment relationship and the work provider can be *ipso iure* subject to various consequences³¹⁰, including applicable protection against dismissal, inadmissibility of fixed-term contracts, annual leave and continued payment claims (consequences under employment law). Furthermore, there can be consequences under social security law, such as social security contributions to be paid. Furthermore, false self-employment can be considered a form of illegal undeclared work. However, since the underlying legal terms are very fuzzy and could be interpreted differently by social security institutions and courts in individual cases, a reliable distinction between permissible self-employment and false self-employment is usually only possible before the contract begins if there is gross abuse. Sometimes, only during the course of a personal work relationship might false self-employment become apparent. Furthermore, this distinction between employment and self-employment is becoming increasingly blurred by the aforementioned trend to make work relationships

310 Maties, “§ 37 Arbeitsrechtliche Bezüge,” para. 39.

more flexible through regulating relationships that were previously considered employment relationships through (pure) civil contracts. On the other hand, there is also a dilution from another side – driven by a shortage of skilled working individuals and the aftermath of the COVID-19 pandemic. For instance, working from home or telework can increasingly blur the boundaries between employment relationships and self-employment; organizational criteria can contribute less and less to recognizing an employment relationship. Incentive trends such as trust-based working time, working from home/anywhere and workation, trust-based annual leave, performance-related/project-related forms of remuneration (bonuses) or on-call work are leading to employment relationships increasingly approaching independent civil contract relationships. Personal dependence or organizational subordination are increasingly being softened because of these trends and are thus increasingly being transformed from an active right to setting conditions of the employment by the employer to a passive one. This makes it even more difficult to distinguish between an employment relationship and a self-employment relationship but makes this distinction even more important. Despite these difficulties, due to the principle ‘primacy of facts,’ false self-employed persons are typically employed³¹¹ and are treated as such when the characteristics of the respective employment status are given³¹² and uncovered³¹³. Recently, scholars have therefore begun to refer to this as a ‘defective (factual) employment relationship’³¹⁴.

2.3. Freelance workers – neither fish nor fowl

Freelance workers occupy a space that spans genuine self-employment, false self-employment, and traditional employment, and in certain cases, may simultaneously fall within aspects of each category. In recent years, the (labor) market has undergone a substantial transformation, driven by the rise of freelancers, gig workers, and (in) dependent contractors. These are frequently linked to the relatively recent emergence of platform work, a development enabled by technological advancements. The ability to deliver services in real time from anywhere in the world, thanks to the internet, or to connect working individuals ad hoc with work providers, enabled the widespread

311 Or another employment status such as ‘limb (b) worker’ in the UK or ‘employee-like person’ in Germany.

312 It is not the task of a court or authority to award employment status to a working individual, but to determine the criteria relevant to employment status in order to establish the status of the working individual in question, in this regard, cf. BAG, Urt. v. 15.03.1978 - 5 AZR 819/76, *AP BGB § 611 Abhängigkeit* Nr. 26.

313 Lithuania: LAT, 2001 m. sausio 31 d. nutartis civilinėje byloje Nr. 3K-3-123; LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002; EU: CJEU, *Union Syndicale Solidaires Isère*, para. 29; CJEU, *Fenoll*, para. 29; CJEU, *Holterman*, para. 46; CJEU, *Sindicatul Familia Constanța*, para. 42; Germany: BAG, Urt. v. 29.08.2012 - 10 AZR 499/11, para. 15; BAG, Urt. v. 15.02.2012 - 10 AZR 301/10, para. 13, 20; BAG, Urt. v. 20.05.2009 - 5 AZR 31/08, para. 19; UK: *Autoclenz Ltd v Belcher* [2011] UKSC 41.

314 Preis, “BGB § 611a Arbeitsvertrag,” para. 151.

adoption of these new forms of ‘employment’. Digitalization has introduced new ways to break down tasks into smaller units, reducing transport and communication costs and requiring minimal physical infrastructure³¹⁵. Furthermore, in many cases, work can be done independently from time and place considerations³¹⁶. Workplaces have increasingly become “fissured”³¹⁷ and “boundaryless”³¹⁸. However, platform work is only one aspect of this issue, but one in which all the problems of categorization as employed or self-employed seem to come together and the problems that arise are amplified as if under a magnifying glass³¹⁹. This was aptly described in the *Lyft* case in 2015 by US judge *Chhabria*, who described this categorization as an attempt to put a square peg into one of two round holes, as some “factors point in one direction, some point in the other, and some are ambiguous”³²⁰. It seems that traditional employment models, which assumed a clear distinction between employers and employees with well-defined rights and obligations, are increasingly inadequate in covering the complexities of modern work, as in most legal jurisdictions, these two categories do comprise the basic distinction in classifying types of work forms, with employment usually entailing the only full set of working individuals’ rights and employers’ obligations as well as subsequent social guarantees.

Wank, in advocating for a teleological rather than an ontological approach to conceptualization, refers to the popular parable of the elephant in this regard. An ontological definition of an elephant might describe it as large, with four sturdy legs, a thick skull, and a trunk. In *Wank’s* view, such an ontological definition – applied to employment law – risks describing the factory worker of the 20th century, rather than addressing the contemporary protective purposes of employment law³²¹ – as it would carry the risk to orient strongly towards the SER. The elephant parable is indeed highly illustrative, particularly when expanded slightly, for demonstrating the challenges of legally classifying freelance workers and showing why an ontological definition reaches its limits. An elephant typically also possesses other features, such as

315 Andrew McAfee and Erik Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* (New York/London: W. W. Norton & Company, 2018), 9.

316 Kocher, *Digital Work Platforms at the Interface of Labour Law*, 4.

317 David Weil, “The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It,” *WorkingUSA* 17, no. 4 (December 2014): 621–26, doi:10.1111/wusa.12149.

318 Katherine V. W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004), doi:10.1017/CBO9780511617089; Ursula Huws, *Labor in the Global Digital Economy: The Cybertariat Comes of Age* (New York: Monthly Review Press, 2014), 27–83.

319 Cf. Directive (EU) 2024/2831, recital 6.

320 *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (Northern District of California 2015); Miriam A. Cherry, “Beyond Misclassification: The Digital Transformation of Work,” *Comparative Labor Law & Policy Journal* 37, no. 3 (2016): 577–602; Wilma B. Liebman, “Debating the Gig Economy, Crowdwork and New Forms of Work,” *Soziales Recht* 7, no. 6 (2017): 229.

321 Rolf Wank, “Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive,” *EuZA*, 2016, 149–50.

gray skin, its typical ears and tusks, which can further describe it. Some might place greater emphasis on these additional characteristics than on those initially mentioned by *Wank*, arguing that they offer a better description of an elephant. Thus, the criteria used to define something can vary – in the context of employment relationships, this variation is evident when different countries or institutions apply different characteristics to define the same overall idea of an employment relationship. But what if certain features are missing – for instance, if poachers had removed the elephant’s tusks and it had been painted pink? The result would be a creature much harder to describe based solely on typical characteristics. Yet, upon seeing it in reality, one would still unmistakably recognize it as an elephant. This scenario is comparable to false self-employment, where the true nature of a legal relationship is obscured. Moreover, if an elephant naturally lacked a trunk, tusks, or gray skin and typical ears leaving only the traits of being large, four-legged, and thick-skulled, these characteristics could just as easily describe a rhinoceros. Nevertheless, one could distinguish between the two animals, as also the rhinoceros possesses distinct features absent in an elephant, e.g., the horn. Still, even with the absence of all these typical features, an observer might recognize both animals upon sight. However, caution must be exercised in this context: as relying on the absence of a horn would be a misleading approach when distinguishing an elephant from a hippopotamus.

Ultimately, also the purpose behind making such distinctions must be considered. For a zoologist, specific characteristics are critical, particularly for identifying subspecies. For a tourist, however, who might encounter one of these animals unexpectedly, it is likely secondary whether the animal is an elephant or a rhinoceros. In such a situation, the more decisive characteristics would be size and the presence of sturdy legs – features most associated with the immediate danger the animal might pose. This analogy shows that identifying something always depends on context, and that an ontological description reaches its limits when the characteristics arise from diverse circumstances and cannot all be predetermined.

The questions and problems of distinction of different forms of labor are by no means new. It must be noted that already in 1951, *Kahn-Freund* suspected that the criteria used for determining employment law classifications reflect “the social constructions of an earlier age”³²². At a time when the SER had not yet reached its full potential. Such difficulties in distinguishing between existing legal categories have repeatedly arisen over time. As early as 1978, at the time when the SER seemed to reach its peak, the German BAG recognized this issue in relation to persons working in broadcast. At the time, such difficulties were particularly evident in cases where individuals carried out their work outside a traditional workplace and, by the nature of their profession, were neither bound to fixed working hours nor a specific location. This was especially true when they had the freedom to organize their tasks, determine their own working hours, and were largely exempt from direct professional supervision – indicating a

322 Otto Kahn-Freund, “Servants and Independent Contractors”, *Mod. L. Rev.* 14, no. 4 (1951): 504–509, <http://www.jstor.org/stable/1089372>, p. 505.

degree of personal independence. In particular, when individuals provided intellectual services, preparatory intellectual work could not be strictly defined in terms of time and place. As a result, the BAG acknowledged already in 1978 that it was essential to properly recognize new profession types emerging from technological advancements and to correctly integrate their corresponding legal relationships into the legal system³²³. A challenge that persists to this day and has reignited.

These difficulties in classification are further driven by a competing desire for flexibilization, as any labor relationship inherently represents a balance of conflicting interests in which each of the parties logically wants flexibility where it benefits them – the work provider in coping with peak workloads through ad-hoc access to labor force and the compensation of operational economic downturns at the lowest possible legal efforts and cost at these times; and the working individual with regard to work-life balance.

To address these challenges, two primary strategies have emerged – one being the introduction of greater flexibility within the existing employment law framework. Within the EU, this concept has been advanced under the notion ‘flexicurity’³²⁴. The UK pioneered this model, fostering flexibility through neoliberal reforms since the 1980s by allowing part-time and temporary work arrangements, supported by mechanisms like zero-hour contracts, which permit work without guaranteed hours, offering high adaptability for both employers and workers. Germany began its journey towards a state-imposed flexibilization with the so-called ‘Hartz reforms’ or ‘Agenda 2010’, implemented at the beginning of the 2000s. These reforms eased rules on temporary and part-time work, allowed fixed-term contracts without material justification, and permitted deviations from equal pay through collective agreements. A temporary employment market emerged as a result. However, fully flexible contracts like those in the UK – especially zero-hour contracts – remained largely impermissible. Lithuania’s flexibility reforms, though often seen as delayed³²⁵, can actually be traced back to the 1997 Labor Contract Act, which excluded certain civil contract arrangements from employment law³²⁶. Fixed-term contracts were permitted without material reasons under certain limits, while temporary contracts faced no strict time caps³²⁷, albeit lim-

323 BAG, Urt. v. 15.03.1978 - 5 AZR 819/76.

324 Cf. European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security {SEC(2007) 861} {SEC(2007) 862}, COM/2007/0359 Final,” accessed April 14, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007DC0359>.

325 Mačernytė-Panomariovienė et al., “Some Aspects of Improving the Legal Regulation of Labour Relations,” 1237.

326 Lietuvos Respublikos darbo sutarties įstatymo papildymo 17(1), 17(2) straipsniais ir 3, 28(1) straipsnių pakeitimo įstatymas, *e-TAR*, art. 1, accessed March 15, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.CB3CC18BBA93>.

327 LR DŠĮ, art. 9.

ited to actual temporary relationships³²⁸. However, a comprehensive legal framework for temporary employment was only implemented in 2011³²⁹. Before that, temporary employment practices existed in a legal gray zone, often misclassified under civil law contracts and sometimes considered illegal³³⁰. It is noted by scholars that these measures were intended to make these flexible forms of work more attractive and promote entrepreneurship; however, they largely failed to achieve this goal³³¹. It was therefore seen as necessary to implement further flexibilization. As in Germany, this was partly linked to economic considerations, as there was realization at that time that “it will be essential to identify and eliminate unnecessary restrictions affecting flexible contractual agreements, dismissal provisions and working time arrangements”³³², because structural unemployment in this era remained high. As a result, the impact of the financial crisis years from 2008 to 2012 in Lithuania can at least indirectly be held responsible for these considerations³³³. It was observed that the flexible forms of employment contracts introduced up to that point failed to take into account the fact that the structure of Lithuanian economic entities had already shifted toward small and medium-sized companies³³⁴. Consequently, the legal framework remained relatively rigid and inflexible³³⁵, reinforcing the prevailing notion that increased flexibility in employment law could better accommodate these structural changes. This approach can also be attributed to the broader transformation of labor markets across Europe, which was unfolding in the background³³⁶ – giving rise to numerous new forms of

328 Dambrauskienė, “Lanksčių užimtumo formų taikymas Lietuvoje,” 23.

329 LR ĮLIII, *e-TAR*, accessed March 15, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.AFA54B21F8C3>.

330 Usonis and Bagdanskis, “Problems of Introduction of Flexibility into Lithuanian Labour Law.”

331 Daiva Petrylaitė, “Orus darbas ekonominės krizės sąlygomis,” *Teisė* 94 (2015): 156; Tomas Davulis, “Lietuvos Respublikos darbo kodekso pakeitimai 2009-2010 metais - besikeičianti darbo teisėkūros paradigma?,” in *Darbo rinka XXI amžiuje : lankstumo ir saugumo paieškos* (Vilnius: Standartų spaustuvė, 2011), 230; Boguslavas Gruževskis, Inga Blažienė, and Julija Moskvina, “Flexicurity Lietuvoje : teorinis modelis ar reali siekiamybė?,” in *Darbo rinka XXI amžiuje : lankstumo ir saugumo paieškos* (Vilnius: Standartų spaustuvė, 2011), 129.

332 Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Lithuania and Delivering a Council Opinion on the Convergence Programme of Lithuania, 2014, *EUR-Lex*, accessed March 17, 2025, para. 11, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0729\(13\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0729(13)&from=EN).

333 Petrylaitė, “Orus darbas ekonominės krizės sąlygomis,” 156.

334 Mačernytė-Panomariovienė et al., “Some Aspects of Improving the Legal Regulation of Labour Relations,” 1239.

335 Davulis, “Lietuvos Respublikos darbo kodekso pakeitimai 2009-2010 metais - besikeičianti darbo teisėkūros paradigma?,” 230.

336 Main drivers were the integration of European and international economies, the rapid advancement of new technologies, the aging of Europe’s population combined with persistently low employment rates and disproportionately high long-term unemployment rates and the emergence of increasingly segmented labor markets in many countries, cf. Ingrida Mačernytė-Panomariovienė, “Flexicurity samprata ir įgyvendinimo galimybės Lietuvos užimtumo politikoje,” *Jurisprudencija* 18, no. 3 (2011): 1083.

work. In a series of reports published since 2015, *Eurofound* identified nine employment forms as ‘new’ for the first time, based on developments observed during 2013–2014³³⁷, whereby it identified two forms of ‘employment’ that are structured based on a civil law contract instead of an employment contract³³⁸. These forms are not mutually exclusive and touch upon various aspects of labor organization. For instance, types like voucher-based work are linked to specific remuneration methods. Others, such as ICT-based mobile work, pertain to the location where work is performed, enabled by digital technology. Additionally, there are employment forms focused on the distribution of obligations, whether among multiple work providers, as seen in employee sharing, or among multiple working individuals, as in job sharing. Interim management addresses temporary and project-based work, while casual work involves flexible arrangements with minimal mutual obligations. Some forms relate to how working individuals and work providers connect: portfolio work involves working individuals engaging with multiple work providers, while crowd employment uses online platforms to match work providers with a broad pool of working individuals. Lastly, collaborative employment describes how working individuals or small companies independently organize their work to overcome size limitations and isolation. These various employment forms highlight the evolving nature of employment arrangements and the diverse ways in which they accommodate modern work needs and technological advancements. However, it should also be noted that the forms identified by *Eurofound* are not complete, as the already mentioned temporary employment or some form of platform work where a platform connects working individuals with consumers, e.g., were initially not mentioned. Furthermore, these work forms are also possible in combination and to varying degrees. There is an almost infinite number of possible forms of work, which makes universal approaches to regulating them within employment law difficult – particularly within the framework of the traditional distinction between employment and self-employment.

In response to persistent structural unemployment and evolving labor needs, Lithuania adopted further reforms in 2017 via a new LR DK. It introduced several innovative contract types³³⁹, without doubt, partly inspired by emerging work patterns identified in *Eurofound’s* reports. There was an attempt to integrate as many of these employment forms as possible into the strict framework of Lithuanian employment law. In addition to the existing types of employment contracts (such as fixed-term contracts and contracts for remote or additional work), the LR DK introduced new contract types. Firstly, there is the project-based employment contract. This is a specific type of fixed-term contract where an employee is hired to complete a particular project and the contract ends upon the completion of the project or the agreed-upon result. Essentially, this is a fixed-term contract with a specific purpose, characterized by the

337 Irene Mandl et al., *New Forms of Employment*, EF, 14/61/EN (Luxembourg: Publications Office of the European Union, 2015).

338 *Ibid.*, 137.

339 LR DK 2002, art. 93.

fact that its duration is tied to the realization of a particular result. This contract type is deliverable-oriented, making it atypical with regard to standard employment contracts and more akin to contracts to produce a work. It can encourage work providers to place the contractual relationship under employment law protection since they do not have to fear continuing employment obligations once the project is completed when the employee is no longer needed. This bears some similarity to interim management, as identified by *Eurofound*, but extends beyond it as it is not limited to highly-skilled employees. However, there are risks, such as the arbitrary definition of the required result potentially undermining the employment protection typically provided by standard employment contracts. Another new type of contract is the multi-employer contract, which allows an employee to be simultaneously employed by two or more employers. The employee and all the employers are parties to the same employment contract. This is similar to the employee sharing concept identified by *Eurofound*. The contract must designate a primary employer who sets the employee's schedule, determines the remuneration, handles payroll contributions, and fulfills other employer obligations on behalf of all the contracting parties. The other employers reimburse the primary employer for the costs associated with the employee's work hours. All employers are jointly liable to the employee, who can claim against one or more employers, e.g., if the salary is not paid on time. Also likely inspired by *Eurofound*'s identification of job sharing, the job-sharing contract was introduced. In this arrangement, two employees agree with the employer to share a single job, with both employees free to divide tasks and working hours between themselves. This type of contract is beneficial for employees who wish to reduce their working hours for a better work-life balance. Additionally, there have been attempts to implement what *Eurofound* refers to as casual work, known in the UK as zero-hour contracts, a form of on-call work with limited pre-agreed mutual obligations. These contracts typically stipulate only a minimum period of employment, offering significant flexibility regarding the actual hours of work. The employee should only work if the employer has a corresponding need. The draft of the LR DK only stipulated a minimum working time of 8 hours per month³⁴⁰. This type of contract was initially also intended to be included in the new LR DK. However, following the exercised veto by the Lithuanian president, partly due to concerns about this type of contract, the LR DK draft had to be revised and came into effect in 2017 without this type of contract. Therefore, the framework conditions for on-call work in Lithuanian employment law today are mainly governed by the regulations on the specifics of on-call working time arrangements³⁴¹, the strict regulations on part-time work³⁴², and the new regulations on idle time³⁴³ introduced in 2020, the latter of which

340 Darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo ĮSTATYMO PROJEKTAS (nauja redakcija), Projektas Nr. 3234(3), *e-Seimas*, art. 85 para. 4, accessed March 15, 2025, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/ed61a4001c1c11e6acbed8d454428fb7?jfwid=-vsw525cw2>.

341 LR DK, art. 118.

342 *Ibid.*, art. 40.

343 *Ibid.*, art. 47.

may only be applied in exceptional situations.

Forms of work that describe self-employment were left out of the reforms and were merely re-regulated in the course of the specification of the personal scope of application of employment law via, i.a., Art. 32 LR DK. However, it is precisely these forms that increasingly pose significant problems for legislators. Summarizing, the introduced state-imposed flexibility in employment law in the UK, Germany, and Lithuania essentially aimed to achieve two main objectives:

- Stimulating the economy and reducing unemployment by lowering barriers for employers through increased flexibility;
- Encouraging the formalization of employment relationships by bringing relationships previously outside of employment law under its scope (e.g., through project-based employment contracts), i.e., an attempt to bring new flexible employment contracts under the protective umbrella of employment law and to prevent such work forms from slipping into less-regulated self-employment³⁴⁴.

Thus, instead of bringing regulation into flexible forms of work, this approach tries to bring flexible forms of work into regulation. These measures rely more on the voluntary participation of the contracting parties in the employment law framework. The idea behind this is that work providers could voluntarily waive the idea of structuring the work relationship in a particular way that prevents opening up the personal scope of employment law and not attempting to find creative ways to circumvent it – incentivized by the fact that obligations imposed by employment law are more flexible and sufficiently acceptable in particular for the work provider. However, it should be noted that in particular project-based employment contracts carry a considerable risk of abuse concerning employment protection. This appears when work that would normally fall under a standard employment contract is reclassified as a project-based employment contract through arbitrary definitions of work results, rather than being properly and sufficiently regulated under employment law. Yet the voluntary nature of participation limits the protective reach. If a working individual does not fall under the personal scope of employment law to begin with, flexibility within employment law offers no benefit.

The Lithuanian model of expanding employment law through new contract subtypes reveals further structural limitations. As modern work grows more diverse, the ability of fixed contractual categories to reflect reality diminishes. As a result, new subtypes of employment contracts would likely have to be continuously created – yet by the time they are introduced, they may already be outdated due to the constant evolution of work structures in reality and/or the need of the parties of such agreements³⁴⁵. Emerging forms of work increasingly fall outside traditional definitions of employment,

344 Cf. Tomas Davulis, “Main Features of Lithuanian Labour Law Reform 2016,” in *Labour Law Reforms in Eastern and Western Europe*, ed. Tomas Davulis, Cultures Juridiques et Politiques, vol. 12 (Brussels/Bern/Berlin/Frankfurt am Main/New York/Oxford/Vienna: P.I.E Peter Lang, 2017), 66.

345 In this regard, cf. Tomas Bagdanskis and Marijona Rasa Macijauskienė, “Application of Different Types of Employment Contracts in Lithuania – Related Theoretical and Practical Problems,” *Jurisprudencija* 19, no. 1 (2012): 249–67.

as the structure, organization, and conditions under which work is performed differ fundamentally from those characterizing traditional employees.

2.4. The difference of freelance workers compared to traditional employees

The foregoing considerations raise the subsequent question of how freelance work differs from traditional employment, and why these differences seem to complicate its regulation. As previously noted, recent academic literature has largely concentrated on the phenomenon of platform work. While digital platform work is not the only context in which these regulatory challenges emerge, it remains a particularly suitable field of study, as it brings together a variety of issues in distinct forms. Accordingly, the following analysis will draw on these research findings to develop generally applicable conclusions regarding the unique position of freelance workers. Platform work can be structured in various ways, each raising distinct questions regarding the classification of the legal relationship:

1. The platform just brings working individual and work provider together – an employment relationship could be established between the working individual and the work provider; or
2. The platform offers certain services and the working individual provides the service or part of the service to a commercial service recipient under the conditions set by the platform – an employment relationship could be established between the working individual and the platform or between the working individual and the service recipient; or
3. The platform offers certain services and the working individual provides the service or part of the service to a non-commercial work provider (e.g., a consumer) under the conditions set by the platform – an employment relationship could be established between the working individual and the platform.

It is therefore primarily the structure of the work itself that gives rise to categorization problems. Employment law typically relies on specific characteristics of the legal relationship to define its personal scope of application; however, these characteristics are not necessarily absent, but considerably less pronounced in work arrangements facilitated through digital platforms, where the working individual is engaged on an ad-hoc on-call basis. In traditional employment settings, employers exercise control over employees by managing or supervising parts of or the entire work process. By contrast, digital work platforms generally concentrate on the predefinition and organization of discrete tasks, while granting working individuals significant formal autonomy regarding when to work, how much work to accept, and how to complete the work³⁴⁶. Whereas in traditional employment, the time and place of the work seems essential, because the working individual needs (or needed) to be constantly in physical reach of the work provider to fulfil certain work tasks on the spot, digitalization has made place

346 Kocher, *Digital Work Platforms at the Interface of Labour Law*, 86.

and time less important for organizational anchoring³⁴⁷. In theory, the functions performed by digital work platforms could also exist outside the digital sphere. Historically, job advertisements in newspapers served a comparable purpose. However, the practical distinction lies in the temporal dynamics: newspaper advertisements typically involved a time lag before a suitable working individual could be identified and engaged. In contrast, digital platforms facilitate real-time ad-hoc access to the labor force, enabling not only immediate connections but also the fragmentation of work into smaller, discrete tasks that can be distributed individually and instantly, rather than assigning entire job functions. Moreover, it can also be the platform itself – rather than the final service recipient – that establishes certain specifications for how tasks are to be completed. Consequently, the challenges associated with platform work do not stem directly from digitalization *per se*, but rather from the ad-hoc mobilization of the labor force made possible by digital technologies.

In freelance work in general, there are generally also fewer constraints regarding time and place, provided that the predefined tasks are completed as specified. This tends to support the classification of freelance workers as genuinely self-employed individuals. Nevertheless, this formal autonomy does not imply the complete absence of any control or organizational integration. It might be that the work provider gives working individuals ‘on paper’ the freedom to be available or not available, as well as to accept or deny requests and tasks. Consequently, there might be no specific obligations incumbent on working individuals as to the ‘if’ and ‘when’ of work³⁴⁸. There may also be no formal obligation to follow instructions, nor direct sanctions or rewards tied to obedience. Instead, indirect forms of control may emerge through reputation and rating systems, which can significantly influence a worker’s prospects for future assignments. Additionally, the behavior of the working individual can nonetheless be shaped by the work provider through the necessity for the working individual to ‘stay on the ball’ for a favorable standing in the said reputation and rating systems, i.e., mechanisms designed to incentivize long-term commitment by the working individual which can create economic disadvantages³⁴⁹ or render the activity itself economically meaning-

347 Ulrich Preis, “§ 611a BGB,” in *ErfK*, by Thomas Dieterich et al. (Munich: C.H. Beck, 2019), para. 10, 13; cf. Stone, *From Widgets to Digits*.

348 Mirela Ivanova et al., “The App as a Boss? Control and Autonomy in Application-Based Management,” *Arbeit | Grenze | Fluss - Work in Progress interdisziplinärer Arbeitsforschung*, 2018, doi:10.11584/ARBEIT-GRENZE-FLUSS.2; Brishen Rogers, “Employment Rights in the Platform Economy: Getting Back to Basic,” *Harvard Law & Policy Review* 10 (2016): 493.

349 Wolfgang Däubler and Thomas Klebe, “Die neue Form der Arbeit – Arbeitgeber auf der Flucht?,” *NZA*, 2015, 1036; Dominika Biegoń, Wolfgang Kowalsky, and Joachim Schuster, *Schöne neue Arbeitswelt? wie eine Antwort der EU auf die Plattformökonomie aussehen könnte* (Berlin: Friedrich-Ebert-Stiftung, 2017), 6; 10–11; Martin Gruber-Risak and Doris Lutz, “Gute Arbeitsbedingungen in der Gig-Economy – was tun?,” in *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud*, ed. Doris Lutz and Martin Gruber-Risak (Vienna: ÖGB Verlag, Verlag des Österreichischen Gewerkschaftsbundes, 2017); European Commission, *Competition Policy for the Digital Era*. (Luxembourg: Publications Office of the European Union, 2019), 57 ff., <https://data.europa.eu/doi/10.2763/407537>.

less if the working individual is not constantly accepting new assignments.

Furthermore, an organizational integration may also be identified when the services performed by the working individual are closely aligned with, or embedded into, the business processes of the work provider³⁵⁰. Long-term commitments or informational dependence may also exist. These can manifest, e.g., through the mandatory use of an application provided by the work provider, the provision of work tools, or mechanisms through which the work provider monitors and/or controls the quality of the products or services performed³⁵¹. There may also be monitoring of work activities itself by the work provider, which can include the establishment of a permanent communicative connection or direct surveillance of activities through means such as screenshots, time-tracking, interactive checklists, or GPS tracking³⁵². Furthermore, the programming of the predefined tasks via apps can be quite pronounced and enforces certain work steps to be taken – so-called ‘app-based management’³⁵³. Such features suggest at least a deeper level of coordination and external determination of the activity, which might not be apparent from the formal contractual arrangements alone.

While the possibility of using substitutions might also not be restricted or even explicitly allowed ‘on paper’, this may be limited in practice because certain requirements may be placed on the activity that only the assigned working individual could fulfil³⁵⁴. Moreover, practices like testing and/or training of working individuals might be used to ensure they are provided with appropriate tasks³⁵⁵. At least some introductions or tutorials or a classification of working individuals according to performance

350 Silvia Rainone, “Digital and remote work: pushing EU labour law beyond its limits,” in *The Future of Remote Work* (Brussels: ETUI aisbl, 2023), 169.

351 Kocher, *Digital Work Platforms at the Interface of Labour Law*, 88.

352 Rüdiger Krause, *Digitalisierung der Arbeitswelt - Herausforderungen und Regelungsbedarf* (Deutscher Juristentag, Munich: C.H. Beck, 2016); Bernd Waas, “Crowdwork in Germany,” in *Crowdwork – a Comparative Law Perspective*, by Bernd Waas et al. (Frankfurt am Main: Bund-Verlag, 2017), 152; Däubler and Klebe, “Die neue Form der Arbeit – Arbeitgeber auf der Flucht?,” 1035; Robert Sprague, “Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes,” *ABA Journal of Labor & Employment Law* 31 (2015).

353 Sprague, “Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes”; Seth D. Harris and Alan B. Krueger, “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The ‘Independent Worker,’” Discussion Paper (The Hamilton Project, 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

354 Cf. Kocher, *Digital Work Platforms at the Interface of Labour Law*, 86–91.

355 Eva Kocher, “Crowdworking: Ein neuer Typus von Beschäftigungsverhältnissen?: Eine Rekonstruktion der Grenzen des Arbeitsrechts zwischen Markt und Organisation,” in *Selbstständige Unselbstständigkeit: Crowdworking zwischen Autonomie und Kontrolle*, ed. Isabell Hensel et al., edition sigma (Baden-Baden: Nomos, 2019), 173–213; Harris and Krueger, “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The ‘Independent Worker,’” 8; Wilma B. Liebman and Andrew Lyuzbarsky, “Crowdworkers, the Law and the Future of Work: The U.S.,” in *Crowdwork – a Comparative Law Perspective*, by Bernd Waas et al. (Frankfurt am Main: Bund-Verlag, 2017), 85.

levels might still exist³⁵⁶. In this regard, the use of substitutes by the working individual would be theoretically possible but practically illusory.

There can be further indicators that the working person is rather organizationally integrated instead of working on a competitive service market, such as the unilateral determination of prices and fees by the work provider³⁵⁷. But even if this is not given, the work provider could use additional, indirect mechanisms to regulate prices, e.g. by restricting the acceptance of other working individuals to exert influence on prices³⁵⁸.

Some parts of the literature propose an alternative definitional approach, suggesting that the degree of financial investment made by working individuals may serve as an indicator of entrepreneurial opportunity or the lack thereof qualifying freelance workers³⁵⁹. Similarities emerge with the concept of ‘lack of entrepreneurial opportunities’. However, a distinction is again more challenging in practice in the context of freelance work, as the provision of services might require at least (and only) minimal essential tools, such as a smartphone, a normal car, or a computer, which are usually owned and financed by the working individual but cannot necessarily be considered productive means, as would be the case for a genuine entrepreneur, aimed at scaling or multiplying the pure labor input³⁶⁰.

Ultimately, it becomes apparent that the typical characteristics on which traditional distinction criteria are based do exist in freelance work, albeit in a significantly less pronounced form than in the classic employment relationship. Nonetheless, it is precisely these characteristics that generally serve as the basis for determining the personal scope of application of employment law. Returning to the earlier elephant metaphor: the elephant might have a different color, short legs, only a stump for a trunk, and no tusks and would be hard to describe. Nevertheless, it might still be recognizable as an elephant when seeing it in reality, even if the features that typically characterize it are not as pronounced.

Yet there remains considerable uncertainty regarding how to address these

356 Steven Hill, *Raw Deal: How the “Uber Economy” and Runaway Capitalism Are Screwing American Workers* (New York: St. Martin’s Press, 2015), 111; Elisabeth Vogl, *Crowdsourcing-Plattformen als neue Marktplätze für Arbeit: die Neuorganisation von Arbeit im Informationsraum und ihre Implikationen* (Augsburg/Munich: Rainer Hampp Verlag, 2018), 79, doi:10.978.395710/3048.

357 Adams-Prassl and Gruber-Risak, “Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork,” 28; Harris and Krueger, “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The ‘Independent Worker,’” 10; Biegoń, Kowalsky, and Schuster, *Schöne neue Arbeitswelt?*, 10–11; Julien-Alexis Defromont, “Plateformes, Crowdsourcing, et Principes Des Life Time Contracts,” in *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law*, ed. Luca Ratti (The Hague: Eleven International Publishing, 2018), 239.

358 Cf. Ivanova et al., “The App as a Boss?”

359 Rogers, “Employment Rights in the Platform Economy: Getting Back to Basic,” 483.

360 In other words, these are tools whose mere possession and use do not inherently increase the value of the pure labor performed, as they are ordinary, everyday items. By contrast, the presence of a specialized vehicle or a particular software application on these devices may indicate a different situation, as such tools have the potential to scale and multiply the labor input.

emerging forms of work relationships – whether by creatively reinterpreting traditional terms softer within the existing personal scope of employment law, or by establishing a new, hybrid regulatory framework. To bridge these legal and regulatory gaps, there is a growing movement towards the regulation of at least particular freelance work as seen with the adoption of the Directive (EU) 2024/2831³⁶¹. In essence, the effort to integrate freelance workers into the framework of employment law reflects a broader transformation in the understanding of employment relationships. This shift involves expanding legal definitions, recalibrating protections and benefits to accommodating new work models. It is therefore necessary to examine whether, and to what extent, this shift is required or already underway by analyzing how different countries define the personal scope of their employment law frameworks and might already include such freelance workers in their regulation without major legal adjustments.

361 Cf. Directive (EU) 2024/2831.

3. STATUS DETERMINATION FOR THE APPLICABILITY OF EMPLOYMENT LAW

After examining the significance and practical challenges of distinguishing between self-employment and employment status in general – and of classifying freelance workers in particular – it is further necessary to clarify where Germany, the UK, and Lithuania draw the line between self-employed and employed status, where they would include freelance workers in this systematics and might already take the discussed particularities into consideration within their overall legal systems. The following discussion will analyze this distinction within the context of each country's employment law framework.

3.1. Germany

In Germany, it is first possible to approach the concept of the genuine self-employed person from two sides. Case law has already set rough framework criteria in numerous rulings as to when an activity is to be considered self-employed. In Germany, self-employment in the context of employment law is defined as being personally independent³⁶². Thus, if the working individual is subject to a comprehensive right to issue instructions by the work provider regarding working hours, duration and place of performance of the services, an employment relationship typically exists. If the working individual is, however, essentially free to determine the working conditions, it is a 'freelancer' (in the meaning of 'Freier Mitarbeiter'), i.e. self-employed³⁶³. Self-employment therefore means being essentially free to organize one's activities and determine one's working hours³⁶⁴. If the work provider grants the working individual the right to involve third parties in the provision of services, this is at least an indication for self-employment³⁶⁵. If the contracting parties agree that the working individual is entitled to engage in other professional and commercial activities during the term of the contract, this can be a further indication of self-employment³⁶⁶. However, in order to get a complete picture, the employee as the counter-term in this regard must be defined.

3.1.1. Employees

Employment law in Germany is not consolidated into a single code but is instead dispersed across various legal sources. Prior to 2017, the employment contract existed

362 BAG, Urt. v. 13.01.1983 - 5 AZR 156/82," *AP BGB § 611 Abhängigkeit* Nr. 43.

363 BAG, Urt. v. 21.02.1990 - 5 AZR 162/89," *AP BGB § 611 Abhängigkeit* Nr. 57.

364 HGB, sec. 84 para. 1 sentence 2.

365 BAG, Urt. v. 12.12.2001 - 5 AZR 253/00, *NJW*, 2002, 2411–13.

366 *Ibid.*

merely as an undefined subcategory of the broader service contract, the distinction of which was shaped exclusively by case law. A distinction was drawn between a ‘freier Dienstvertrag’ (free service contract) and the employment contract. Only in 2017, the employment contract received a comprehensive statutory definition³⁶⁷. The criteria previously established through case law were largely – but according to some scholars – not fully incorporated into the law³⁶⁸. By the employment contract,

“the employee is obliged to perform work in the service of another, such work being tied to instructions and determined by others, and to do so in a relationship of personal dependence”³⁶⁹.

This definition contains the ‘general’ definition of the employee³⁷⁰ which in principle applies to all matters of employment law. Personal dependence is the essential characteristic that distinguishes the employment contract from the (free) service contract. It can result from the work being tied to instructions or the determination by the work provider. Being tied to instructions may concern “the substance, implementation, time and place at which the activities are pursued”³⁷¹. Determination can manifest itself, i.a., by an integration into the work provider’s work organization,³⁷² or the dependence on the work provider’s organization³⁷³.

This means that a working individual may not necessarily perform directly controlled labor only due to a formal obligation to follow instructions but rather for other reasons. For instance, they may rely on technical equipment provided by the work provider to fulfill their obligations. German case law suggests that personal dependence can also arise when a working individual is integrated into a team, as teamwork requires organization, and all members must align with the established work structure. While this form of dependence differs from that of traditional employees, its intensity is not necessarily lower. As a result, these working individuals cannot operate in the market like independent entrepreneurs, setting their own goals, assuming full

367 BGB, sec. 611a; For the sake of completeness, it should be noted that not only this one, but the existence of several ‘employee’ concepts in German law is assumed by some scholars; in this regard, cf. Wank, “Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen,” 328.

368 “Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze” (Deutscher Bundestag, July 20, 2016), 18, <https://dserver.bundestag.de/btd/18/092/1809232.pdf>; In addition to the obligation to follow instructions, the literature sees the integration of the working individual into the organization of the work provider as a fundamental characteristic of the employee status, although this was not included in the wording of the law, case law does not seem to have abandoned this criterion either, cf. Wank, “Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen,” 328.

369 BGB, sec. 611a.

370 Cf. BAG, Beschl. v. 5.12.2012 - 7 ABR 48/11, *NZA*, 2013, para. 17.

371 BGB, sec. 611a; BAG, Urt. v. 17.05.1978 - 5 AZR 580/77, *AP BGB § 611 Abhängigkeit* Nr. 28; BAG, Urt. v. 09.09.1981 - 5 AZR 477/79, *AP BGB § 611 Abhängigkeit* Nr. 38.

372 BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, para. 31.

373 BAG, Urt. v. 13.08.1980 - 4 AZR 592/78, *AP BGB § 611 Abhängigkeit* Nr. 37: 477; BAG, Urt. v. 09.09.1981 - 5 AZR 477/79.

responsibility, and bearing financial risks with the potential of scaling or multiplying their labor's output. Instead, they must provide their labor for the benefit of the work provider, who utilizes it according to its planning and needs. Because also these working individuals perform externally controlled and beneficial work under conditions of personal dependence, they typically require some form of social protection. Their professional livelihood depends on this particular work provider, within whose organization they are embedded. According to the German case law, this dependence is a defining characteristic of an employee: Someone who could only secure work within another's organization requires job security and the full range of protections that employment law provides. Conversely, those who derive benefit from another person's labor and incorporate them into their operations must also fulfill the legal obligations imposed on employers. This overall perspective, according to the German case law, ensures that working individuals who do not fit the traditional model of employment but still depend on a single work provider are granted appropriate legal protections. The goal is not to arbitrarily reclassify contractual relationships traditionally considered independent service contracts under employment law but to acknowledge and safeguard working individuals in genuine employment-like situations³⁷⁴.

However, being tied to instructions and determined overlaps to some extent, as an activity that is tied to instructions is usually also determined³⁷⁵. And determination usually only occur with a minimum level of being tied to instructions³⁷⁶. Anyone who is not able to essentially determine their activities freely and to determine the times at which they work is tied to instructions³⁷⁷. However, in this context, the degree of personal dependence is also subject to the specific nature of the activity concerned³⁷⁸. Yet, instruction rights can also exist outside of an employment relationship and are therefore not alone a blanket feature of German employment status, as e.g., time constraints can also appear in a (free) service contract with fixed deadlines. Instructions given to self-employed individuals are generally task- and result-oriented, while employment-related instructions are person-centered and regulate the work process. The type of contract is primarily determined by how much the work process is pre-structured by the work provider. If the work provider plans and organizes the activity, an employment relationship may typically exist³⁷⁹.

As already discussed, certain activities can be performed under either an employment contract or a service contract. However, according to German case law, especially simple tasks tend to involve more personal dependence than more difficult

374 BAG, Urt. v. 15.03.1978 - 5 AZR 819/76.

375 BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, para. 31.

376 Preis, "BGB § 611a Arbeitsvertrag," para. 42.

377 BGB, sec. 611a.

378 Ibid.

379 BAG, Urt. v. 30.11.2021 – 9 AZR 145/21, NZA, 2022, para. 34.

tasks³⁸⁰ which require higher qualification. The latter indicator became crucial in a recent decision by the BAG who had to decide whether a crowd or platform worker – i.e., a freelance worker – could be considered employee towards its platform or app operator – which was decided affirmative³⁸¹. In this case, the fact that recurring small tasks involved simple, low-skilled jobs and were predetermined in content indicated an employment relationship. Furthermore, the used app's unilateral work conditions required the working individual to regularly accept and complete specific tasks over a long period to perform the work economically – even if there was no explicit obligation to do so. The BAG stated that by signing a framework agreement, registering on the platform, and using it, the working individual implicitly agreed to this form of work, where the work provider controlled the user's behavior by shaping and combining the tasks according to its own needs, without needing to give explicit instructions but by giving incentives and by subtle nudging³⁸². The working individual had to perform the tasks personally and could only be hired if registered on the platform with an account provided by the work provider. According to the terms and conditions of the platform, the working individual's account was furthermore non-transferable, and multiple accounts were not allowed as any account sharing was deemed a violation of the terms and conditions. The app's function was not designed for the assignment of individual tasks by an independent user but – despite the simplicity of the tasks – aimed at automated task distribution to already trained working individuals. The attractiveness of available tasks was determined by the work provider, pushing the working individual to constantly monitor new offers and be ready to work to secure favorable tasks. Furthermore, the work provider used a rating system where only at a higher experience level, multiple tasks could be accepted simultaneously, allowing for better route planning and thus a higher hourly wage to incentivize working individuals to continuously perform tasks. The key factor was that the platform's organizational structure was designed for registered and well-trained (in relation to the activity performed, not highly skilled in general) users to continuously accept bundles of tasks, which they must then personally complete in a precisely specified manner³⁸³.

The case made clear that a contractual employment relationship can also be established through consistent, implied behavior if both parties exchange services and payments over a legally significant period. This may express their mutual intent to be bound by an employment contract for the actual services provided³⁸⁴. It was made clear that determinate work is also possible, even if the working individual is not necessarily obliged to follow any instructions. It significantly lowered the threshold for the

380 Ibid., para. 35; BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, para. 37.

381 BAG, Urt. v. 30.11.2021 – 9 AZR 145/21.

382 Gregor Thüsing and Gisela Hütter-Brungs, "Crowdworking: Lenkung statt Weisung – Was macht den Arbeitnehmer zum Arbeitnehmer?," *NZA-RR*, 2021, 231.

383 BAG, Urt. v. 01.12.2020 – 9 AZR 102/20.

384 BAG, Urt. v. 9.4.2014 – 10 AZR 590/13, *NZA-RR*, 2014, para. 26; BAG, Urt. v. 17.04.2013 – 10 AZR 272/12, *ZUM-RD*, 2014, para. 13.

emergence of employee status and opened the possibility that freelance workers can be regarded as employees. However, the judgment does not intend that freelance workers are employees *per se*. The individual case is decisive, as other criteria also play a role. German labor courts are constitutionally required to consider also fundamental rights in their interpretations to ensure that their value is upheld in the application of the law. In the case of journalists³⁸⁵, typically a case-by-case balancing of the freedom of press against employment law applicability is required³⁸⁶. In determining whether or not an employment contract exists, all circumstances are to be given overall consideration³⁸⁷ and the principle ‘primacy of facts’ is followed³⁸⁸.

When classifying a legal relationship within this legal framework, the assessment does not depend on how the parties have consciously or unconsciously labeled their relationship. The designation is not decisive; what matters is how the contract was mutually and actually carried out. This provides insight into the rights and obligations the parties intended³⁸⁹. The goal is to prevent employment law protections from being circumvented by labelling an existing employment relationship differently. Parties cannot deliberately or inadvertently avoid the legal consequences associated with an employment relationship through mere terminology. Therefore, the true nature of the contract must be determined independently of how the parties classify it³⁹⁰.

According to the German literature, this principle requires a specific method of qualification: the so-called ‘typological’ method³⁹¹, which was also accepted by the German constitutional court BVerfG³⁹², i.e. the definition in the law only mentions certain characteristics that are typical for an employment contract and are found in an ‘average case’. Not all characteristics must be present or have the same weighing, but the existence of an employment contract results from the overall circumstances³⁹³. When making an assessment, it is essential to consider the main factors of the right to issue and the obligation to follow instructions, the determination of the work and the integration into the organization, along with sub-factors such as professional supervision and control. A balanced evaluation is necessary, as it is not required for each

385 GG, art. 5 para. 1 sentence 2.

386 BAG, Urt. v. 30.11.2021 – 9 AZR 145/21, para. 37; BAG, Urt. v. 25.8.2020 – 9 AZR 373/19, *AP BGB* § 611 *Rundfunk* Nr. 49: para. 21.

387 BGB, sec. 611a.

388 *Ibid.*

389 BAG, Urt. v. 09.03.1977 – 5 AZR 110/76, *AP BGB* § 611 *Abhängigkeit* Nr. 21; *ibid.*

390 BAG, Urt. v. 09.03.1977 – 5 AZR 110/76.

391 Gregor Thüsing, “BGB § 611a,” in *Arbeitsrecht Kommentar*, by Martin Henssler, Heinz Josef Willemsen, and Heinz-Jürgen Kalb (Cologne: Otto Schmidt, 2020), para. 46.

392 BVerfG, Beschl. v. 20.05.1996 – 1 BvR 21/96, *NZA*, 1996, para. 7, 8.

393 Cf. BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, para. 38.

factor or sub-factor to be present to the same degree³⁹⁴. Therefore, the German definition consists less of strict factors than of soft factors and flexible indicators³⁹⁵. With the introduction of the legal definition in Sec. 611a BGB in 2017, there was disagreement as to whether this principle continues to apply without limitation³⁹⁶, as the new legal definition provided a clearer framework. However, the disagreement was only brief, as the case law assumes that this principle continues to exist³⁹⁷. The problem with this method, however, is that it is not always clear in advance how the relationship will look like, and it is also not always clear what the average case actually is – a simple subsumption is rarely possible³⁹⁸. It is therefore likely that the SER is often used as a guidance but could be misleading as it is no longer necessarily the norm or ‘average case’ in reality. It is clear that the considerations under German law are based on a strong contextuality, which would also make it necessary to interpret individual terms theologically – however, German courts themselves do not always adhere to this and in sometimes follow a more ontological interpretation or at least do not make teleological considerations explicitly apparent, even if they may have taken place.

Summarizing, the main duty of the employee is personally dependent work. In exchange, the employer has the duty to pay the agreed remuneration³⁹⁹. If there is an employment relationship, a multitude of German employment laws regulating different aspects of it. The German definition of employee relies mainly on soft criteria of personal dependence; any form of economic dependence plays no role in the evaluation – even if employees themselves are considered both personally and economically dependent⁴⁰⁰.

3.1.2. Employee-like persons

The term ‘employee-like person’ (‘arbeitnehmerähnliche Person’) can be found in various forms in different laws relating to German employment law. The employee-like person seems to be an intermediate category between employees and the self-employed. It is often described as a fixed status or category between employee and self-employed person or a sub-category of the self-employed, especially in international

394 Rolf Wank, “§ 12. Absatzmittler als Arbeitnehmer oder als Selbständige,” in *Handbuch des Vertriebsrechts*, by Florian Amereller, ed. Michael Martinek, Franz-Jörg Semler, and Eckhard Flohr (Munich: C.H. Beck, 2024), para. 46.

395 Cf. Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 41 – “and only for those – the typological method can be appropriate.”

396 Preis, “§ 611 a BGB – Potenziale des Arbeitnehmerbegriffes,” 817 ff. – “typologischer Irrweg [typological fallacy].”

397 Cf. BAG, Urt. v. 01.12.2020 – 9 AZR 102/20, para. 38.

398 Cf. BVerfG, Beschl. v. 20.05.1996 - 1 BvR 21/96.

399 BGB, sec. 611a para. 2.

400 Cf. Rolf Wank, “Beschäftigungsverhältnisse außerhalb des Arbeitsrechts im Unionsrecht,” *RdA*, 2024, 132.

literature⁴⁰¹. This description is not wrong but lacks one important aspect which might lead to misleading assumptions and to an equation of similar concepts in other countries, which, however, might work methodologically in a different way. In fact, the concept of the employee-like person functions as a catch-all provision to close gaps in protection and avoid circumvention⁴⁰², i.e., it aims to ‘catch’ all working individuals who might otherwise fall outside the scope of an overly restrictive definition and the law applies if at least the qualification as an employee-like person is established⁴⁰³. In principle, employee-like persons are genuinely self-employed and are clearly not considered employees under the law, with the result that employment law is, in general, not applicable to them⁴⁰⁴. Considering that even platform or crowdworkers could be employees under certain circumstances, the question arises where to draw the demarcation line between employees and employee-like persons who work, e.g., under a long-term framework agreement. In such a case, it depends on whether such an agreement grants one party the right to effectively freely decide on the acceptance of future individual contracts or if it grants one party the authority to unilaterally and bindingly determine the performance to be provided for the other party⁴⁰⁵. The necessity to follow purely technical standards and quality requirements by the work provider do likely not constitute a personal dependence and do therefore not lead to

401 E.g., cf. Bernadett Szekeres, “Reflections on the Employee-Like Persons and on Their (Non-) Regulation in Hungary,” in *MultiScience - XXXIII. microCAD International Multidisciplinary Scientific Conference* (MultiScience - XXXIII. microCAD International Multidisciplinary Scientific Conference, University of Miskolc, 2019), n. 17, doi:10.26649/musci.2019.064; Nicola Countouris and Valerio De Stefano, “New Trade Union Strategies for New Forms of Employment” (Brussels: ETUC, 2019), 23, https://www.etuc.org/sites/default/files/publication/file/2019-04/2019_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment_0.pdf; Monika Schlachter, “Trade Union Representation for New Forms of Employment,” *ELLJ* 10, no. 3 (September 2019): 229, doi:10.1177/2031952519870018; Bernd Waas et al., *Crowdwork - a Comparative Law Perspective* (Frankfurt am Main: Bund-Verlag, 2017), 160; Ban Xiaohui et al., *Platform Economy in China and Germany Labour Law Policy Recommendations for Decent Work* (Shanghai: Friedrich Ebert Stiftung, 2023), 14, <https://library.fes.de/pdf-files/bueros/china/20528.pdf>; Christina Hießl, “Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions,” *SSRN Electronic Journal*, 2021, 23, doi:10.2139/ssrn.3839603; Davidov, Freedland, and Countouris, “The Subjects of Labor Law: ‘Employees’ and Other Workers,” 14; Eva Bertram, “The Political Development of Contingent Work in the United States: Independent Contractors from the Coal Mines to the Gig Economy,” *E-Journal of International and Comparative Labour Studies* 5, no. 3 (2016): 32.

402 Christine Schulze-Doll, “ArbSchG § 2 Begriffsbestimmungen,” in *Gesamtes Arbeitsschutzrecht: Arbeitsschutz, Arbeitszeit, Arbeitssicherheit, Arbeitswissenschaft: Handkommentar*, by Wolfhard Kohte et al. (Baden-Baden: Nomos, 2023), para. 19.

403 Ibid.

404 Frank Hohmeister, “BUrlG § 2 Geltungsbereich,” in *Bundesurlaubsgesetz: BUrlG, BEEG, JArbSchG, MuSchG, SGB IX ; Handkommentar*, by Frank Hohmeister and Angelika Oppermann (Baden-Baden: Nomos, 2013), para. 14; BAG, Beschl. v. 21.01.2019 - 9 AZB 23/18, NZA, 2019, para. 31.

405 BAG, Urt. v. 21.5.2019 - 9 AZR 295/18, NZA, 2019, para. 26.

employee status⁴⁰⁶. In such a case, however, a working individual could still fall under the catch-all provision.

A comprehensive definition of employee-like persons can be found in Sec. 12a TVG including them into the personal scope of Germany's collective bargaining law⁴⁰⁷. According to this definition, employee-like persons are individuals who are economically dependent or there is a lack of entrepreneurial independence and they are in need of social protection comparable to an employee⁴⁰⁸. Employees are both personally and economically dependent, whereby personal dependence alone is sufficient as a criterion for assessment. Employee-like persons, by contrast, work under no or significantly mitigated personal dependence⁴⁰⁹ – otherwise the working individual would be an employee⁴¹⁰.

In the context of collective bargaining law, it is assumed that the working individual is economically dependent on the work provider and, as a result, is in need of social protection to the same extent as an employee if several criteria are met: (1) work on the basis of a service contract or a contract to produce a work for other persons⁴¹¹, (2) obligation to perform service personally and essentially without collaboration with (own) employees, and (3a) work predominantly (i.e. in principle more than 50%) for one person⁴¹², or (3b) on average more than 50 per cent of the income of the working individual (total gainful activity) is received only by one work provider⁴¹³.

However, this is not a generally binding definition⁴¹⁴ and in principle only applies to collective bargaining law but can at least serve as a guidance for other contexts⁴¹⁵. This is reflected in the fact that Sec. 12a para. 4 TVG expressly excludes commercial agents from the personal scope of application, although in other contexts, e.g., according to Sec. 5 para. 3 ArbGG (the personal scope governing access to the labor courts) in conjunction with Sec. 92a HGB, they may be employee-like persons if they are only permitted to broker business for one company and have not received more than EUR 1 000 in remuneration on average during the last six months of the contractual

406 Schulze-Doll, "ArbSchG § 2 Begriffsbestimmungen," para. 24.

407 TVG, sec. 12a para. 1.

408 Ibid.

409 Wank, "Beschäftigungsverhältnisse außerhalb des Arbeitsrechts im Unionsrecht," 132.

410 BAG, Beschl. v. 21.01.2019 - 9 AZB 23/18, para. 31.

411 This means that it does not matter whether the work is deliverable-oriented or not.

412 TVG, sec. 12a para. 1 lit. a.

413 Ibid., sec. 12a para. 1 lit. b.

414 However, it has a certain indirect binding effect, as the labor courts must be open to all those who are to be regarded as employee-like pursuant to Sec. 12a TVG, and not only in cases in which they assert claims under collective agreements; in this regard, cf. BAG, Urt. v. 17.10.1990 - 5 AZR 639/89, NZA, 1991, 403; In this regard, the definition from the TVG must at least be considered whenever a law refers to the concept of the employee-like person from the ArbGG.

415 Cf. Heinz Josef Willemsen and Michael Müntefering, "Begriff und Rechtsstellung arbeitnehmerähnlicher Personen: Versuch einer Präzisierung," NZA, 2008, 193.

relationship. Sec. 12a TVG thus does not cover all employee-like persons⁴¹⁶ and the concept can show nuanced differences in other contexts.

Due to a lack of a legal definition, the concept of the employee-like person in other contexts has been significantly shaped by case law. It is regarded as an ‘indefinite legal concept’, granting the courts a certain degree of discretion in its application⁴¹⁷ – at least in contexts where it is not predefined by law such as in the TVG. Nevertheless, according to the case law, it is the nature and duration of the activity as well as the amount of remuneration that leads to an economic dependence of the employee-like person on their work provider – instead of a personal dependence⁴¹⁸. For the question of dependence, significant weight is given to the duration of the legal relationship⁴¹⁹ and the amount of profit remaining from the self-employed activity after deduction of all costs before taxes and private insurance⁴²⁰. But also the legal basis for practicing a profession must be considered in an evaluative manner. For instance, a continuously mandated attorney would not be similar to an employee in terms of requiring protection⁴²¹. An employee-like person is dependent on the utilization of their labor and the income from the performed work to secure their livelihood⁴²². This is particularly the case if the individual only works for one work provider⁴²³, or the remuneration received from one work provider represents the essential basis of the working individual’s livelihood⁴²⁴. The former is particularly the case if the working individual cannot freely offer their services to third parties because only a limited circle of potential work providers is available or there is no sufficient time left to utilize their labor elsewhere⁴²⁵. What is decisive is the individual’s actual income situation. It is irrelevant whether they could have generated income from other sources⁴²⁶. If the work performed for the

416 BAG, Urt. v. 17.10.1990 - 5 AZR 639/89.

417 BAG, Beschl. v. 21.01.2019 - 9 AZB 23/18, para. 32.

418 BAG, Beschl. v. 21.02.2007 - 5 AZB 52/06, 700; BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, *Neue Juristische Online Zeitschrift*, 2006, 3822; BAG, Urt. v. 15.11.2005 - 9 AZR 626/04, *Neue Juristische Online Zeitschrift*, 2007, 5253; BAG, Beschl. v. 26.09.2002 - 5 AZB 19/01, *NZA*, 2002, 1415.

419 Willemsen and Müntefering, “Begriff und Rechtsstellung arbeitnehmerähnlicher Personen: Versuch einer Präzisierung,” 195; BAG, Urt. v. 17.01.2006 - 9 AZR 61/05.

420 BGH, Beschl. v. 04.11.1998 - VIII ZB 12–98, *NZA*, 1999, 53–56; BAG, Urt. v. 21.06.2011 - 9 AZR 820/09, *NZA-RR*, 2012, 365–68.

421 LAG Cologne, Beschl. v. 03.02.2011 - 6 Ta 409/10, *NZA-RR*, 2011, 212.

422 BAG, Beschl. v. 21.02.2007 - 5 AZB 52/06, 700; BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, 3822; BAG, Urt. v. 15.11.2005 - 9 AZR 626/04, 5253; BAG, Beschl. v. 26.09.2002 - 5 AZB 19/01, 1415.

423 BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, 3822.

424 BAG, Urt. v. 28.06.1973 - 5 AZR 568/72, 1995; BAG, Urt. v. 08.06.1967 - 5 AZR 461/66, *NJW*, 1967, 1982.

425 BAG, Beschl. v. 21.12.2010 - 10 AZB 14/10, *NZA*, 2011, 309–11.

426 BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, 3823; BAG, Beschl. v. 17.06.1999 - 5 AZB 23/98, *NZA*, 1999, 1176.

work provider does not yield high remuneration⁴²⁷, it should however be examined whether the individual possesses other sources of income or substantial assets capable of securing their livelihood⁴²⁸.

This economic dependence must also have reached a degree that the economically dependent person needs social protection in terms of their overall position ‘comparable to an employee’ according to the public’s perception⁴²⁹. The need for social protection comparable to an employee is to be assumed if the degree of dependence has reached a level that is normally (according to the public’s perception) only found in an employment relationship and if the services provided are according to their sociological typology typical for an employee⁴³⁰. However, some scholars highlight the risk that an excessive emphasis on this similarity could unlawfully narrow the group of employee-like persons⁴³¹ and therefore suggest considering only economic dependence without additionally taking this social vulnerability into account⁴³². The BAG has followed this approach in individual cases⁴³³. However, social vulnerability is generally required in addition to economic dependence. A comparable need for protection is usually absent if the working individual receives a high remuneration. Some scholars therefore argue for specific income thresholds based on relevant social security reference values⁴³⁴. A comparable need for protection is also lacking if the working individual independently employs employees like an entrepreneur⁴³⁵. On the other hand, social vulnerability is indicated if the working individual’s earning potential is not higher than that of a comparable employee of the work provider, despite greater time investment and assumed economic risk⁴³⁶. The actual need for social protection ‘comparable to an employee’ is

427 BAG, Urt. v. 23.12.1961 - 5 AZR 53/61, *NJW*, 1962, 1125; BGH, Beschl. v. 04.11.1998 - VIII ZB 12-98, 56.

428 BAG, Urt. v. 23.02.1977 - VIII ZR 222/75, *NJW*, 1977, 854.

429 BAG, Urt. v. 08.06.1967 - 5 AZR 461/66, 1982; BAG, Urt. v. 15.11.2005 - 9 AZR 626/04, 5253; BAG, Beschl. v. 21.01.2019 - 9 AZB 23/18, para. 31; BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, para. 14; BAG, Beschl. v. 30.08.2000 - 5 AZB 12/00, *NZA*, 2000, 1359-60; BAG, Beschl. v. 22.02.1999 - 5 AZB 56/98, *BeckRS* 162594 (1999); BAG, Urt. v. 02.10.1990 - 4 AZR 106/90, *NZA*, 1991, 239-41; BGH, Beschl. v. 21.10.1998 - VIII ZB 54-97, *NJW*, 1999, 648-51.

430 BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, 3822; BAG, Urt. v. 02.10.1990 - 4 AZR 106/90, 240.

431 Rudi Müller-Glöge, “ArbGG § 5 Begriff des Arbeitnehmers,” in *Arbeitsgerichtsgesetz: Kommentar*, ed. Claas-Hinrich Germelmann et al. (Munich: C.H. Beck, 2022), para. 34.

432 Willemsen and Müntefering, “Begriff und Rechtsstellung arbeitnehmerähnlicher Personen: Versuch einer Präzisierung,” 194.

433 Cf. BAG, Beschl. v. 30.08.2000 - 5 AZB 12/00.

434 Willemsen and Müntefering, “Begriff und Rechtsstellung arbeitnehmerähnlicher Personen: Versuch einer Präzisierung,” 199; Wolfgang Hromadka, “Arbeitnehmer, Arbeitnehmergruppen und Arbeitnehmerähnliche im Entwurf eines Arbeitsvertragsgesetzes,” *NZA*, 2007, 841.

435 BGH, Beschl. v. 21.10.1998 - VIII ZB 54-97; BGH, Beschl. v. 27.01.2000 - III ZB 67/99, *NZA*, 2000, 390-91.

436 BGH, Beschl. v. 04.11.1998 - VIII ZB 12/98, *NZA*, 1999, 53-56.

therefore examined on a case-by-case basis according to the overall circumstances⁴³⁷.

Some scholars furthermore suggest measuring economic dependence also by indicators derived from social security law where a similar but not identical term of so-called ‘employee-like self-employed’ exists⁴³⁸:

- acting for another person on the basis of a service contract or a contract to produce a work;
- personal provision of services essentially without own employees;
- performing work predominantly for one work provider; or
- in the case of work performance for several work providers, receiving from one of these work providers on average more than half of the income to which such a working individual is entitled for their entire gainful activity.

This already shows that the terms used in social security law overlap or are at least similar to some extent to those used in employment law. As the courts already clarified that the concept of the employee-like person is an indefinite legal concept⁴³⁹, the approach of referring to indicators from social security law can rightfully help in this case to cause a better understanding of what an employee-like person is. However, it must be noted that the assessment of a particular activity under social security law cannot be automatically applied without limitations to its evaluation under employment law⁴⁴⁰.

Consequently, an employee-like person is not integrated into the business organization of the work provider, i.e. they are freer to organize their activities than an employee. However, they do not provide the service on the free market, but essentially to this one work provider. The work relationship for this work provider must be essential, i.e. the remuneration received from it must represent the decisive basis of the employee’s livelihood⁴⁴¹. The service is thus provided under free organization, but the entrepreneurial risk is still borne by the work provider⁴⁴². In addition, there must be a certain permanent relationship⁴⁴³. Services provided for only a short period of time do regularly not lead to economic dependence. Essential benchmarks for the existence of economic dependence are thus the type and duration of the activity as well as the amount of remuneration. Therefore, in addition to persons already legally defined by law (including domestic servants⁴⁴⁴ or single-company representatives under certain

437 BAG, Urt. v. 25.7.1996 - 5 AZB 5/96, NJW, 1996, 3294; BAG, Beschl. v. 30.08.2000 - 5 AZB 12/00.

438 Hohmeister, “BUrlG § 2 Geltungsbereich,” para. 16.

439 BAG, Beschl. v. 21.01.2019 - 9 AZB 23/18, para. 32.

440 BAG, Urt. v. 26.6.2019 - 5 AZR 178/18, NZA, 2019, 1558–63.

441 Frank Hohmeister and Susanne Goretzki, *Verträge über freie Mitarbeit: Arbeits-, Sozialversicherungs- und Steuerrecht* (Heidelberg: Verl. Recht und Wirtschaft, 2000), 60.

442 Hohmeister, “BUrlG § 2 Geltungsbereich,” para. 17.

443 Cf. BAG, Urt. v. 06.12.1974 - 5 AZR 418/74, AP BGB § 611 Abhängigkeit Nr. 14.

444 BUrlG, sec. 2 sentence 2.

conditions⁴⁴⁵), other freelancers (*freie Mitarbeiter*), e.g. artists, journalists, authors – who work exclusively for one specific work provider over a longer period of time and are therefore economically dependent, but are not personally dependent on this work provider – can also be considered employee-like persons⁴⁴⁶. The same can apply to working individuals from any kind of sector if they fulfil these characteristics.

The deliberate opening of selective areas of employment law takes into account the special need for protection of certain self-employed individuals in certain areas. The German concept can therefore be described as bimodal – there is a binary concept, i.e. employee on the one hand and self-employed person on the other hand. Some areas of protection of employment law are selectively opened up for self-employed persons who are employee-like. This means that freelance workers who are not personally dependent may nonetheless be protected by certain areas of employment law.

However, despite a reference to the already discussed shapes of the concept, a different understanding arises in occupational health and safety law⁴⁴⁷, as the use of the criterion of economic dependence is seen as going against its purpose. Instead, a comparable need for social protection compared to employees is considered that does not result from an economic dependence but from the inclusion of the working individual into the danger-causing work organization of the work provider⁴⁴⁸. The need to extend occupational health and safety protections to employee-like persons is therefore based solely on the comparability of their activities and the risks arising therefrom⁴⁴⁹. It is not the status, but the actual and hazardous nature of the work that is decisive⁴⁵⁰. Such relationships may arise, e.g., in the construction sector, in manufacturing occupations, or in courier services when these tasks are performed by self-employed individuals, but where the same safety measures are necessary due to their integration into the work provider's activities⁴⁵¹. Furthermore, freelance workers – working either via a platform or directly – could be employee-like persons under occupational health and safety regulations if they are not working in an employment relationship under personal dependence⁴⁵² and are not economically dependent either, but still work predominantly within a work environment created by one platform operator or work provider⁴⁵³. This

445 Cf. ArbGG, sec. 5 para. 3 sentence 1.

446 Cf. BAG, Urt. v. 15.11.2005 - 9 AZR 626/04, para. 27; BAG, Urt. v. 17.01.2006 - 9 AZR 61/05, para. 10.

447 Different opinion, cf. Wank, "Beschäftigungsverhältnisse außerhalb des Arbeitsrechts im Unionsrecht," 132 – "Since employee-like persons are not 'personally dependent', their similarity can only be based on economic dependence."

448 Pottschmidt, *Arbeitnehmerähnliche Personen in Europa*, 226 ff.; Wolfhard Kohte, "ArbSchG § 2 Begriffsbestimmungen," in *Arbeitsschutzgesetz: mit BetrSichV, BaustellV, LasthandhabV, PSA-BV, BiostoffV, MuSchArbV, LärmVibrationsArbSchV, OStrV, ArbMedVV, ArbStättV, EMFV: Kommentar*, by Norbert Kollmer et al. (Munich: C.H. Beck, 2021), para. 83 ff.

449 Schulze-Doll, "ArbSchG § 2 Begriffsbestimmungen," para. 19.

450 Ibid.

451 Examples, cf. Kohte, "ArbSchG § 2 Begriffsbestimmungen," 86–95.

452 BAG, Urt. v. 21.5.2019 – 9 AZR 295/18.

453 Kohte, "ArbSchG § 2 Begriffsbestimmungen," para. 100.

demonstrates that the concept of the employee-like person, even when legally defined in certain contexts, does not represent a fixed status but is instead interpreted as an open-ended and flexible concept, oriented towards the purpose of the specific area of employment law in question.

3.2. The UK

In the UK, self-employment is a ‘residual category’, i.e., if a working individual cannot be classified as an ‘employee’ on the basis of various tests courts have developed, it will typically be classified as ‘self-employed’⁴⁵⁴. But there is no legal definition of who is a ‘self-employed’ person⁴⁵⁵. This makes employment status all the more important for legal classification. UK law has the peculiarity of having more than one employment status. It distinguishes between ‘employee’ and ‘worker’ which however follow a different systematic than the concepts of ‘employee’ and ‘employee-like person’ in German law.

Employment law in the UK is likewise not codified in a single code. The term ‘worker’ is defined in differing broad terms in different laws in the UK. For instance, Sec. 230 para. 3 lit. b ERA 1996 and Sec. 296 para. 1 lit. b TULRCA 1992 each provide definitions which are similar but, on closer inspection, not identical. A further concept can be found in Sec. 35 para. 1 of NMWA 1998⁴⁵⁶.

Sec. 230 para. 3 ERA 1996 has two litterae or limbs – (a) and (b). Accordingly, an employee or so-called ‘limb (a) worker’ refers to an individual who is party to, or operates under, a contract of employment⁴⁵⁷. A contract of employment is defined as a contract of service or apprenticeship. Such a contract may be either express or implied, and may be concluded orally or in writing⁴⁵⁸. A so-called ‘limb (b) worker’ is defined as an individual who has entered into, or works either under a contract of employment or any other type of contract under which they undertake to perform work or services personally for another party, where the work provider is not by virtue of the contract that of a client or customer of any profession or business undertaking. Also such a contract, like a contract of employment, may be express or implied, and may be concluded either orally or in writing⁴⁵⁹. This creates a two-tier system, whereby every

454 Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, “Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market” *ELLJ* 10, no. 3 (September 2019): 295, doi:10.1177/2031952519872322.

455 Countouris, “Waiting for Godot.”

456 Nicola Countouris, “Not Delivering: The UK ‘Worker’ Concept before the UK Supreme Court in Deliveroo - IWGB v CAC and Another [2023] UKSC 43,” *ELLJ* 15, no. 4 (December 2024): 786–802, doi:10.1177/20319525241242796.

457 Employment Rights Act 1996, c. 18, sec. 230 para. 1, accessed March 1, 2025, <https://www.legislation.gov.uk/ukpga/1996/18/>.

458 *Ibid.*, sec. 230 para. 2.

459 *Ibid.*, sec. 230 para. 3.

employee qualifies as a worker, but not every worker qualifies as an employee. Worker is a broader term than employee. UK's employment law is thus based on a trinary concept consisting of the employee, the self-employed person and an intermediate person, the 'limb (b) worker' who includes employees but is itself considered a self-employed person⁴⁶⁰. Therefore, the term worker is comprised of employees or limb (a) workers and also includes some self-employment persons. However, the category of limb (b) worker does not cover all forms of personal self-employment⁴⁶¹.

A slightly different worker concept is found in Sec. 296 para. 1 lit. b TULRCA 1992. The definition of a worker under TULRCA 1992 includes "any other contract whereby [the person] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his"⁴⁶². Unlike the ERA 1996's limb (b) definition, it relies solely on personal work or services "for another party to the contract who is not a professional client of his"⁴⁶³ instead of requiring that the work provider is "not by virtue of the contract that of a client or customer of any profession or business undertaking"⁴⁶⁴. This subtle yet important difference clearly indicates that TULRCA 1992's definition of 'worker' is broader in scope⁴⁶⁵. A distinction that, however, became increasingly blurred by case law which has blended both concepts into one⁴⁶⁶.

Various other employment laws, such as the NMWA 1998⁴⁶⁷, establish specific deviating definitions either easing the requirement for a strict personal duty to perform work or broaden the scope of who qualifies as a 'worker'. For instance, Sec. 43K of the ERA 1996 extends worker status for the purposes of whistleblower protections⁴⁶⁸. Additionally, judicial rulings have influenced and, at times, complicated the interpretation of worker status. A notable example is the case *National Union of Professional Foster Carers v The Certification Officer*⁴⁶⁹, which indicates that, in the context of certain RESC rights, a more inclusive and relationship-focused definition of employment status may be appropriate⁴⁷⁰, which is comprehensible in the context of interpretation of fundamental rights, as such rights must be regularly interpreted broadly. Additionally,

460 Clyde & Co LLP and Another v Bates van Winkelhof [2014] UKSC 32, para. 31.

461 Freedland and Prassl, "Employees, Workers and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom," 23.

462 Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, sec. 296 para. 1 lit. b, accessed April 13, 2025, <https://www.legislation.gov.uk/ukpga/1992/52>.

463 Ibid.

464 ERA 1996, sec. 230 para. 3.

465 Countouris, "Not Delivering."

466 Independent Workers Union of Great Britain v Central Arbitration Committee and Another [2023] UKSC 43.

467 National Minimum Wage Act 1998, c. 39, sec. 35 para. 1, accessed March 22, 2025, <https://www.legislation.gov.uk/ukpga/1998/39>.

468 ERA 1996, sec. 43K.

469 National Union of Professional Foster Carers v The Certification Officer [2021] EWCA Civ 548.

470 Countouris, "Waiting for Godot."

the terms used in the RESC constitute autonomous concepts, and the meaning of individual terms may vary contextually across its different articles⁴⁷¹.

The reason why employees are thought to need employment protection is that they are in a subordinate and dependent position vis-à-vis their employers. Limb (b) workers are deemed to be at least ‘substantively’ and ‘economically’ in the same position⁴⁷² and are “in the same need of that type of protection as employees ‘stricto sensu’”⁴⁷³. What initially sounds like a similar distinction between personal and economic dependence as in German law is, however, different and less clear. Therefore, in the following, it is necessary to clarify what is meant by a ‘contract of employment’ that defines ‘employee’ or ‘limb (a)’ status.

3.2.1. Employee or limb (a) worker

Over the years, courts and tribunals have established several so-called ‘tests’ to differentiate between a contract of employment and other contracts. In this case, ‘test’ means nothing other than that certain criteria, factors or indicators are used to determine the employment status – similar as it is done in Germany.

These tests for determining ‘employee’ status in the UK primarily rely on the common law definition of a ‘contract of service’ in comparison to a ‘contract for services’ which describes a pure civil contract. What is notable is that it seems that the employment status is not linked to the fact whether or not a contract is a contract to produce a work with a deliverable-oriented nature, as the NMWR 2015 explicitly mentions ‘output work’ as an option⁴⁷⁴. What is important, however, is that the working individual must agree to work personally for a pay⁴⁷⁵. This is the same for employees and limb (b) workers and also includes the question of whether the working individual can send another person to perform the task.

Another test considers the degree of control an employer has over the location, time, and the performance of the work, including decisions about what tasks are performed and how they are carried out⁴⁷⁶. Indicators that indicate the work provider’s ability to influence the work performed include the supervision of the activity, the adherence to the work provider’s instructions, and the level of discretion the working

471 In this regards, cf. Chapter 4.2.2. of this dissertation.

472 *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para. 17(4).

473 *Ibid.*

474 The National Minimum Wage Regulations 2015, 2015 No. 621, regulation 36, accessed March 1, 2025, <https://www.legislation.gov.uk/ukxi/2015/621/>.

475 Cf. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

476 Cf. *Yewens v Noakes* [1880] 6 QBD 530; *Lane v Shire Roofing Co (Oxford) Ltd* [1995] EWCA Civ 37.

individual has in determining their working hours⁴⁷⁷. This test is largely in line with the German criterium of being tied to instructions, however, the ruling in the case *Uber BV v Aslam*⁴⁷⁸ has shown that this control can be very broad by setting the fare, determining the route through the app, and imposing rules on driver behavior and vehicle standards or via a rating system to monitor and control driver performance and algorithmic penalizing of repeated refusals of orders. Therefore, the control tests can also align much with the determination criterium in German law – however, while German case law tends to focus more on positive control, i.e. through incentives or nudging⁴⁷⁹, UK case law tends to focus more on negative control, i.e. the possible disciplining or sanctioning of the working individual.

A further test is the so-called integration test. This test evaluates whether an employee is embedded within the company’s organizational structure⁴⁸⁰. Indicators of such integration include wearing company attire, participating in employee consultation processes, and being subject to the company’s disciplinary procedures⁴⁸¹. However, as businesses began moving away from tightly integrating workers into their organizational structures and instead relied more on employment relationships with minimal attachment to the company⁴⁸², the relevance of this test has decreased over time⁴⁸³. The integration test appears to be similar to the German criterion of integration into the work provider’s work organization. Both are linked to the institutional integration of the person performing the work. However, to the extent that German case law refers directly to the employer’s right to issue instructions⁴⁸⁴, or to the fact that the activity is linked to the company in such a way that it inevitably conveys an external determination of the activity and finally takes into account the dependence of the individual

477 Cf. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *O’Kelly v Trusthouse Forte Plc* [1983] ICR 728; cf. Brendan Burchell, Simon Deakin, and Sheila Honey, *The Employment Status of Individuals in Non-Standard Employment* (Great Britain: Department of Trade and Industry, 1999), 18.

478 Cf. *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5.

479 In this regard, cf. Chapter 3.1.1. of this dissertation.

480 Cf. *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101; *Bank Voor Handel En Scheepvaart N.v. v Slatford and Another* [1953] 1 Q.B. 248.

481 Cf. *O’Kelly v Trusthouse Forte Plc* [1983] ICR 728.

482 Cf. *Hewlett Packard Ltd v O’Murphy* [2002] IRLR 4 EAT; Simon Deakin, “The Many Futures of the Contract of Employment,” in *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, by Joanne Conaghan, Richard Michael Fischl, and Karl Klare (Oxford: Oxford University Press, 2004), 187, doi:10.1093/acprof:oso/9780199271818.001.0001; Samuel Engblom, “Equal Treatment of Employees and Self-Employed Workers,” *IJCLLIR* 17, issue 2 (June 1, 2001): 221, doi:10.54648/354231.

483 Engblom, “Equal Treatment of Employees and Self-Employed Workers,” 222.

484 BAG, Urt. v. 13.01.1983 - 5 AZR 156/82; BAG, Beschl. v. 13.11.1991 - 7 ABR 18/91, NZA, 1992, 989–92; BAG, Urt. v. 29. 5. 2002 - 5 AZR 161/01, NZA, 2002, 1232.

performing the work⁴⁸⁵, i.e., it focuses on the specific activity to be performed and its significance for the work process. The UK courts, on the other hand, focus again more on elements of personnel management (disciplinary procedures, promotion and bonus systems), which are to be distinguished from the nature and performance of the work. In this respect, these tests or criteria used in Germany and the UK are similar to a certain extent but not identical⁴⁸⁶.

Another test, known as the business reality test, examines the economic situation of the working individual. This test determines whether an individual works under an employment contract rather than a service contract if they do not operate their own business⁴⁸⁷, and deliberately make their labor's value available for use by others. Conversely, an individual is considered to run their own business if they own the essential equipment, bear the risk of financial loss, and directly receive the business' profits⁴⁸⁸. Thus, UK courts use this test rather to evaluate the working individual's economic independence than their economic dependence. Parallels can be drawn to *Wank's* approach of a lack of entrepreneurial opportunities.

One more test is the mutuality of obligation test⁴⁸⁹. According to this test, a key factor is whether the contract between the parties contains any indication of mutual obligations to offer and perform future services. If neither the work provider commits to providing work in the future nor is the working individual contractually obliged to accept and perform any work offered by the work provider, a crucial characteristic of an employment contract is missing⁴⁹⁰. This test evaluates not the activity itself but the stage prior to its execution in practice⁴⁹¹. However, the existence of this test in employment law is highly disputed⁴⁹². Furthermore, it is in this narrowness not recognized

485 BAG, Urt. v. 15.03.1978 - 5 AZR 819/76, 07; BAG, Urt. v. 07.05.1980 - 5 AZR 293/78, AP BGB § 611 *Abhängigkeit* Nr. 35.

486 Cf. Rolf Wank, "Der Arbeitnehmerbegriff des BAG im Vergleich zum englischen und amerikanischen Recht," in *Personalrecht im Wandel: Arbeitsrecht, Lohnsteuerrecht, Sozialversicherungsrecht; Festschrift für Wolf Dieter Küttner zum 70. Geburtstag*, ed. Peter Hanau et al. (Munich: C.H. Beck, 2006), 5, 16.

487 Cf. *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173.

488 Cf. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *ibid.*; *Lane v Shire Roofing Co (Oxford) Ltd* [1995] EWCA Civ 37.

489 Simon Deakin, "Interpreting Employment Contracts: Judges, Employers, Workers," *IJCLLR* 20, issue 2 (June 1, 2004): 208, doi:10.54648/IJCL2004012.

490 Patricia Leighton, "The European Employment Guidelines, 'Entrepreneurism' and the Continuing Problem of Defining the Genuinely Self-Employed," in *The Legal Regulation of the Employment Relation*, by Hugh Collins, Paul Davies, and Roger Rideout (London: Kluwer Law International, 2000), 295.

491 Cf. *McMeechan v Secretary of State for Employment* [1996] EWCA Civ 1166; *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217; *Nethermere (St Neots) Ltd v Gardiner and another* [1984] ICR 612.

492 Bob Hepple, "Restructuring Employment Rights," *ILJ* 15, no. 1 (1986): 71, doi:10.1093/ilj/15.1.69 – "sensible analysis has been deliberately ignored"; Deakin and Morris, *Labour Law*, 164 – "it cannot therefore function as an indicator of employee status."

by the CJEU⁴⁹³. Also in Germany, contractual clauses that at least exclude a mutual commitment between the parties for the future are generally considered an indication that speaks against an employment relationship⁴⁹⁴. However, unlike the UK test, this indication does not necessarily lead to the denial of employment status. Rather, contractual clauses or verbal agreements that authorize the working individual to refuse assignments are measured by whether they have extended the working individual's personal dependence and whether refusals are also practiced in such a way that they shape the overall picture of the activity⁴⁹⁵. When understood in this way, mutuality of obligation also served as an indication for the CJEU in the case *Yodel*, where working individuals were afforded discretion to accept or not accept tasks offered and employment status was denied, at least in the context of the Working Time Directive 2003/88/EC⁴⁹⁶.

These tests constitute different factors, however, not all of them need to be applied in every case. Consequently, the factors do not need to be collectively satisfied to confirm a contract of employment. However, positive results of the control test in combination with the mutuality of obligation test⁴⁹⁷ are considered an essential requirement for any contract of employment, i.e., employee status⁴⁹⁸.

3.2.2. Limb (b) worker

The question arises as to how a further distinction is made from the limb (b) worker. 'Limb (b) worker' is a broader term than 'employee', because it seems that the element of subordination might be present but not as pronounced. The distinction between employees and limb (b) workers is far from straightforward. The question as to where exactly to draw the demarcation line as well as which characteristics distinguish them and to what extent is still unresolved. However, a certain trend is emerging due to recent case law. Limb (b) workers are considered self-employed⁴⁹⁹, but they benefit from a set of core employment rights which is more limited than that enjoyed by employees⁵⁰⁰, which makes the correct distinction very important. Even though the court in the case *Uber BV v Aslam* considered that subordination might not be a

493 CJEU, Judgment of 13 January 2004, *Allonby*, C-256/01, ECLI:EU:C:2004:18, para. 72.

494 BAG, Beschl. v. 28.11.1990 - 7 ABR 51/89ArbG, *BeckRS* 31022535 (1990); BAG, Urt. v. 20.03.1996 - 7 AZR 524/95, *BeckRS* 30924865 (1996); BAG, Beschl. v. 7. 5. 2008 - 7 ABR 17/07, *NZA*, 2009, 1142-45.

495 BAG, Urt. v. 19.11.1997 - 5 AZR 653/96, *NZA*, 1998, 366.

496 CJEU, Order of 22 April 2020, *Yodel*, C-692/19, EU:C:2020:288.

497 Cf. *Nethermere (St Neots) Ltd v Gardiner and another* [1984] ICR 612.

498 *Ibid.*

499 *Clyde & Co LLP and Another v Bates van Winkelhof* [2014] UKSC 32, para. 31.

500 Freedland and Prassl, "Employees, Workers and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom," 17.

freestanding and universal characteristic of a worker⁵⁰¹, it also noted that “vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done”⁵⁰². However, intermittent or casual work that indicates a degree of independence or lack of subordination, would not lead to a qualification as a ‘limb (b) worker’⁵⁰³.

In making this decision, the UKSC relied primarily on the element of ‘control’ and its degree, which is generally a typical feature of subordination⁵⁰⁴. It interpreted this control very broadly, however, considering, i.e., the setting of the fare by the platform operator, the determination of the route through the app, the imposing rules on driver behavior and vehicle standards or the ability to monitor and control driver performance and algorithmic penalizing of repeated refusals of orders via a rating system, despite no actual obligation to accept such orders or direct sanctions⁵⁰⁵. The lack of mutual obligations makes the concept of ‘limb (b) worker’ broader than the concept of ‘limb (a) worker’, so that it seems justified not to apply the entire employment law to them. This is, however, a two-tier system that does not exist in Lithuanian law. The qualification as an employee under Lithuanian law necessarily leads to the conclusion of an employment contract and all other employment law regulations are also applicable to it. Otherwise, it would be considered illegal work⁵⁰⁶. The term employee in Lithuanian law corresponds therefore more to the term employee or ‘limb (a) worker’ in UK law than to the term ‘limb (b) worker’.

UK’s case law suggested for some time that rather similarly strict requirements regarding the test of mutual obligations apply for both types of workers, making it necessary to consider the control and mutual obligations for both statuses⁵⁰⁷. However, a combination of recent judgments suggests that a positive result of the mutual obligations test in combination with the control test is still necessary to gain employee status⁵⁰⁸. But it seems that only a positive result of the control test is needed to gain worker status⁵⁰⁹ and gives the impression that the requirements for mutual obligations in limb (b) contracts are either less stringent or that they are not even a necessary

501 Uber BV & Ors v Aslam & Ors [2021] UKSC 5, para. 74; Clyde & Co LLP and Another v Bates van Winkelhof [2014] UKSC 32, para. 39.

502 Uber BV & Ors v Aslam & Ors [2021] UKSC 5, para. 97.

503 Ibid., para. 87.

504 Ibid., para. 97; cf. ILO, *Annotated Guide to ILO Recommendation No. 198*, 35.

505 Cf. Uber BV & Ors v Aslam & Ors [2021] UKSC 5.

506 Cf. LR UĮ, *e-TAR*, art. 56 para. 1, accessed March 16, 2025, <https://www.e-tar.lt/portal/lt/legalAct/422c8b5042b811e6a8ae9e1795984391/asr>.

507 Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para. 5.

508 Cf. Pimlico Plumbers Ltd v Smith [2018] UKSC 29.

509 Cf. Uber BV & Ors v Aslam & Ors [2021] UKSC 5.

factor in determining worker status under limb (b), but only under limb (a)⁵¹⁰. It remains to be seen whether this demarcation will continue to hold or whether this is just the beginning of a shift away from the mutual obligation test for employee status as well, as advocated in the literature⁵¹¹ and instead focus again more on the control test.

Such a shift could also be made possible by the fact that UK court practice has been increasingly applying the principle of ‘primacy of facts’ in recent times. While at first glance the definitions of limb (a) and limb (b) give the impression that the distinction between them is primarily a declaratory one based on the form of the contract, it was made clear in the case *Autoclenz Ltd v Belcher* that the written contract alone does not determine employment status⁵¹². Instead, courts should look at the reality of the relationship between the parties. If actual circumstances of the working relationship contradict the written terms, the real agreement between the parties must be based on what was actually happening in practice and that employment status should be determined by the totality of circumstances⁵¹³. The UKSC also ruled similarly in the case *Uber BV v Aslam*⁵¹⁴.

However, it must also be noted that the control test results in the case *Uber BV v Aslam* are not the ‘minimum threshold’ for employment status, as already clarified in the case *Johnson v Transopco UK Ltd*⁵¹⁵. Despite similar on the first look, as it also involved a taxi service platform, the court in this case denied limb (b) status based on the arguments that the working individual was found to have been running their own business already for some time before entering into a contract with the platform and the work they performed for others was not materially different to the work for the platform. While in the case *Uber BV v Aslam*, drivers were not provided with the contact information of the riders and were discouraged from making contact with them, the platform in the case *Johnson v Transopco UK Ltd* provided contact details directly to the drivers, making it possible for them to enter into contracts with the riders directly. Furthermore, unlike Uber, the platform did not control the working individual as much as, since the prices were not calculated by the platform but by taximeter according to public regulations and drivers were able take their own routes⁵¹⁶. Moreover, while Uber drivers could be subject to a disciplinary regime and negative rating in case of ride rejection, which was regarded as a “classic form of subordination that is characteristic of employment relationship”⁵¹⁷, there was also a rating system in place in *John-*

510 Cf. *Windle & Arada v Secretary of State for Justice* [2016] EWCA Civ 459; furthermore, cf. Freedland and Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” 26.

511 Cf. Hepple, “Restructuring Employment Rights,” 71; Deakin and Morris, *Labour Law*, 164.

512 Cf. *Autoclenz Ltd v Belcher* [2011] UKSC 41.

513 *Ibid.*

514 Cf. *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5.

515 Cf. *Mr Christopher Johnson v Transopco UK Ltd* [2022] EAT 6.

516 *Ibid.*, para. 74–75.

517 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 99.

son v Transopco UK Ltd., but with no negative consequences if rides were not accepted. The court highlighted this as a form of ‘performance monitoring’, but not a form of ‘performance management’⁵¹⁸. However, what was also significant in the case is that the working individual earned less than 15 per cent of their income through the app and was therefore not regarded as dependent on the platform. Therefore, economic indicators played a role in the evaluation⁵¹⁹. This shows once again that the distinction between self-employed, employee and limb (b) worker is more fluid in the UK than in Germany. It seems less the type of subordination or dependence that is decisive, but rather its degree. Only intermittent or casual work that indicates a degree of independence or lack of subordination, would be incompatible with any worker status⁵²⁰. Furthermore, although the assessment in Germany allows for a degree of flexibility, it is nonetheless anchored in specific, predefined statutory factors, with the objective of flexibly subsuming the circumstances of the real-life case under these established legal terms. By contrast, the UK legal framework grants courts more discretion to develop and apply new factors or tests as part of the judicial decision-making process as seen in the case *Johnson v Transopco UK Ltd.*

3.2.3. Excursus: UK’s employment status(es) at reform

On 10 October 2024, the Employment Rights Bill (ERB)⁵²¹ was introduced in the House of Commons and had its 3rd reading in the House of Lords on 3 September 2025. The ERB seeks to implement measures aimed at enhancing employment rights and strengthening protections related to workplace issues. Initially, it was anticipated that the ERB would also introduce a new, uniform legal definition of the term ‘worker’. This expectation stemmed from the governing Labour Party’s 2021 policy document *A New Deal for Working People*⁵²², in which it promised to create a single status of ‘worker’ for all but the ‘genuinely self-employed’. The Labour Party’s 2024 policy document *Labour’s Plan to Make Work Pay: Delivering A New Deal for Working People* reaffirmed this commitment by promising to “move towards a single status of worker and transition towards a simpler two-part framework for employment status”⁵²³. However, after taking over the government, these reforms have been reframed as longer-term

518 Mr Christopher Johnson v Transopco UK Ltd [2022] EAT, para. 76.

519 Ibid., para. 70.

520 Uber BV & Ors v Aslam & Ors [2021] UKSC 5, para. 87.

521 Employment Rights Bill HL Bill 81, accessed April 10, 2025, <https://bills.parliament.uk/publications/59737/documents/6210>.

522 “Employment Rights Green Paper - A New Deal for Working People” (Labour Party, 2022), <https://labour.org.uk/wp-content/uploads/2022/09/Employment-Rights-Green-Paper.pdf>.

523 “Labour’s Plan to Make Work Pay: Delivering A New Deal for Working People” (Labour Party, 2024), <https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf>.

objectives⁵²⁴. There has been strong criticism that the ERB was not accompanied by the introduction of a new and comprehensive ‘worker’ definition⁵²⁵. Among others, *Deakin* argued that without such a new definition, many of the measures contained in the ERB would not achieve their intended effectiveness⁵²⁶.

The discussion surrounding employment status reform highlights three main elements of this commitment, along with important clarifications. First, it envisions a simplified binary framework distinguishing only between workers and genuinely self-employed individuals, thereby eliminating the intermediary category of ‘limb (b) workers’. Additionally, a new ‘single status’ definition would aim to consolidate the existing fragmented classifications into a unified legal concept and definition⁵²⁷. Furthermore, it is planned that the new status must “capture the breadth of employment relationships in the UK, adapt to changing forms of employment and guard against a minority of employers using novel contractual forms to avoid legal obligations”⁵²⁸, covering especially ad-hoc working individuals in the gig economy, i.e., it must be defined and shaped in sufficiently broad terms. On the other hand, it is planned that some employment rights will be extended also to those that will be referred to as ‘genuinely self-employed’⁵²⁹.

Countouris elaborated, as one of the first, on how such a new single status could look like. In this opinion, there are some key points that a new single worker status would need to address to move beyond the limitations of the current framework. He argues that instead of basing it on the idea of a ‘contract’, it should also cover ‘relational’ definitions that include non-contractual forms of ‘engagements’ and ‘arrangements’ which should be at the core of a new definition⁵³⁰. There should be no concentration on a personal work performance requirement, because especially in platform work, the work can be easily managed by algorithms regardless of whether it is performed personally or by others. He suggests treating personal work only as an indicator rather than a conclusive factor or to make it an ‘indicative’ factor by further elaborating that work is ‘predominantly’ (or ‘mainly’ or ‘primarily’) performed personally to acknowledge that some degree of substitution should be accepted in most cases. Finally, he suggests instead of solely relying on the idea of ‘employment’, to embrace a broader understanding of modern work relationships based on ‘work’ or ‘labour’ to make the new term ‘future proof’, as the nature of work is constantly evolving and will continue

524 “Make Work Pay: Employment Rights Bill” (Business and Trade Committee, 2024), <https://committees.parliament.uk/publications/46693/documents/241361/default/>.

525 Countouris, “Waiting for Godot.”

526 Public Bill Committee, “Sitting of 28 November 2024”, accessed April 5, 2025, https://publications.parliament.uk/pa/bills/cbill/59-01/0011/PBC011_EmploymentRights_1st-17th_Compilation_09_01_2025.pdf.

527 Countouris, “Waiting for Godot.”

528 “Labour’s Plan to Make Work Pay,” 7.

529 *Ibid.*

530 Countouris, “Waiting for Godot.”

to evolve. He highlights in this respect the Status of Workers Bill⁵³¹ introduced in the House of Lords in 2023⁵³² and which, according to *Countouris* already contains even more than these elements. The Bill proposes a single, unified definition of a ‘worker’ for the TULRCA 1992 and the ERA 1996 as any individual engaged by another to provide labor, unless they are genuinely operating an independent business on their own account⁵³³. In *Countouris*’ opinion, it should be the responsibility of the work provider to prove that the arrangement does not constitute an employment relationship. Furthermore, according to *Countouris*, a new worker term should clarify that for the avoidance of doubt, “where a worker or employee provides labour through a personal service company the employer is the third party for whom the labour is performed”⁵³⁴ to ensure that cases where a legal entity is interposed solely to obscure the employment relationship are also covered by the definition.

While this framework proposed by the *Labour Party* and further elaborated by *Countouris* seeks to simplify employment classification and enhance worker protection, it raises several concerns. First, a too broad definition of ‘worker’ could create ambiguity, particularly for freelance workers and small business owners who may again not fit neatly into the new binary categories. The requirement for businesses to prove a negative – that no ‘work’ relationship exists – could also place an excessive administrative and legal burden on work providers, especially smaller ones. Furthermore, rather than truly eliminating the existing trinary classification (employees, workers, and self-employed persons), with the plan by the *Labour Party* to grant certain employment rights also to genuinely self-employed individuals, it would effectively just shift the current legal threshold in favor of employment rights. This means that a new intermediate status would emerge between workers and those who are ‘truly and undeniably genuine’ self-employed individuals. There is a risk that this could potentially introduce a new gray area between workers and genuinely self-employed individuals and the same classification disputes that exist today may simply resurface in a different form. Moreover, the concept’s soft and somewhat vague definition of a worker might be too indeterminate for practical application, which plays a crucial role in employment law. Clear and enforceable criteria are essential for both work providers and working individuals to have at least guidance and understand their rights and obligations. Without greater specificity, the proposed framework risks leading to continued legal disputes over employment status, undermining its intended purpose of providing clarity and protection. Ultimately, only time will reveal whether this concept prevails or if an entirely different approach emerges.

531 Cf. Status of Workers Bill [HL], accessed March 19, 2025, <https://bills.parliament.uk/publications/53285/documents/4124>.

532 “Provisional List of Suggestions for Amendments to the Employment Rights Bill 2024” (Institute of Employment Rights, January 20, 2025), 17, <https://www.ier.org.uk/wp-content/uploads/Preliminary-identification-of-amendments-2nd-200125-clean.pdf>.

533 Cf. Status of Workers Bill [HL].

534 “Provisional List of Suggestions for Amendments to the Employment Rights Bill 2024,” 17.

3.3. Lithuania

3.3.1. Distinction of the employee from the self-employed person

Lithuanian law provides numerous starting points for the distinction of employees from the self-employed persons. The self-employed person must first be distinguished from persons who work based on an employment contract or based on a legal relationship equivalent to an employment relationship and from persons who work unpaid⁵³⁵. Art. 5 LR UĮ defines a self-employed person as:

“a natural person who is engaged in the activity that is not characterized by subordination to another person for whose benefit the work is performed, inherent to labor relations or legal relations deemed to be equal to labor relations, such activity is continued and/or repetitive, and opportunities for carrying out such activity in the future exist”⁵³⁶.

Decisive for the status is therefore, on the one hand, that the activity is not characterized by subordination to another person and is not performed for their benefit. At the same time, it is implied that these characteristics are inherent to labor relations or legal relations deemed equal to labor relations. Instead, self-employment is a continued and/or repetitive activity that is designed to be performed repeatedly in the future. One example referred to is the ‘individuali veikla’ (individual activity), a status in tax law⁵³⁷.

As a counterpart, Art. 4 para. 1 LR UĮ mentions a person who works under an employment contract or on the grounds of legal relations deemed to be equal to labor relations. Regarding persons who work under an employment contract, the law refers to the LR DK⁵³⁸. Persons who work on the grounds of legal relations deemed to be equal to labor relations are listed exhaustively in Art. 4 para. 3 LR UĮ. These are labor relations in the public sector such as judges or military personnel. This could be seen as a catch-all provision, however, legal relations deemed to be equal to labor relations clearly have a different meaning than the open catch-all provision of ‘employee-like persons’ in German law.

Art. 56 LR UĮ is also important for the distinction, as it defines the legal consequences of an incorrect classification. Accordingly, if a working individual performs work under subordination of and for the benefit of another person for remuneration, this work is considered illegal unless an employment contract has been concluded and the contractual relationship has been reported to the Lithuanian social insurance institution SoDra at least one working day before the start of work⁵³⁹. The question

535 LR UĮ, art. 3.

536 Ibid., art. 5.

537 LR GPMĮ, e-TAR, art. 2 para. 7, accessed March 16, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.C677663D2202/asr>.

538 LR UĮ, art. 4 para. 2.

539 Ibid., art. 56 para. 1 no. 1.

arises to what extent this is already sufficient for a distinction. According to this alone, every relationship would be illegal work if a natural person performs work under subordination and for the benefit of another person for remuneration in the absence of an employment contract and reporting to SoDra. In the overall systematic interpretation, this must be logically exactly congruent with the definitions in the LR DK. Therefore, it does not create a new definition but contains a self-evident statement or clarification and a legal consequence that if an undeclared or unformalized employment relationship exists according to the LR DK, it is considered illegal work. Thus, the norm is not alone suitable for a distinction of the terms employee and self-employed person but is more intended as a pure legal consequence in case of false self-employment. It can already be emphasized here that no written employment contract is required to qualify as a legal relationship. The absence of a written employment contract merely results in the legal consequence of illegal work. Furthermore, it is already apparent that subordination of some kind plays a significant role, although this has not yet been defined in more detail.

It is further evident that such a working individual is meant to be an employee. This is confirmed by Art. 21 para. 2 LR DK. Accordingly, an employee is a natural person who has reached the age of 16 (exceptions apply) and who undertakes to perform a job function for remuneration under an employment contract with an employer⁵⁴⁰. This definition serves to establish that an employee is a natural person who has reached the age of 16 and thus acquires working and legal capacity⁵⁴¹. The counterparty is the employer. It is legally defined in Art. 21 para. 3 LR DK as a domestic or foreign natural or legal person “for whose benefit and under subordination of whom, by an employment contract, a natural person has undertaken to perform a job function for remuneration”⁵⁴².

Both definitions already provide clues as to what makes the relationship between these parties special that it differs from other legal relationships. Combining the characteristics of these two parties from their definitions, the employment relationship appears to represent an exchange relationship of performance of a job function for remuneration, which takes place for the benefit and under subordination of one of the parties (the employer). The link between the two parties is the employment contract. Therefore, these definitions of employee and employer only serve to distinguish the employee from the self-employed person insofar as it refers to the definition of the employment contract. The decisive issue for the distinction between employee and self-employed person is therefore when an employment contract exists. There are several ways of approaching this.

A distinction can be made with some other contract types found in the LR CK which have a certain similarity to the employment contract and are to be distinguished

540 LR DK, art. 21 para. 2.

541 Ibid.

542 Ibid., art. 21 para. 3.

from it⁵⁴³. The ‘rangos sutartis’ (contract to produce a work) and the ‘paslaugų sutartis’ (services contract) are relevant types in this regard⁵⁴⁴. Both types of contracts have in common that someone uses their personal labor for the benefit of the contractual partner and does not just deliver money or an object or hand it over for use, as in the case of a purchase contract, a loan contract or a rental contract⁵⁴⁵. Both have a very similar basic structure to some contracts under German law – the ‘rangos sutartis’ corresponds to the German ‘Werkvertrag’ (contract to produce a work), whereas for the ‘paslaugų sutartis’ as an equivalent to the German ‘Dienstvertrag’ (service contract).

With the ‘rangos sutartis’, the distinction from the employment contract is supposedly easier than with the ‘paslaugų sutartis’. Here, one party (the contractor) undertakes to carry out certain work at their own risk in accordance with the order of the other party (the client). The contractor transfers the result of this work to the client. In return, the client undertakes to accept and pay for the work performed. The work is therefore carried out at the contractor’s own risk and a specific result must be achieved at the end, i.e. in comparison to an employment contract, the ‘rangos sutartis’ is deliverable-oriented. However, it must be noted that with the introduction of the project employment contract in the LR DK in 2017⁵⁴⁶, these boundaries began to blur, and the separation became significantly less clear-cut based on this ‘deliverable-oriented’ characteristic⁵⁴⁷.

The distinction is more difficult in the case of the ‘paslaugų sutartis’. Here, one party (the service provider) undertakes to provide the client with certain intangible, intellectual or other services. In comparison to the ‘rangos sutartis’, it is not related to the creation of a tangible object or result, i.e. certain actions are performed or certain activities are carried out to provide the client with corresponding services. These services are rendered according to the order of the client. In exchange, the client undertakes to pay for the services rendered. This means that the ‘paslaugų sutartis’ is not deliverable-oriented. In order to distinguish the ‘paslaugų sutartis’ from the employment contract, Lithuanian law stipulates that a ‘paslaugų sutartis’ only exists where there is no employment relationship or other subordination relationship involved between the service provider and the client⁵⁴⁸. The main distinguishing criteria from an employ-

543 Dambrauskienė, “Lanksčių užimtumo formų taikymas Lietuvoje,” 21.

544 However, this is not exclusively because Lithuanian law provides also for other legally standardized contracts on the basis of which one’s own labor is provided for another party. Furthermore, there can also be atypical contracts that lead to the same economic result due to the ‘freedom of contract’.

545 Cf. Tomas Bagdanskis, “Nekonkuravimo susitarimų, sudaromų tarp darbdavio ir darbuotojo, reglamentavimo ir taikymo problemos,” *Jurisprudencija* 20, no. 3 (2013): 1176, doi:10.13165/JUR-13-20-3-16.

546 Cf. LR DK, art. 89.

547 Although the nature of the project-based employment contract is more akin to that of a fixed-term contract based on objective reasons.

548 LR CK, *e-TAR*, art. 6.716 para. 2, accessed March 16, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.8A39C83848CB/asr>.

ment contract is therefore the lack of subordination in a 'paslaugų sutartis'.

Ultimately, the references are already sufficient to define the term employee more precisely: It is a person who performs continuous, non-deliverable orientated work under subordination and for the benefit of another person. The differentiation from individuals who perform unpaid work also already allows the conclusion that this performance of work must take place in return for remuneration⁵⁴⁹. The last piece of the puzzle that is missing, however, is the term 'subordination', which is still not clearly defined up to this point.

This crucial piece is provided by Art. 32 LR DK, which contains a comprehensive definition of the employment contract, the key feature of which appears to be this subordination. However, in order to gain a comprehensive impression of this definition, it is helpful to first look at the development of the concept of the employment contract in Lithuanian law.

3.3.2. Development of the Lithuanian employment contract

The concept of the Lithuanian employment contract is closely interwoven with the codification of Lithuanian employment law. Like the codification itself, this concept has its origins in the already mentioned LTSR-DĮK from 1972⁵⁵⁰. It regulated almost all working conditions in detail and left little room for flexible contractual arrangements between the parties to the employment contract – the working [person] ('dirbantysis')⁵⁵¹ on the one hand and the (almost exclusively state-owned) companies, institutions or organizations on the other hand. The employment relationship had been defined in the law as to what constitutes an employment contract:

“An employment contract shall be an agreement between a worker and an undertaking, institution or organization, whereby the worker undertakes to perform work of a certain specialty, qualification or to perform specific duties in accordance with the work regulations,

whereas the undertaking, institution or organization undertakes to pay the worker the wage and to ensure working conditions as set in labour laws, the collective agreement and by agreement between the parties”⁵⁵².

The working individual undertook to perform work of a certain specialty, qualification or to perform specific duties in accordance with the work regulations. In exchange, the undertaking, institution or organization undertook to pay the working individual the remuneration and to ensure working conditions as set in employment laws, a collective agreement and by agreement between the parties⁵⁵³. Essential char-

549 LR UĮ, art. 3.

550 Cf. LTSR DĮK.

551 'Dirbantysis' can in this context be understood as a separate legal term which includes the worker ('darbininkas') and the servant ('tarnautojas').

552 LTSR DĮK, art. 18.

553 Ibid.

acteristics were already apparent here: Some kind of continuous and non-deliverable-oriented performance of work as well as a kind of subordination relationship by performing the work in accordance with the work regulations set by the undertaking, institution or organization as the employer.

After Lithuania's independence from the Soviet Union, it goes without saying that Lithuania underwent an enormous economic and social transition. As a result, the long tradition of pure codification of employment law was somewhat blurred as some individual laws were enacted to make this transition possible⁵⁵⁴. In this context, the LR DSĮ should be mentioned, which took up the previously valid employment contract concept but replaced the working individual and the work provider in its definition with the terms 'darbuotojas' (employee) and 'darbdavis' (employer)⁵⁵⁵. It defined the contract slightly modified as:

“an agreement between an employee and an employer whereby the employee undertakes to perform work of a certain profession, specialty, qualification or to perform specific duties in accordance with the work regulations established,

whereas the employer undertakes to pay the employee the wage and to ensure working conditions as set in labor laws, other regulatory acts, the collective agreement and by agreement between the parties”.⁵⁵⁶

This definition of the term employment contract was also essentially included into the LR DK 2002 which came into force in 2003⁵⁵⁷. It was an agreement between an employee and an employer, where the employee undertook to

“perform work of a certain profession, specialty, qualification or to perform specific duties specified in the agreement in accordance with the work regulations established at the workplace”⁵⁵⁸.

In return, the employer undertook to

“provide the employee with the work, to pay him an agreed wage and to ensure the working conditions as set in labor laws, other regulatory acts, a collective agreement and/or other agreements between the parties”⁵⁵⁹.

Despite being substantive and not merely descriptive, this definition was relatively vague and not exhaustive. Consequently, Lithuanian case law further shaped this concept and translated it for practice – and thus automatically also the concept of employee.

It established the fundamental principle that, to identify an employment contract, all necessary indications of employment law relationships must first be established, and

554 Cf. Justinas Usonis, “Darbo teisės problemų evoliucija Lietuvoje po 1990 m.,” *Jurisprudencija* 19, no. 3 (2012): 1133 ff.

555 LR DSĮ, art. 3.

556 Ibid.

557 Cf. LR DK 2002, art. 93.

558 LR DK 2002.

559 Ibid.

an overall consideration of circumstances is required⁵⁶⁰. This means that the principle ‘primacy of facts’ applies. As in Germany, this approach makes the typological method appropriate for interpreting the concept of the employment contract, i.e., this type of contract was not determined strictly by rigid factors but by an overall assessment of indications typical in reality. Not all features characterizing the type of contract needed to be present, but rather they could be present to varying degrees and intensity. Accordingly, an employment contract had several essential features that distinguished it from other (pure civil law) contracts. First of all, the employee was obliged to perform a certain work or to fulfil certain duties, i.e. they must not only perform certain tasks, but must perform a certain job function of a permanent nature which is not deliverable-oriented⁵⁶¹. Furthermore, the employee must follow the work rules and obey the employer’s instructions when performing the job function, i.e., there is the criterion of subordination⁵⁶². The decisive characteristics were therefore the performance of a specific continuous and not deliverable-oriented job function. Additionally, the court practice determined that performing the job function according to work regulations and following the employer’s instructions constitute a subordination, which is absent in civil law contracts⁵⁶³.

However, it is questionable whether subordination in general must only be understood as performing the job function under instructions or supervision. *Supiot* formulated that “when workers afford a certain degree of autonomy in the performance of their duties, other indicators of their possible subordination must be sought to establish the legal status of their contract”⁵⁶⁴. Thus, a broader understanding of subordination can also encompass the integration of the worker into a collective organizational scheme, designed by and for others⁵⁶⁵. At that time, it was still possible to subsume *Supiot*’s broader understanding under the Lithuanian employment contract concept, because the LAT had not commented on whether *Supiot*’s concept of subordination was also one that was absent in civil law contracts according to Lithuanian law.

In addition, it was debated whether some judgments from tax law brought another aspect into play⁵⁶⁶. Thus, the essence of the employment contract seemed to be that the employee does not work at their own risk but performs the work at the employer’s risk. This view was based on the definition of an ‘individuali veikla’ (individual activity) as an apparent tax counterpart to the employment relationship. It is “any independent activity in pursuit whereof an individual seeks to derive income or any other economic

560 LAT, 2001 m. sausio 31 d. nutartis civilinėje byloje Nr. 3K-3-123; LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002.

561 LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002.

562 Ibid.

563 Ibid.

564 Supiot and Meadows, *Beyond Employment*, 12.

565 Ibid.

566 Martišienė, “Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai,” 140.

benefit over a continuous period⁵⁶⁷. In this respect, individual activity was understood as individual self-employment. Like the employment relationship, it is characterized by continuity. However, this continuity has a different character – self-employment involves one-off activities over a continuous period of time⁵⁶⁸, which is understood to mean repeatability⁵⁶⁹. In the literature, this tax concept was sometimes generally seen as the antithesis of the employment relationship. Reference was made to the fact that case law had apparently already recognized⁵⁷⁰, that the existence of an individual activity must be assessed on the basis of signs such as independence, entrepreneurial spirit, continuity and the purpose of the activity – i.e. the pursuit of an economic benefit⁵⁷¹.

A self-employed activity would therefore be an activity in which a working individual acts independently of other persons at their own will and discretion and from which it derives income directly⁵⁷². Furthermore, a self-employment activity involves a natural person taking risks using their own or borrowed funds and using the profits made⁵⁷³. Indeed, the employee, on the other hand, typically only bears the risk of losing the job in case the employer is economically unsuccessful. However, it should be noted that the initial judgments on which these characteristics were developed did not deal with the question of the distinction between an employment relationship and a pure civil law relationship, but with the question of whether or not the sale of real estate could be regarded as an individual activity with corresponding taxation of the income generated⁵⁷⁴. This means that the judgments were related to whether or not an activity serves the economic purpose of generating benefit or income for the person pursuing the activity. Since the employment relationship also serves the economic purpose of generating benefit or income in form of remuneration – albeit in a different manifestation – this blanket analogue transmission is rather unsuitable for the question of the distinction between individual activity and employment relationship. For a correct distinction and the establishment of appropriate criteria in employment law, it is not only the context-free characteristics that matter but also the precise opposing counter-term from which one wants to differentiate the employee or the employment contract⁵⁷⁵.

However, what appears to be a suitable criterion adopted from tax case law is ‘savarankiškumas’ (autonomy) which the LVAT emphasized when the case concerned

567 LR GPMĮ, art. 2 para. 7.

568 LVAT, 2006 m. birželio 16 d. sprendimas administracinėje byloje Nr. A-502-902-06.

569 LVAT, 2009 m. vasario 19 d. nutartis administracinėje byloje Nr. A-442-66/2009.

570 Martišienė, “Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai,” 140.

571 LVAT, 2006 m. spalio 20 d. sprendimas administracinėje byloje Nr. A-469-916/2006.

572 Ibid.; LVAT, 2009 m. vasario 19 d. nutartis administracinėje byloje Nr. A-442-66/2009.

573 LVAT, 2009 m. vasario 19 d. nutartis administracinėje byloje Nr. A-442-66/2009.

574 LVAT, 2006 m. spalio 20 d. sprendimas administracinėje byloje Nr. A-469-916/2006; LVAT, 2006 m. birželio 16 d. sprendimas administracinėje byloje Nr. A-502-902-06.

575 On the necessity of determining the appropriate counter-term, cf. Wank, “Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive,” 148 ff.

the distinction between relationships under an employment contract or a general civil contract. Autonomy is seen as a necessary condition for the existence of an independent activity⁵⁷⁶. It is understood as a certain degree of independence, i.e. the working individual has the right to choose the way the contract is fulfilled, acts at their own discretion and is not bound to the recipient of the service by a relationship of subordination or dependence⁵⁷⁷. In a way, autonomy represents the antithesis of subordination⁵⁷⁸. It can again be emphasized at this point that the employment relationship under Lithuanian law represents an exchange relationship – performance of a job function for remuneration. Job function means that the employee is obliged to perform a certain work or to fulfil certain duties, i.e. they must not only perform certain tasks, but perform work of a continuous nature which is not deliverable-oriented⁵⁷⁹.

The concept of employee in Lithuania up to this point has thus remained almost unchanged in terms of the essential criteria for more than 40 years, even if individual employment law and the social circumstances changed. The case law developed by the LAT that was based on this concept, was later included in another and, for the time being, the last major reform to the LR DK that came into force in 2017⁵⁸⁰ – however, with limitations.

3.3.3. The current legal concept of employment contract in Lithuanian Law

According to Art. 42 para. 1 LR DK, an employment contract is deemed concluded when the parties agree on its necessary conditions. According to Art. 34 para. 1 LR DK, the necessary conditions are the job function, the remuneration, and the workplace. If any of these essential conditions are absent, the contract is not considered to have been concluded⁵⁸¹. However, it is important to note that the law does not mandate any specific form for the existence of the contract's conclusion, meaning that an agreement on the necessary conditions can be verbal or implied. In addition, the necessary conditions can be interpreted very broadly⁵⁸². However, these broad conditions are of limited use when distinguishing employment relationships from self-employment, as they may also be present – albeit in a broader sense – within civil law contracts. Their specific legal significance and meaning arises only in the context of an employment contract and the particular characteristics associated with it. Therefore, it is necessary to first clarify what constitutes an employment contract in legal terms.

576 LVAT, 2006 m. spalio 20 d. sprendimas administracinėje byloje Nr. A-469-916/2006.

577 LVAT, 2012 m. birželio 28 d. nutartis administracinėje byloje Nr. A-602-164-12.

578 Cf. Martišienė, “Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai,” 139.

579 LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002.

580 LR DK, art. 32.

581 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentarai*, 56, 59.

582 Cf. Davulis, *LR DK komentarai*, 170.

3.3.3.1. Performance of a job function against remuneration (Art. 32 para 1. LR DK)

Today, an employment contract is

“<...> an agreement between the employee and the employer by which the employee undertakes to perform a job function for the benefit and under the subordination of the employer, and the employer undertakes to pay remuneration therefor”⁵⁸³

This means, as distinct from a pure civil law contract, i.e. as distinct from self-employment, the employment contract requires an employee to perform a specific job or function rather than specific individual tasks⁵⁸⁴. Civil law contracts under Lithuanian law are based on an obligation of the parties to carry out a certain predefined task based on an order and they can also be deliverable-oriented⁵⁸⁵. In contrast, in the case of an employment contract, the employee is required to carry out a function of a continuous nature, not linked to a deliverable (an assignment or a service rendered within a specific time)⁵⁸⁶, i.e., a continuing obligation is established, but it does not necessarily have to be permanent.

In addition, since 2017, it must serve the benefit of the employer, whereby this serves mainly to clarify who the actual employer would be in the case of a triangular employment relationship⁵⁸⁷. Despite the latter, Art. 32 para. 1 LR DK can until this point be seen as a pure translation of the case law of the LAT into codified law. The historical outline has shown that the essence of the definition of the employment relationship originated in the LTSR DĮK and runs like a thread almost unchanged through the history of Lithuanian employment law. Major changes therefore only occur insofar as individual terms of the definition would allow for new, different interpretations. The key characteristic is subordination which is necessary for every employment contract⁵⁸⁸ and comprehensively defined in Art. 32 para. 2 LR DK.

3.3.3.2. Definition of subordination (Art. 32 para. 2 LR DK)

Subordination is legally defined as:

“<...> the performance of a job function when the employer has the right to control or manage either the entire work process or part thereof, and the employee obeys the instructions of the employer and the procedures in force at the workplace”⁵⁸⁹.

That means when the employee performs the work function, the employer has the

583 LR DK, art. 32 para. 1.

584 LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002; cf. LVAT, 2011 m. birželio 30 d. nutartis administracinėje byloje Nr. A-502-2801-11.

585 LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002.

586 Ibid.

587 Davulis, *LR DK komentaras*, 86.

588 Ibid.

589 LR DK, art. 32 para. 1.

right to control or manage all or part of the work process and the employee must follow the employer's instructions or workplace procedures⁵⁹⁰. This subordination pertains to the obligations arising from the employment contract⁵⁹¹. It is evident that the job function performed by the working individual is performed under heteronomy, indicating primarily organizational supervision or control rights (right to control or manage) for the work provider and obedience obligations for the working individual⁵⁹². This supervision or control can be exercised by issuing instructions or by the procedures in force at the workplace – Art. 32 para. 2 LR DK does not mention any other sources of supervision or control.

This follows the case law of the LAT, which stated that there is no such form of subordination in civil service contracts between the parties⁵⁹³. However, the definition thus only contains one form of organizational subordination⁵⁹⁴ which is just a partial aspect of a broader understanding of subordination, which according to *Supiot* may also involve the integration of the working individual where there is hardly any supervision or control left⁵⁹⁵. The LAT did, however, not have the chance to specify whether there could also be other forms of subordination under the prior Lithuanian concept. Thus, what might seem like a straightforward codification of case law into codified law necessitates a different methodological approach, given that the term 'employment contract' in the LR DK includes elements of a legal definition. Legal definitions are open to legal interpretation, but this interpretability is restricted by the LR DK itself. According to Art. 5 para. 2 of the LR DK, the words and word combinations used in employment law provisions must be interpreted according to their general meaning, unless a specific legal, technical, or otherwise defined meaning is assigned. In instances where the general and specific meanings diverge, the specific meaning takes precedence⁵⁹⁶. According to these rules of interpretation set forth in the LR DK itself, the specific meaning defined in Art. 32 para. 2 LR DK must prevail, so that a mere integration of the working individual is not a factor in identifying an employment contract. This means, that the concept of subordination since 2017 is clearer but could at the same time be potentially narrower than before – as there was still potential of a broader understanding of subordination beforehand to be developed by the LAT. A potential that is not given anymore, as the typological method can since appropriately used only for the indicators under the level of subordination⁵⁹⁷, except if the courts

590 Ibid., art. 32 para. 2.

591 Davulis, *LR DK komentaras*, 132.

592 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 53.

593 Cf. LVAT, 2011 m. birželio 30 d. nutartis administracinėje byloje Nr. A-502-2801-11.

594 José João Abrantes et al., "Thematic Report 2009: Characteristics of the Employment Relationship" (Brussels: European Labour Law Network, 2010), 16, <http://www.labourlawnetwork.eu/frontend/file.php?id=165&dl=1>.

595 Supiot and Meadows, *Beyond Employment*, 12.

596 LR DK, art. 5 para. 2.

597 Cf. Wank, "Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff," 41.

would, as in Germany, decide that the typological method would further apply to the whole employment contract definition, making subordination more of a flexible concept, regardless of its narrow wording. However, Art. 32 para. 2 LR DK is formulated in such a clear and narrow way that there is little room for that in line with the norm's legal intent. The question therefore arises as to how broad the term can still be interpreted. There are only a few approaches in literature that try to fully grasp the term.

Davulis elaborates on how the presence of subordination can be assessed. According to him, in cases of labor disputes, courts or authorities are advised to evaluate its presence based on specific characteristics or indicators. He provides a total of 19 example indicators for this purpose, emphasizing that this list is not exhaustive and that the indicators are not ranked hierarchically⁵⁹⁸ – i.e., he follows the typological method and applies the principle ‘primacy of facts’. Following *Davulis*' remarks, the Lithuanian employment contract definition would therefore essentially follow a method provided by the ILO Recommendation No. 198⁵⁹⁹. Like the Recommendation suggests⁶⁰⁰, the Lithuanian employment relationship would be an exchange relationship – performance of work for remuneration. However, Art. 32 para. 1 LR DK stipulates as an important factor that this work is performed as a job function, i.e. that it has a continuous nature and is not deliverable-oriented – characteristics that the concept of ‘performance of work’ of Recommendation No. 198 does not inherently contain. Another important factor is that the work is performed personally. The most important factor, however, is subordination, whereby according to Art. 32 para. 2 LR DK, this is only to be understood as an organizational subordination based on formal control and supervision rights. Like Recommendation No. 198 suggests, in general, it also still follows the principle ‘primacy of facts’ as developed by the LAT. However, when interpreting the Lithuanian employment contract concept, the rules of contract interpretation⁶⁰¹ must be taken into account, i.e., the determination of the true intentions of the contracting parties on the contract's content, the nature and purpose of the contract and the subjective opinion of the parties on the content of the contractual terms as well as the understanding of the contractual terms at the time the contract was concluded⁶⁰². The fact of the conclusion of the employment contract can be inferred from the conduct of the parties, the nature of their actions and other relevant circumstances⁶⁰³. Thus, both parties must at least assume that the working individual is obliged to work under the

598 *Davulis*, *LR DK komentaras*, 133–34.

599 Cf. *Davulis*, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13.

600 Regarding the significance of Recommendation No. 198, cf. Chapter 4.2.3. of this dissertation.

601 LR CK, art. 6.193-6.195.

602 LAT, 2022 m. gegužės 26 d. nutartis civilinėje byloje Nr. e3K-3-151-684/2022, para. 39; LAT, “2018 m. kovo 2 d. nutartis civilinėje byloje Nr. 3K-3-68-248/2018,” para. 14; LAT, 2018 m. kovo 30 d. nutartis civilinėje byloje Nr. e3K-3-114-701/2018, para. 27.

603 LAT, 2018 m. kovo 2 d. nutartis civilinėje byloje Nr. 3K-3-68-248/2018, para. 17; LAT, 2019 m. kovo 28 d. nutartis civilinėje byloje Nr. 3K-3-122-248/2019, para. 24; LAT, “2021 m. gegužės 12 d. nutartis civilinėje byloje Nr. e3K-3-116-943/2021, para. 24.

control of the work provider or follow instructions⁶⁰⁴. In other words: There is no employment contract if there are no obligations to work under supervision or control or to follow instructions. In this respect, the principle differs slightly from that of Recommendation No. 198, because the latter infers the existence of an employment relationship primarily from facts relating to the performance of work and the remuneration of the worker, i.e. from their execution in reality without attaching any importance to the intention of the contracting parties. Therefore, compared to the Recommendation No. 198's concept of 'primacy of facts,' characteristics of an employment contract under Lithuanian law result from the agreed obligations of the parties⁶⁰⁵. In contrast, the subjective intention regarding the legal consequences of the existence of an employment contract do also not play a role under the Lithuanian concept. The question of whether or not an employment relationship exists, is in Lithuania not subject to the parties' "freedom of will"⁶⁰⁶.

To get a complete picture of the Lithuanian concept of subordination, it therefore makes sense to take a closer look at the 19 example indicators that *Davulis* lists in his commentary and to examine whether and under what conditions they are suitable for determining subordination according to the Lithuanian concept. This is done in the following.

1. "how much and how intensively the person who ordered the work regulates and how the working individual obeys these instructions";
2. "whether the person who ordered the work has the right to instruct where the work is to be carried out, at what time and in what order, and how the working individual is to behave during the work or at the workplace";
3. "whether the person who ordered the work gives instructions as to how the function of the work is to be carried out and what the requirements of the work are, or whether they gives instructions as to how the work is to be performed";
4. "whether the person who ordered the work has the right to control the work and supervise the work process at any time";

These indicators no. 1-4 would fall undoubtedly under the legal definition of subordination. Subordination in Art. 32 para. 2 LR DK focuses exclusively on the working individual's obligation to observe the work procedure and obey the work provider's instructions⁶⁰⁷. It is obvious that these indicators serve this purpose, as they observe, e.g., the extent and intensity of the employer's direction and the employee's compliance with this direction with regard to the time, place and manner how the work is to be performed, or whether the working individual can decide when to take time off work or allocate time for other purposes.

604 Cf. LAT, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023, para. 46.

605 Ibid.

606 Usonis and Bagdanskis, "Problems of Introduction of Flexibility into Lithuanian Labour Law," 603.

607 LR DK, art. 32 para. 2.

5. “whether the working individual is integrated into the work organisation or the employer’s business scheme”;

This indicator covers the integration of the working individual into the organization or business scheme of the person who ordered the work. It is not specified what the integration into the organization refers to. Integration could on the one hand be seen as a sign of economic dependence⁶⁰⁸ which is not a typical component indicating an organizational subordination. If, however, it is a mandatory organizational integration of the working individual, this is clearly an indicator that can serve to indicate subordination. If, on the other hand, it is another form of integration and includes no obedience obligations for the working individual, this is unsuitable to serve as a direct indicator for the existence of the Lithuanian concept of subordination, since it would go beyond the legal wording of Art. 32 para. 2 LR DK. However, it can serve as an indirect indicator suggesting that integration indicates control or supervision by the employer.

6. “whether the working individual is obliged to carry out the work himself or whether they may delegate the performance of the work to another person”;

Indicator no. 6 can be used to determine subordination only to the extent that it is used to determine whether the person who ordered the work has the right to control or direct at least a part of the work process, and the working individual is obliged to follow the instructions or the procedures at the workplace. Interpretations beyond this would be inadmissible. Therefore, if the instructions or the procedures at the workplace oblige the working individuals to carry out the work themselves and/or prohibit that they may delegate the performance of the work to another person, it would be a clear indicator for an organizational subordination. However, it could also well serve a different purpose in the definition of the employment contract, but outside the definition of subordination, as it could indicate the personal performance by the employee, which is an essential characteristic of the employment contract as a whole.

7. “whether the relationship between the person who ordered the work and the working individual is one-off or ongoing”;

This indicator is rather unsuitable to define subordination, as it does not entail any obligation of obedience on the part of the working individual. Instead of being related to subordination, it could indicate the fact that the work is being a job function of a continuous nature, i.e., only in the context of the interpretation of the other criterion in Art. 32 para. 1 LR DK that the employee receives a (steady) wage for continuously performing the work function⁶⁰⁹.

608 Bagdanskis and Usonis, “Problems of Qualifying an Employment Relationship and Undeclared Work in Lithuania,” 1111.

609 Cf. LR DK, art. 32 para. 1.

8. “whether the person who ordered the work requires the physical presence of the working individual at a particular place”;

This indicator contains two different statements: (1) the work provider obliges the working individual to be present at a particular place and (2) the physical presence derives from the work itself. In the first case, it would be clearly a sufficient indicator for an organizational subordination. In the second case, however, it is rather unsuitable to indicate the Lithuanian concept of subordination, when there are no obedience obligations, but the physical presence is only required, e.g., because the work is connected to a physical object or machine that has a fixed location.

9. “whether the working individual is paid for rest periods (holidays) and public holidays”;
10. “whether additional payment is made for the fact that the work is carried out while travelling or in a different location”;

While they may externally suggest a distinction from a commercial relationship, they are more accurately seen as symptoms of an employment relationship. This is because such requirements generally come into play under employment law once an employment relationship has already indisputably existed – making causality the crucial issue⁶¹⁰. While there can be functional criteria (factors or indicators) which reflect the purpose of applicable laws in their personal scope of application, there can also be purely descriptive criteria, which may appear to characterize a legal relationship at first glance but can be misleading due to their determination by the law applied to an already qualified legal relationship. They have a justification in tax law where no protective purpose of the law exists. Such descriptive criteria can also be used in international law to determine whether an activity that holds a special status under national law must instead be classified as ‘worker’ status under international law. Descriptive criteria – which only allow an ontological interpretation – can also be helpful defining the scope of application of a fundamental freedom for persons working under such special statuses – since the question in this case is not whether a fundamental freedom is applicable or not, but rather which one is applicable. However, caution is needed in this regard. If it is the national law that initially grants a person these rights, it cannot ultimately be used blanketly to indicate EU worker status – otherwise, the national status would ultimately determine the EU status⁶¹¹. Furthermore, it must be noted, despite being e.g. listed also as an example indicator in Recommendation No. 198, the significance of the travel payment by the work provider for indicating employment status seems to be questionable. It seems that other jurisdictions mostly only force the work provider to pay travel costs if it is an employment relationship, but there is not

610 Cf. Martišienė, “Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai,” 142.

611 Cf. CJEU, Judgment of 4 December 2014, *FNV Kunsten*, C-413/13, EU:C:2014:2411, para. 36 and the case law cited therein.

necessarily a reverse causality⁶¹².

11. “whether the remuneration for such work is the working individual’s sole and primary source of income”;

Also this indicator seems to be blanketly derived from the example indicators in Sec. 13 of Recommendation 198. This indicator refers to an economic dependence similar to the economic dependence of employee-like persons in German law that goes well beyond Lithuania’s legal definition of an organizational subordination and even the concept of the Lithuanian employment contract as a whole. Therefore, the use of such an indicator would have the potential to extend the Lithuanian employment contract beyond legal intent.

12. “whether the working individual may decide to take time off work to perform his/her function at other times or to devote his/her time to other purposes”;

As already explained with regard to indicator no. 6, this indicator can only be used to check the extent to which the working individual is prohibited to take time off work at their free will. In this respect, however, this criterion overlaps with indicator no. 2.

13. “whether the working individual has the opportunity to behave as a person integrated into the organisation of the person who ordered the work, or whether they is obliged to obey the internal rules of the organisation”;

This indicator includes two aspects: The opportunity for the working individual to be integrated into the organization and the compliance with internal rules of the organization. As far as subordination is concerned, it is beyond doubt that compliance with the internal rules is an indicator of the existence of subordination. As far as the opportunity of organizational integration is concerned, there are doubts, as it is not specified what the integration into the organization refers to and the mere opportunity of integration into the employer’s organization does not necessarily entail a control-/obey relationship necessary under the Lithuanian definition. If it is a mandatory organizational integration, this is clearly to be affirmed. If, on the other hand, it is another form of integration, this is unsuitable to serve as a direct indicator for the existence of subordination – but only an indirect one, if it would give hints to a potential control-/obey relationship.

14. “who provides the materials and tools needed for the work and pays for their acquisition”;

This indicator can also only be used to a limited extent to assume an organizational

612 ILO, *Regulating the Employment Relationship in Europe*, 49.

subordination as Art. 32 para. 2 LR DK describes it. It is only suitable insofar as the person doing the work is obliged to work with materials and tools provided by the person who ordered the work and is prohibited from using their own tools if available. Typically, in its generality, such an indicator can indicate an integration into the work organization. However, as already clarified, integration is not a decisive factor under the Lithuanian concept but could only serve as an indirect indicator for the question whether there is a control/obey relationship. In the Lithuanian context, this indicator could therefore just serve as an indirect indicator for the existence of control or supervision rights and obedience obligations which in turn indicate a potential subordination.

Furthermore, it could indicate autonomy and thus, by implication, subordination. It is a typical characteristic of an independent activity that the self-employed person has and uses their own means of production. However, this is the default natural state in case of self-employment, i.e. without the parties having made an agreement in this regard. Thus, if there is a contractual agreement (whether written or implied) that the working individual will provide the materials and tools needed, this rather tends to indicate the existence of an employment relationship under the Lithuanian definition, since both parties consider it necessary to agree on this, which deviates in their view from the default natural state.

However, the individual case is decisive, as it should be mentioned that even under a Lithuanian employment relationship it is possible for the employee to use their own equipment or property, even if there must of course be reimbursement of costs⁶¹³.

15. “to whom the ownership of the product created passes”;

This indicator in this generalized form is problematic. Also in civil law contracts, the transfer of ownership is essentially freely negotiable within the limits of the *nunquam clausus* of the legal norms governing the transfer of ownership. In many cases, intellectual property rights represent the product when using working individuals. Lithuanian copyright law provides that only the economic rights to works created by employees in the performance of their official duties or work functions shall generally be automatically transferred to the employer for a period of five years in the absence of a provision in the employment contract⁶¹⁴. However, the same result can also be achieved by means of a civil contract. Therefore, only a forced automatic transfer of such rights to the created product can serve to assume the existence of subordination – an automatic transfer of these *per se*, however, cannot.

16. “the extent to which the working individual is free to carry out other identical or similar activities within the limits of this contract”;

613 LR DK, art. 31 para. 1.

614 LR ATGTJ, e-TAR, art. 9, accessed March 16, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.551F0CDE5B64/asr>.

This indicator can also only be used for the assumption of subordination to determine whether the working individual is prohibited from performing other activities. The freedom of the working individual to do so, in turn, cannot be used to assume that there is no employment relationship. Therefore, this indicator in its generality is also not suitable for determining of the Lithuanian concept of organizational subordination. However, even further problems apply if understood in the context of the following indicator.

17. “whether the working individual has and can have other clients”;

This indicator includes two statements. The question of whether the working individual has other clients seems to be related to the issue of economic dependence which is not included in the Lithuanian definition. The question of whether the working individual can have other clients might be suitable as it describes a prohibition and therefore an obedience obligation. However, this indicator clashes with Lithuanian legal reality. Lithuanian employment law explicitly allows the employee to work for other employers⁶¹⁵ or to perform several work functions with the same employer⁶¹⁶. Furthermore, Lithuanian law has the particularity that a non-competition clause must expressly be agreed even during the term of the employment contract, must generally be compensated and it is possible to deviate from this only under narrow conditions⁶¹⁷. This is different in other jurisdictions, e.g. in German, where each and every employee is restricted by an obligation of loyalty towards the employer⁶¹⁸. Furthermore, it is possible to provide an individual activity besides having an employment relationship. Moreover, non-competition clauses in civil law contracts are not uncommon (within the limits set by competition law)⁶¹⁹.

Against the background of this special Lithuanian situation, it is even possible to say that if the working individual is allowed to work for other work providers and compete with the work provider, it is even more likely that there is an employment relationship rather than none.

18. “whether the work performed is casual in nature”;

This indicator can only serve for the assumption of the existence of subordination insofar as there would be less organizational dependence if it is only occasionally performed and there is no continuing obligation. However, since the definition of subordination in the LR DK is limited to organizational subordination, it does not matter whether the work is casual. Rather, this indicator serves to verify whether the service

615 Cf. LR DK, art. 66 para. 1 no. 7.

616 Cf. *Ibid.*, art. 35.

617 *Ibid.*, art. 38.

618 HGB, sec. 60.

619 Cf. LR CK, art. 2.164.

is provided on a continuous basis, i.e. in line with Article 32 para. 1 LR DK, and is no question of subordination according to according to Article 32 para. 2 LR DK.

19. “whether the work is part of the usual occupation or business of the person who ordered the work”.

The wording of the legal definition of subordination does not actually allow for such a broad interpretation, as the organizational subordination stems from the obligations of the employment contract. A certain similarity of this example indicator could be seen with the interpretation of the employment relationship by the Lithuanian state tax inspectorate VMI from its commentary where it further notes that it is important to consider the functions performed by the individual within the company. Specifically, if the functions carried out by the self-employed individual are similar to those performed by the company’s employees, this similarity could serve as an indicator of an employment relationship⁶²⁰. This indicator has its *raison d’être* in the tax context but would be problematic in employment law as it would take into account not the structure of the work under the employment contract, but solely the type of work and would make employment status depended on external factors that are not related to the contractual relationship itself, e.g., whether other employees of the company perform similar kind of work (tasks), however, in a different contractual structure.

Overall, the analysis of *Davulis’* example indicators reveals significant issues. In some cases, their content is unclear because they lack the considerations behind them and the context in which they should be understood. This could be attributed to the fact that example indicators, in their generality, are difficult to draw conclusions from for individual cases because indicators arise from the specific reality of each case, which is diverse. *Davulis* himself highlights that the example indicators do not represent a checklist and are only exemplary but not exhaustive. Accordingly, it is obvious that the order of the listed indicators does not represent priority levels, but rather the totality of the circumstances of the individual case must be taken into account. However, in their generality, the example indicators tend to serve more as keywords or headlines for an ontological but – without adjustment of the wording to the individual case – not a teleological interpretation, which is necessary due to the principle of the ‘primacy of facts’. Some of the indicators seem to not indicate subordination but other factors of the Lithuanian definition under Art. 32 para. 1 LR DK, others are not suitable at all as they would clearly go beyond the scope of the Lithuanian employment contract as defined in Art. 32 LR DK. Therefore, a court or authority that seeks to interpret the concept of subordination or the employment contract in general should always disclose its considerations as to why a particular indicator was used, e.g., to indicate subordination. Only in this way can it be ensured that a teleological interpretation in line with the principle ‘primacy of facts’ is guaranteed and that a decision does not go beyond the legal intent of the LR DK.

620 VMI, “KM0292 11/22/18,” accessed March 16, 2025, <https://www.vmi.lt/evmi/lt/u%C5%BE-darb%C4%85-lietuvoje1>.

3.3.3.3. Bearing the commercial, financial or industrial risks (Art. 32 para. 3 LR DK)

Furthermore, Art. 32 para. 3 LR DK provides that:

“In carrying out a job function, the commercial, financial or industrial threat that arises falls to the employer”⁶²¹.

It is still questionable what functions this paragraph serves and in which relationship it stands towards Para. 1 and 2. First, it should be seen as a prohibition for the employer on passing on costs, liability, economic risks or losses to the employee, and allow, e.g., a liability of the employee for damage caused only to the narrow extent expressly specified by the LR DK⁶²². The causality is: If there is an employment relationship, the employer bears the costs and risks. However, there is the question whether this paragraph also serves a second function of reverse causality. It is argued in parts of the literature that this can also be seen as a further criterion to identify an employment relationship, describing how the work is performed and therefore to distinguish it from a self-employed contract relationship. The argument behind it is that only a person who takes commercial and industrial risks, can work autonomously in a profit-oriented manner⁶²³. If understood in such a way, the bearing of risk would serve more as a guiding principle for the teleological understanding of subordination and autonomy rather than as a separate criterion, i.e. more a question of whether the possibility of autonomous decisions exists – and therefore a further indirect indicator to indicate subordination.

What suggests the latter, i.e. speaks against it being a factor in the definition, is that illegal false self-employment is linked solely to the fact that it exists if work is performed under the subordination of and for the benefit of another person for remuneration⁶²⁴. The content of this form of illegal work must logically be completely congruent with the content of the definition of the employment contract given by Art. 32 of LR DK. Similarly, Art. 6.264 para. 2 of the LR CK offers a further indication, which regulates a person's liability for damage caused by the fault of its employees. In doing so, Art. 6.264 para. 2, on the one hand, refers to working under an employment contract and, on the other hand, to working under a (pseudo) civil contract where the working individual is acting under the direction and control (i.e., subordination) of the work provider⁶²⁵, i.e., where an actual employment contract is concealed⁶²⁶.

However, even if financial risk is not a defining factor but merely an indicator, it must still be considered carefully. If the individual performing the work is genuinely

621 LR DK, art. 32 para. 3.

622 Cf. Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 54.

623 Cf. Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13.

624 LR UĮ, art. 56 para. 1.

625 LR CK, art. 6.264 para. 2.

626 Cf. Valentinas Mikelėnas, ed., “Lietuvos Respublikos civilinio kodekso. Šeštoji knyga. Prievolių teisė. Pirmas tomas” (Vilnius: Justitia, 2003), 368–69.

self-employed, bearing financial and commercial risk and retaining profits is the default natural state. In such cases, there is no need for an artificial contractual transfer of risk from the work provider to the working individual. Thus, when it comes to the treatment of this indicator, there are three possible scenarios which are exactly the opposite of what one might expect at first glance⁶²⁷:

1. Assumption of financial risk and success without explicit or implicit contractual agreement – This suggests the absence of an employment relationship, as neither party considers it necessary to formalize any transfer of risk from the work provider to the working individual.
2. The contractual agreement stipulating that the working individual assumes financial risk – This indicates the presence of an employment relationship, as both parties find it necessary to define this obligation contractually.
3. The contractual agreement stipulating that the work provider assumes financial risk instead of the working individual – This suggests a genuine self-employed status, as both parties acknowledge that the work provider would not otherwise bear the financial risk.

In conclusion, it can be noted that Lithuanian employment law focuses exclusively on a narrow personal dependence in determining an organizational subordination. A reference to economic dependence is methodologically inadmissible against the background of the wording of Art. 32 para. 2 LR DK. Thus, briefly summarized, the characteristics of an employment contract in Lithuania only include the performance of a job function, i.e. the continuous, non-deliverable-oriented work for the benefit of another person for remuneration. This performance takes place under subordination, i.e. the work provider has supervision or control rights via instructions or via the procedures in force at the workplace in relation to at least a part of the work and the working individual must comply with these⁶²⁸. The spirit of this definition is clearly a traditional employment relationship in the employer's company based on an SER. An evaluation of the bearing of the financial risks can help to assess autonomy and in the result subordination, however, it is not a separate factor of the Lithuanian definition of the employment contract.

3.3.3.4. Special Types of Employment Contracts Introduced into the LR DK in 2017

It is further necessary to examine whether the more flexible employment contract types introduced in 2017⁶²⁹ lead to any deviation from the previous assessment results.

First, this question arises in particular with regard to the temporary agency

627 In this regard, cf. Michael Doherty, "The « Worker », EU Law, and Collective Bargaining," *Revue de Droit Comparé Du Travail et de La Sécurité Sociale*, no. 4 (December 31, 2021): para. 3, doi:10.4000/rdctss.2713.

628 LR DK, art. 32 para. 1, 2.

629 In this regard, cf. Chapter 2.3 of this Dissertation.

employment contract and the triangular employment relationship⁶³⁰. These contract types seem to differ in several key respects from the standard employment contract defined in Art. 32 LR DK. Although remuneration continues to be paid by the employer, the employee performs their work not for the benefit of their employer (or temporary agency), but rather for the benefit of the user enterprise⁶³¹. The employee remains subject to the authority of their employer but, within the scope of their work function, is also subordinated to the user enterprise and acts under its supervision⁶³². Thus, while the principle of subordination remains consistent with Art. 32 para. 2 LR DK, the user enterprise also possesses a right to issue instructions to the employee, which the employee is obligated to obey. The same applies to adherence to the internal procedures of the user enterprise. However, disciplinary measures or liability in cases of poor performance apply exclusively in relation to the actual employer⁶³³. Accordingly, the fundamental structure relevant to distinguish from self-employed relationships remains unchanged compared to a standard employment contract. The work is still performed under organizational subordination as defined in Art. 32 para. 2 LR DK, although this subordination is now divided between the employer and the user enterprise. Nevertheless, certain exceptions exist. The employee retains the right to reject an assignment from a user enterprise by informing their employer no later than one working day after receiving the assignment. Such rejection does not constitute a breach of duty, and the employee is not required to provide reasons. However, in such cases, the employee forfeits the right to remuneration for the period between assignments⁶³⁴. As a general rule, for periods between assignments of up to five consecutive working days (and no more than once a month), no remuneration is owed. For any additional days between assignments, the employee must receive remuneration from the employer based on the statutory monthly minimum wage⁶³⁵.

Another relevant contract is the apprenticeship contract⁶³⁶, which is primarily intended to help the employee acquire or improve professional skills. This remains true even when products of economic value are created or actions beneficial to the employer are carried out in the process⁶³⁷. Under an apprenticeship contract, the employer agrees to provide work and pay wages to a person (the apprentice) seeking to acquire the necessary qualifications or competencies for a profession, while the apprentice agrees to perform the work function in a manner subordinated to the employer in accordance with Art. 32 para. 2 LR DK, and for the employer's benefit. The apprenticeship

630 LR DK, art. 33 no. 3, art. 72 para. 1.

631 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentarai*, 212.

632 Davulis, *LR DK komentaras*, 277.

633 Ibid.

634 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentarai*, 204.

635 LR DK, art. 76.

636 Ibid., art. 66 no. 4, art. 81.

637 Davulis, *LR DK komentaras*, 293.

contract must include provisions regarding working time and remuneration. For the actual time worked, the apprentice must receive the wage specified in the contract, which must be at least the statutory minimum monthly or hourly wage⁶³⁸. Again, the same defining factors found in Art. 32 LR DK are present.

A contract previously discussed is the project-based employment contract⁶³⁹, which seems to blur the line between employed and self-employed work⁶⁴⁰. It is, in the broadest sense, a fixed-term contract based on objective reasons⁶⁴¹. Under this contract, the employee undertakes work which is aimed at achieving a predefined result. Unlike the process-oriented work function under Art. 32 para. 1 LR DK, this type of work focuses on both the execution and the final result of the work. Completion of the contract is thus tied to a deliverable, bearing similarities to a 'rangos sutartis'⁶⁴². However, key differences exist. Notably, remuneration does not depend solely on the successful completion of the project⁶⁴³. Although the result is emphasized⁶⁴⁴, the standard measure of the employee's performance remains the time worked, based on a fixed average working time rate⁶⁴⁵, necessary to achieve the result⁶⁴⁶. At minimum, the statutory wage must be paid for the time worked⁶⁴⁷. This remuneration is owed even if the project fails or yields unsatisfactory results, since the employer assumes the commercial, financial, or technical risk⁶⁴⁸. While employees under this contract may complete the work on their own schedule, either at the workplace or a location of their choosing⁶⁴⁹, a degree of an organizational subordination remains. The employer must be able to monitor and evaluate the performance and interim results to verify that the employee is fulfilling their contractual obligations⁶⁵⁰. In this sense, the employer still exercises control or supervision over the work and the employee must obey, consistent with Art 32 para. 2 LR DK⁶⁵¹. Additionally, the employee is generally required to comply with the employer's internal regulations⁶⁵². Therefore, although somewhat attenu-

638 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 227.

639 LR DK, art. 66 no. 4, art. 81.

640 In this regard, cf. Chapter 2.3 of this Dissertation.

641 Cf. Davulis, *LR DK komentaras*, 300.

642 Cf. LR CK, art. 6.644.

643 Davulis, *LR DK komentaras*, 300.

644 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 233.

645 *Ibid.*, 234.

646 Davulis, *LR DK komentaras*, 302.

647 *Ibid.*, 303.

648 LR DK, art. 32 para. 3; cf. Davulis, *LR DK komentaras*, 303; Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 236.

649 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 233.

650 Davulis, *LR DK komentaras*, 303.

651 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 234.

652 *Ibid.*, art. 235.

ated, at least when it comes to the organization of working time and the determination of the place of work⁶⁵³, the essential characteristics of an employment contract under Art. 32 LR DK are still present in project-based employment contracts, including the organizational subordination of Art. 32 para. 2 LR DK.

A job-sharing contract⁶⁵⁴ obliges the employee to perform work in accordance with a working time arrangement determined jointly with another employee, while the employer commits to paying wages and setting other necessary employment conditions. This form of contract clearly reflects the subordination concept under Art. 32 para. 2 LR DK, however, with one limitation: the employee has greater influence than the employer over the distribution and timing of working hours⁶⁵⁵. In job-sharing, each employee may independently schedule their working time in coordination with the other employee. Nonetheless, a general working time regime is established, and the employee must coordinate with the employer upon request⁶⁵⁶.

The same applies to the multi-employer employment contract⁶⁵⁷, in which the employee agrees to perform work functions for multiple employers. Among them, one employer must be designated as the principal employer, responsible for creating the work schedule, handling tax obligations, and paying social security and other contributions⁶⁵⁸. The employee must either simultaneously report to both employers without dividing working time, or allocate time between them, in which case remuneration must be arranged accordingly⁶⁵⁹. A unique aspect of this contract is that the employee is not exclusively tied to one employer, meaning that internal rules of a specific employer may apply only partially or exceptionally⁶⁶⁰. Nonetheless, the same defining elements of Art. 32 LR DK, including organizational subordination under Art. 32 para. 2 LR DK, are present – only divided proportionally between the two employers based on the time allocated⁶⁶¹.

In conclusion, although the flexible employment contracts introduced in 2017 may initially appear distinct from the employment contract defined in Art. 32 LR DK, they deviate only partially from the general rules governing the conclusion and performance of employment contracts. Their provisions establish the same basic rights and obligations as those defined by the standard employment contract under Art. 32 LR

653 The work function can also be carried out outside the workplace. In this regard, parallels can be drawn to remote work under Art. 52 LR DK, where the weaker subordination is reflected merely in a lower place commitment, rather than in more flexible time schedule.

654 LR DK, art. 66 no. 6, art. 93.

655 Davulis, *LR DK komentaras*, 305.

656 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 240.

657 LR DK, art. 66 no. 7, art. 96.

658 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 245.

659 Davulis, *LR DK komentaras*, 310.

660 *Ibid.*

661 Bagdanskis, Mačiulaitis, and Mikalopas, *LR DK Komentaras*, 245.

DK⁶⁶², applying the same determining factors – albeit in an attenuated form in some cases when it comes to time or workplace commitment. They reference and are structured around the same legal system and share the fundamental characteristic of a formal organizational subordination as defined in Art. 32 para. 2 LR DK.

3.4. Interim Conclusion

The Lithuanian employment status in employment law is characterized by the Lithuanian approach of codification and a binary approach to distinguish between employees and self-employed persons. Lithuanian employment law essentially systematically follows the principle of ‘all or nothing’, which is inherent in binary systems⁶⁶³, i.e. if a contract is classified as an employment contract, employment law norms are applicable to it. If, on the other hand, a contract is classified as a civil law contract, not a single norm of employment law is applicable to it. Lithuanian employment extends in some instances beyond employment relationships based on an employment contract to persons who work on the grounds of legal relations deemed to be equal to labor relations but are not considered employment relationships in general due to a special status⁶⁶⁴. These are listed exhaustively in the law⁶⁶⁵. Furthermore, in some instances, it even extends to persons performing certain unpaid work listed exhaustively in the law as well⁶⁶⁶. However, there is no open catch-all provision or intermediary category of employment status, i.e., a consideration of whether, under certain circumstances, a broader group of addressees not working under an organizational subordination based on control and obedience would be similarly or even equally in need of protection with regard to an individual norm or at least a regulatory area of norms – such it is the case in the UK and Germany.

With the enactment of a LR DK in 2017, some clarity was provided regarding what constitutes an employment contract, which forms the basis for the Lithuanian concept of an employee. To achieve this, the case law related to the previously applicable employment contract concept, which was still largely based on the LTSR DĮK, was codified into written law. However, this codification, with its now very narrow definitions⁶⁶⁷, eliminated the possibility of creating flexibility for the future. An employment contract is characterized by work being performed for remuneration. This work is carried out for the benefit of another and has a continuous and non-result-oriented

662 Davulis, *LR DK komentaras*, 261.

663 Cf. Miriam Kullmann, “‘Platformisation’ of Work: An EU Perspective on Introducing a Legal Presumption,” *ELLJ* 13, no. 1 (March 2022): 71, doi:10.1177/20319525211063112.

664 LR UĮ, art. 4 para. 1.

665 *Ibid.*, art. 4 para. 3.

666 *Ibid.*, art. 9.

667 This is not changed by the flexible types of employment contracts introduced into the LR DK in 2017; in this regard, cf. Chapter 3.3.3.4 of this dissertation.

nature⁶⁶⁸. This already distinguishes the Lithuanian concept from those in Germany and the UK, where employment status can arise even with result-oriented work (in Germany, at least in the case of employee-like persons).

A key distinguishing criterion from self-employed persons is a form of subordination, which focuses on the right of the work provider to control or supervise at least parts of the work through instructions or internal rules on one side, and the obligation to follow them on the other. This factor of subordination essentially corresponds to the control test in the UK or the concept of being bound by instructions in German law, albeit with a narrower scope than the control test and a narrower understanding than the criterion of determination in German law.

It could be well justified to cover under the Lithuanian concept of organizational subordination all kinds of *de facto* obligations to follow instructions, e.g., resulting from the possibility of dismissal at any time in case of management bodies⁶⁶⁹. However, in the discussed most recent rulings on platform or crowdwork in Germany and the UK, it was established that in both the control test in UK law and the criterion of determination in Germany, not only instructions in the traditional sense, but also steering or nudging through rating systems or incentives could be sufficient in certain cases. Such an extensive interpretation would likely not be possible under the Lithuanian concept of subordination⁶⁷⁰, because it requires, as an essential element, an obligation to follow instructions, internal rules or work at least under supervision, and more indirect influence would likely not suffice⁶⁷¹. An extension of the Lithuanian employee concept to crowd or platform workers, as seen in Germany or the UK, would therefore likely not be possible.

The integration test in the UK appears to be similar to the German criterion of integration into the work provider's work organization. Both are linked to the institutional integration of the person performing the work. However, to the extent that German case law refers directly to the employer's right to issue instructions⁶⁷², or to the fact that the activity is linked to the employer in such a way that it inevitably conveys an external determination of the activity and finally takes into account the dependence of the person performing the work on the employer's equipment or its employees⁶⁷³. It focuses on the specific activity to be performed and its significance for the work or production process. The UK courts, on the other hand, focus on elements of personnel

668 With the exception, at least to some extent, of the project-based employment contract; in this regard, cf. Chapter 3.3.3.4 of this dissertation.

669 Cf. CJEU, Judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674.

670 Cf. Globytė, "The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania," 72.

671 Cf. LAT, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023.

672 BAG, Urt. v. 13.01.1983 - 5 AZR 149/82, *NJW*, 1984, 1985-90; BAG, Urt. v. 13.11.1991 - 7 AZR 31/91, *NZA*, 1992, 1125-29.

673 BAG, Urt. v. 15.03.1978 - 5 AZR 818/76, *AP BGB § 611 Abhängigkeit* Nr. 25; BAG, Urt. v. 23.04.1980 - 5 AZR 426/79, *AP BGB § 611 Abhängigkeit* Nr. 34; BAG, Urt. v. 07.05.1980 - 5 AZR 293/78.

management (disciplinary procedures, promotion and bonus systems), which are to be distinguished from the nature and performance of the working individual's work. In this respect, these criteria are only similar to a certain extent but not identical⁶⁷⁴. At the same time, integration into the work organization of the work provider, unlike in German or UK law, plays a role in Lithuanian law only as an indicator of an existing control/obey relationship, not as a separate test or factor, i.e., an organizational subordination results from a broadly defined right to issue instructions (through instructions or regulations at the workplace) and integration can therefore only serve as an indicator of the existence of these supervision and control rights. Put simply, UK and German law follow different methodological approaches than in Lithuania. While organizational integration in Germany and the UK is largely examined on the basis of the right to follow instructions or determination, Lithuanian law takes a shortcut, as its concept of subordination is based directly on the right to follow instructions and obedience obligations, whereby the integration can only serve as an indicator for the former, even if the integration might hover over everything as a possible overarching virtual guiding concept.

As regards the mutual obligation test, if mutual obligations are understood as in Germany or as decided by the CJEU in the case *Yodel*, where worker status was denied because the working individuals were afforded discretion to accept or not accept tasks offered, it can also serve as an indicator for or against the existence of organizational subordination in Lithuania, because it examines whether the working individual must follow all instructions of the work provider or can refuse these instructions in individual cases.

In summary, the Lithuanian concept of employment status is significantly narrower and less flexible than its German and UK counterparts. This is evident from the fact that in Germany and the UK, there are catch-all provisions or intermediate statuses to provide certain vulnerable groups of working individuals with the context-related protection they need according to the purpose of certain employment law provisions. It is also apparent that even the concept of employee in Germany is much broader than what has been established so far by Lithuanian case law. In Germany, not only control or supervision and the obligation to follow instructions are covered, but also a much broader and softer understanding of influence over the performance of work. If one were to overlay the various legal concepts, the UK's limb (b) worker concept and the German employee concept would likely show the most overlap at their outer boundaries, despite their differing nuances. The German employee concept, according to case law, can so far be determined through positive incentives and nudging, whereas the limb (b) worker concept in the UK emphasizes control through negative measures, such as sanctions through rating systems. The latter aligns with the control/obey principle in Lithuania's employee concept. However, Lithuanian law places importance on the fact that this control stems from contractual obligations – a feature found in the

674 Cf. Wank, "Der Arbeitnehmerbegriff des BAG im Vergleich zum englischen und amerikanischen Recht," 5, 16.

UK's employee concept.

This demonstrates that the limb (b) worker concept in the UK is broader than the Lithuanian employee concept. Regarding the term limb (a) worker or employee concept, comparison is difficult because the mutual obligations test cannot easily be applied to the Lithuanian context. However, as under the Lithuanian concept, the characteristics of an employment contract result from the agreed obligations of the parties⁶⁷⁵ and both parties must at least assume that the working individual is obliged to work under the control of the work provider or follow instructions⁶⁷⁶, it is more closely aligned with the UK's concept of limb (a) worker or employee.

Notably, the Lithuanian legal concept does not address whether certain regulations require broader interpretation in specific areas depending on their underlying purpose. This is particularly evident in the treatment of employee-like persons within the field of occupational health and safety in Germany. In this context, the concept is applied much more expansively than in other areas of law. Unlike traditional approaches that focus on protecting individuals from personal or economic dependency, occupational health and safety regulations instead emphasize the comparability of the hazardous nature of the work performed and the associated risks, making protection broader and more inclusive⁶⁷⁷. It is important to note that similar principles are also found in Lithuanian law. Art. 30 LR DSSĮ provides that when two or more employers are operating within the same workplace or work site, they are required to coordinate their activities to ensure the safety and health of all employees, irrespective of which employer the individual works for⁶⁷⁸. Furthermore, in the context of a triangular employment relationship, the user enterprise (i.e. the company receiving the temporary worker) has a duty to inform the temporary agency worker, prior to the commencement of work, about all potential hazards associated with the work. This includes clearly communicating any elevated or specific risks, outlining the necessary qualifications or knowledge required for the work, and explaining the relevant occupational health requirements. The temporary agency worker may not begin work for the user enterprise until they have been made fully aware of the occupational safety regulations applicable to them – this includes both actual and potential risk factors, as well as the specific protective measures to be taken. Crucially, this obligation exists even if the worker has already received general occupational safety training from the actual employer (temporary agency). The user enterprise must still provide site-specific and task-specific safety instructions⁶⁷⁹.

This reflects the recognition that, in the context of occupational health and safety, a working individual's vulnerability does not primarily arise from their contractual

675 LAT, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023, para. 46.

676 Cf. *Ibid.*

677 Schulze-Doll, "ArbSchG § 2 Begriffsbestimmungen," para. 19.

678 LR DSSĮ, *e-TAR*, art. 30, accessed March 16, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.95C79D036AA4/asr>.

679 *Ibid.*, art. 38–2 para. 2–6.

subordination to a particular employer. Instead, it stems from the inherent dangers and risks associated with the work performed and the conditions of the work environment. However, Lithuanian employment law does not draw any consequences from this consideration for the personal scope of application in the area of occupational health and safety.

The now well-established principle of the ‘primacy of facts’ in all three jurisdictions hovers above everything and ensures that the issue of false self-employment is merely one of legal consequences, as falsely self-employed individuals *de facto* have employment status. However, there are nuances, while e.g., German case law clarified that a contractual employment relationship can be established alone through consistent, implied behavior if both parties exchange services and payments over a legally significant period which alone may express their mutual intent to be bound by an employment contract for the actual services provided⁶⁸⁰. In Lithuania, it would be also necessary that both parties at least assume it is necessary to follow or obey instructions by the work provider⁶⁸¹.

3.5. The EU worker concept(s) by the CJEU

Since Lithuania, like Germany, is a member of the EU, the following chapter will examine in detail the case law of the CJEU to determine the concept(s) it established for distinguishing between employees or workers and self-employed individuals. The case *Yodel* will serve as a key starting point for understanding the EU worker concept developed by the CJEU. In this case, the CJEU examined the classification of self-employed individuals under EU working time rules. It highlighted important criteria for determining whether a working individual is genuinely self-employed or falls under the protection of employment law. The case concerned a UK courier working for Yodel, whose contractual freedom and ability to work for competitors suggested self-employment rather than worker status. Additionally, in paragraphs 26–32 of the judgment, the CJEU provides a comprehensive summary of its case law on distinguishing the concept of a worker, which almost resembles a supposed checklist. The following section will take a closer look at these paragraphs and analyze their key points in detail.

3.5.1. The principle of ‘autonomy’ of the EU worker concept

In its case law, the CJEU regularly emphasizes that the EU’s worker concept is an autonomous concept specific to EU law⁶⁸². This concept may not be interpreted differently according to the law of member states but has an autonomous meaning specific to EU law⁶⁸³. Already in 1964, the CJEU had ruled that the terms ‘worker’ and ‘activity

680 BAG, Urt. v. 9.4.2014 – 10 AZR 590/13, para. 26; BAG, Urt. v. 17.04.2013 – 10 AZR 272/12, para. 13.

681 Cf. LAT, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023, para. 67.

682 CJEU, *Sindicatul Familia Constanța*, para. 41.

683 CJEU, *Union Syndicale Solidaires Isère*, para. 28 and the case law cited therein.

as workers' may not be defined by reference to the laws of the member states but rather correspond to a uniform EU definition ('community meaning') of worker⁶⁸⁴. The concept of worker in EU law is therefore an autonomous concept which is governed solely by EU law. If nothing is said about the application of a provision of EU law in relation to national law, the CJEU considers itself entitled and obliged to make an autonomous definition⁶⁸⁵. However, it must be noted that even if a directive expressly refers to the fact that the concept of worker or employee is to apply according to national law, the CJEU nevertheless defined in some cases a worker concept itself by invoking 'effet utile'⁶⁸⁶. The CJEU regularly links this principle of autonomy directly with a methodological⁶⁸⁷ and, to some extent, substantive elaboration⁶⁸⁸ of the EU worker concept, which will be discussed in more detail in the following. This link is already an indication that the characteristics listed in the *Yodel* judgment should by no means be seen as a checklist, but rather as merging and interacting with each other.

3.5.2. The principle of 'primacy of facts' of the EU worker concept

Where EU law is applicable, a national court or authority is obliged to apply this autonomous concept independently of any national categorization⁶⁸⁹. The CJEU clarified that "the nature of that person's legal relationship with the other party to the employment relationship has no bearing on the application"⁶⁹⁰. When dealing with the autonomous concept, it must base the worker classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved⁶⁹¹ – by contrast, no particular value is placed on considering the will of the parties, as is the case, e.g., under German and Lithuanian law to some extent. This means that a person classified as self-employed under national law may still be considered a worker under EU law if their independence is nominal, thus masking an actual (EU) employment relationship⁶⁹². Even if someone is hired as a self-employed person under national tax or social security law, they may still be regarded as a worker

684 CJEU, Judgment of 19 March 1964, *Unger (Hoekstra)*, C-75/63, EU:C:1964:19.

685 CJEU, Judgment of 23 March 1982, *Levin*, C-53/81, EU:C:1982:105, para. 11 ff.; CJEU, Judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284, para. 13; CJEU, Judgment of 13 April 2000, *Lehtonen*, C-176/96, EU:C:2000:201, para. 45.

686 CJEU, Judgment of 17 November 2016, *Ruhrlandklinik*, C-216/15, EU:C:2016:883, para. 36 ff.

687 CJEU, *Sindicatul Familia Constanța*, para. 41.

688 CJEU, *Union Syndicale Solidaires Isère*, para. 28 and the case law cited therein.

689 *Ibid.*, para. 29.

690 CJEU, *Balkaya*, para. 36.

691 CJEU, *Union Syndicale Solidaires Isère*, para. 29; CJEU, *Fenoll*, para. 29.

692 Cf. CJEU, *FNV Kunsten*, para. 35 and the case law cited therein.

under EU law⁶⁹³. This part of the principle ‘primacy of facts’ thus serves more to achieve equal conditions and equal treatment in all member states, so that EU law can be effectively implemented.

Furthermore, the issue of whether such a relationship exists must, in each particular case, be assessed based on all the factors and circumstances characterizing the relationship between the parties⁶⁹⁴. The CJEU justifies this on the grounds that the employment relationship implies the existence of a hierarchical relationship between the worker and their employer. This assessment must be carried out if national law sets e.g. other benchmarks and for subordination and dependence for the existence of an employment status⁶⁹⁵. In doing so, the CJEU not only lays down a principle that serves the effective implementation of EU law, but also a methodological approach to the determination of the worker concept. However, it should be noted that, unlike the Lithuanian definition of an employment contract under Art. 32 LR DK, e.g., the CJEU does not distinguish between mandatory factors on the one hand and mere indications on the other⁶⁹⁶.

3.5.3. Content of the EU’s worker concept

Five key points can be identified from the judgment in the case *Yodel* to determine the content of the worker concept:

- There must be a performance of services in return for remuneration⁶⁹⁷;
- This performance takes place over a certain period of time⁶⁹⁸;
- This performance is provided for and under the direction of another person, in particular with regard to the time, place and content of the work, i.e. there is comparatively little leeway in terms of choosing the type of work and tasks to be performed, how that work or those tasks should be performed, and little freedom in hiring one’s own staff, as would be typical for independent service providers⁶⁹⁹;
- The working individual does not share the employer’s commercial risk⁷⁰⁰;
- The working individual forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking⁷⁰¹.

693 Cf. *ibid.*, para. 36 and the case law cited therein.

694 CJEU, *Holterman*, para. 46; CJEU, *Sindicatul Familia Constanța*, para. 42; CJEU, *Danosa*, para. 46.

695 CJEU, *Balkaya*, para. 37.

696 Cf. Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 41.

697 Cf. CJEU, *Yodel*, para. 29.

698 Cf. *ibid.*

699 Cf. *ibid.*, para. 29, 31–32.

700 Cf. *ibid.*, para. 31.

701 Cf. *ibid.*

3.5.3.1. Performance of services in return for remuneration

It is self-evident that services must be provided at all. What is questionable is the extent to which these services must be provided. In this respect, the CJEU has made two restrictions:

- It must be an activity that constitutes a part of economic life⁷⁰²;
- The activity must not “present itself as wholly subordinate and insubstantial”⁷⁰³.

The first point is about the motives for the work. A worker is one who works for gain. Therefore, those who work solely for reintegration or rehabilitation are not covered⁷⁰⁴. The same applies to employment solely for sporting or religious reasons. Prostitutes, on the other hand, can be workers⁷⁰⁵. In this respect, a sportsperson competing for the national team is not a worker, but a professional athlete can be⁷⁰⁶. In the case of activities for religious or ideological communities, it depends on whether the services provided by the association to its members can be understood as indirect ‘quid pro quo’⁷⁰⁷.

For the existence of an employment relationship, the CJEU first requires the existence of an economic activity which must be an actual and genuine activity⁷⁰⁸. An economic activity exists in the case of both self-employed and employed activity⁷⁰⁹, so that it is not relevant to the question of whether a freelance worker would be a worker or not, because they undoubtedly pursue an economic activity. However, the activity must also not be of such a small scale that it is completely subordinate and insignificant⁷¹⁰. The assessment of whether an activity is real and genuine is based on objective criteria and an overall consideration of all the circumstances relating to the nature of the activities and the employment relationship in question⁷¹¹. But even part-time workers⁷¹², trainees⁷¹³ and au pairs⁷¹⁴ fall within the EU definition if their activity is

702 CJEU, Judgment of 12 December 1974, *Walrave*, C-36-74, EU:C:1974:140,” para. 36; CJEU, *Levin*, para. 7.

703 CJEU, *Levin*, para. 7.

704 CJEU, Judgment of 31 May 1989, *Bettray*, C-344/87, EU:C:1989:226, para. 65.

705 Cf. CJEU, Judgment of 18 May 1982, *Adoui and Cornvaille*, C-115 and C-116/81, EU:C:1982:183.

706 CJEU, *Walrave*, para. 65; CJEU, Judgment of 14 July 1976, *Donà*, C-13-76, EU:C:1976:115, para. 65.

707 CJEU, Judgment of 5 October 1988, *Steymann*, C-196/87, EU:C:1988:475.

708 Cf. CJEU, *Balkaya*, para. 50; CJEU, Order of 7 April 2011, *May*, C-519/09, EU:C:2011:221, para. 21; CJEU, *Fenoll*, para. 27.

709 Cf. CJEU, *Walrave*.

710 CJEU, Judgment of 1 October 2015, *O*, C-432/14, EU:C:2015:643, para. 22; CJEU, Judgment of 4 February 2010, *Genc*, C-14/09, EU:C:2010:57, para. 19; CJEU, *Levin*, para. 17; CJEU, *Meeusen*, para. 13.

711 CJEU, Judgment of 6 November 2003, *Ninni-Orasche*, C-413/01, EU:C:2003:600, para. 27.

712 CJEU, *Levin*, para. 16.

713 CJEU, Judgment of 17 March 2005, *Kranemann*, C-109/04, EU:C:2005:187, para. 21.

714 CJEU, Judgment of 24 January 2008, *Payir*, C-294/06, EU:C:2008:36, para. 46.

effective and genuine.

There is no question that under the worker concept, the service must be provided in return for remuneration⁷¹⁵. However, in the view of the CJEU, cash payments⁷¹⁶, remuneration in the form of a share in the profits⁷¹⁷ or even remuneration in kind⁷¹⁸ are sufficient to be such a remuneration. A freelance worker thus fulfils this not very high requirement in any case, especially since, according to the CJEU, it is even irrelevant by whom the remuneration is paid or from which funds⁷¹⁹. Also a person with limited income can be a worker⁷²⁰, so that only voluntary work without any kind of remuneration is excluded from this definition. However, it will have to be clarified at a later stage whether this is always the case.

3.5.3.2. Performance of services over a specific period of time

The CJEU established the characteristic that the performance of services must take place over a specific period of time⁷²¹. A person employed for only one day can also be a worker. The characteristic must therefore not be understood in the sense of ‘permanently employed.’ Conversely, employment on a permanent basis for another person is a strong indication of worker status. In particular, the number of hours worked, the amount of remuneration, but also any irregularities, the limited duration of the services rendered during casual work and any obligation to perform must be taken into account⁷²². It is also relevant whether the working individual is entitled to paid leave and sick pay and whether a collective agreement applies to them⁷²³. However, the latter are more descriptive criteria and less criteria based on the protective purpose that national employment law usually has, because it is precisely the employment status under national law that typically leads to these rights in the first place, which is now in turn taken to discuss whether it is an employment relationship under EU law. The CJEU recognized, i.a., the following constellations of activities as sufficient to qualify as an employment relationship:

715 CJEU, Judgment of 3 July 1986, *Lawrie-Blum*, C-66/85, EU:C:1986:284, para. 65; CJEU, *Levin*, para. 7.

716 CJEU, Judgment of 3 June 1986, *Kempf*, C-139/85, EU:C:1986:223, para. 14; CJEU, Judgment of 4 June 2009, *Vatsouras*, C-22/08, EU:C:2009:344, para. 28; CJEU, *Fenoll*, para. 33.

717 CJEU, Judgment of 22 December 2008, *Aggregates*, C 487/06, EU:C:2008:757, para. 36.

718 CJEU, Judgment of 7 September 2004, *Trojani*, C-456/02, EU:C:2004:488, para. 22.

719 CJEU, Judgment of 19 November 2002, *Kurz*, C-188/00, EU:C:2002:694, para. 32; CJEU, *Bettray*, para. 15; CJEU, *Balkaya*, para. 22, 51.

720 CJEU, *Levin*, para. 18; CJEU, *Kempf*, para. 16.

721 Cf. CJEU, Judgment of 6 June 1985, *Frascoigna*, C-157/84, EU:C:1985:243.

722 CJEU, *Genc*, para. 25; CJEU, Judgment of 26 February 1992, *Raulin*, C-357/89, EU:C:1992:87, para. 14.

723 CJEU, *Genc*, para. 27.“

- 10 hours per week⁷²⁴;
- 4-14 hours per week⁷²⁵;
- activity for two and a half months⁷²⁶;
- ‘brief minor’ activity that does not ensure a livelihood or an activity lasting barely more than one month⁷²⁷;
- contractual relationship that had lasted only four days⁷²⁸;
- activity with 5.5 hours per week⁷²⁹.

Therefore, even very short durations of employment, limited working hours or low productivity⁷³⁰ cannot prevent a working individual from being considered a worker under EU law. This means that freelance workers can also meet this relatively low threshold, provided that their work for a particular work provider demonstrates a certain degree of continuity.

3.5.3.3. Performance of services for another under the direction of another

Furthermore, the CJEU clarified that the element of subordination is an essential feature of an employment relationship. If the previously mentioned conditions are met, the CJEU considers that the decisive factor for the distinction between a worker and a self-employed person is first of all whether the working individual performs the services for another person according to the latter’s instructions⁷³¹, i.e. there must be a relationship of subordination⁷³². The principle ‘primacy of facts’ applies here, i.e. not only is the content of the contract decisive, but also the actual practical implementation⁷³³. What performance under instructions means in detail has not been clarified by case law to its full extent. It is questionable whether EU law depends on whether the instructions are exercised in concrete terms or whether instructions may be issued under the underlying contract – i.e., just a right to issue instructions as under the Lithuanian employment contract concept. According to the CJEU, such a subordination is characterized mainly by the employer determining the choice of activity,

724 CJEU, Judgment of 19 April 1989, *Rinner-Kühn*, C-171/88, EU:C:1989:328, para. 16; CJEU, Judgment of 14 December 1995, *Nolte*, C-317/93, EU:C:1995:438, para. 19; CJEU, Judgment of 14 December 1995, *Megner/Scheffel*, C-444/93, EU:C:1995:442, para. 18.

725 CJEU, Judgment of 18 July 2007, *Geven*, C-213/05, EU:C:2007:438, para. 7, 27.

726 CJEU, *Ninni-Orasche*, para. 32.

727 CJEU, *Vatsouras*, para. 25, 30.

728 CJEU, *O*, para. 23.

729 CJEU, *Genc*, para. 9, 15.

730 CJEU, *Bettray*, para. 15.

731 CJEU, *Lawrie-Blum*, para. 17.

732 CJEU, *Holterman*, para. 46; CJEU, *Balkaya*, para. 37; CJEU, *Allonby*, para. 69.

733 CJEU, Judgment of 17 July 2008, *Raccanelli*, C-94/07, EU:C:2008:425, para. 35.

remuneration and working conditions⁷³⁴. Whereas the CJEU initially referred to the right to issue instructions with regard to the services to be rendered and the working hours as well as the corresponding supervision of the contracting partner⁷³⁵, it subsequently refined its jurisprudence and placed particular emphasis on external determination in the choice of working hours, place of work and content of work⁷³⁶ and even more generally on the modalities of the execution of the tasks⁷³⁷ – typically characteristics of personal dependence or organizational subordination. According to the CJEU, it is not necessary that the worker is obliged to perform the work. Rather, a person who is not obliged to comply with an instruction by the employer can also be a worker in the sense of EU law⁷³⁸. For examining the subordination relationship, it is not solely relevant whether the worker has the possibility to refuse assignments⁷³⁹. The possibility of using one's own auxiliary staff argues against a qualification as an employment contract but should as well not exclude it⁷⁴⁰. The characteristics considered so far are also referred to as the so-called *Lawrie-Blum* formula and go back to the judgment of the CJEU in the case *Lawrie-Blum* in 1986. The judgment had a significant impact on the content of the term worker initially only with regard to the fundamental freedoms. The CJEU stated that the concept of 'worker' in today's Art. 45 TFEU⁷⁴¹ should be interpreted broadly, as performing services, in a specific time, for remuneration and for another under the direction of another (i.e., subordination)⁷⁴². This so-called *Lawrie-Blum* formula is the basis for autonomous conceptualization at the EU level.

With the judgment in the case *FNV Kunsten*, two additional characteristics were added to the case law of the CJEU, which have since influenced its decision-making. Accordingly, it must also be considered whether the person does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of the employer's undertaking, thereby creating an economic unit with the work provider's undertaking⁷⁴³. These two characteristics will be analyzed in more detail in the following.

734 CJEU, Judgment of 20 November 2001, *Jany*, C-268/99, EU:C:2001:616, para. 71.

735 CJEU, *Lawrie-Blum*, para. 18; CJEU, Judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, para. 30.

736 CJEU, *Allonby*, para. 72; CJEU, *Haralambidis*, para. 33; CJEU, Judgment of 14 December 1989, *Agegate*, C-3/87, EU:C:1989:650, para. 36.

737 CJEU, *Haralambidis*, para. 33.

738 Cf. CJEU, *Raulin*.

739 CJEU, *Allonby*, para. 72.

740 CJEU, *Agegate*, para. 36; CJEU, *Haralambidis*, para. 33.

741 TFEU, art. 45.

742 Cf. CJEU, *Lawrie-Blum*.

743 CJEU, *Yodel*, para. 31; CJEU, *FNV Kunsten*, para. 36.

3.5.3.4. Sharing of commercial risk

As the source of the characteristic of sharing of commercial risk, the judgment in the case *FNV Kunsten* cites the judgment in the case *Agegate* from 1989⁷⁴⁴. If one looks at the reference in the *FNV Kunsten* judgment to paragraph 36 of the *Agegate* judgment, it states:

“The question whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterizing the arrangements between the parties, such as, for example, the sharing of the commercial risks of the business <...>⁷⁴⁵.”

However, the judgment lacks any concrete elaboration on what this might mean. The only indication comes from the statement that “the sole fact that a person is paid a ‘share’ and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker⁷⁴⁶.” One way to understand this concept can be found in Advocate General *Wahl*’s opinion in the case *FNV Kunsten*. He stated that

“a self-employed person must assume the commercial and financial risks of the business, whereas a worker normally does not bear any such risk, being entitled to remuneration for the work provided irrespective of the performance of the business⁷⁴⁷.”

It is the employer who is generally responsible to the outside world for the activities carried out by employees within the scope of their employment relationship. The higher risks and obligations borne by the self-employed, on the other hand, are meant to be offset by the ability to retain all profits generated by the business. According to this understanding, assuming commercial and financial risk alone would not be a decisive factor rather than one element of a broader assessment of the mutual rights and obligations of a worker and their employer compared to those of a self-employed person and their client. He referred to the case *Commission/Italy* in his assessment⁷⁴⁸. The latter judgment, having regard to the case *Suiker Unie*⁷⁴⁹, states that

“the activity of customs agents has an economic character. They offer, for payment, services consisting of carrying out customs formalities, particularly those related to the importation, exportation, and transit of goods, as well as other complementary services in monetary, commercial, and fiscal areas. Furthermore, they assume the financial risks involved in the exercise of that activity⁷⁵⁰.”

744 CJEU, *FNV Kunsten*, para. 36.

745 CJEU, *Agegate*, para. 36.

746 *Ibid.*

747 Opinion of Advocate General *Wahl* delivered on 11 September 2014, *FNV Kunsten*, C-413/13, EU:C:2014:2215, para. 45.

748 *Ibid.*

749 CJEU, Judgment of 16 December 1975, *Coöperatieve Vereniging ‘Suiker Unie’ UA*, C-40 to C-48, C-50, C-54 to C-56, C-111, C-113 and C-114-7, para. 541.

750 CJEU, Judgment of 18 June 1998, *Commission/Italy*, C-35/96, EU:C:1998:303, para. 37.

The CJEU picked up this point in the case *FNV Kunsten* to clarify that, according to settled case law,

“a service provider can lose his status as an independent trader, and hence as an undertaking, if he does not determine his own conduct on the market independently but is entirely dependent on his principal. This is the case when he does not bear any of the financial or commercial risks arising from the principal’s activity and operates as an auxiliary within the principal’s undertaking⁷⁵¹.”

However, the key reference in the case *FNV Kunsten* was made with regard to the case *Agegate*⁷⁵². A first indication which hints to a possible understanding of the concept of sharing of commercial risk in the case *Agegate* can be found in the statements of Advocate General *Mischo* in the latter case. He mentions that “all the factors mentioned by the Court” are useful for determining whether or not a person is a worker⁷⁵³. It is therefore necessary to take a closer look at the specific case and its underlying facts. The case *Agegate* concerned the owner of a fishing vessel, which was registered in the UK and flew the British flag. The crew of the vessel was partly composed of Spanish share fishermen, that is to say fishermen who are remunerated solely by a share of the proceeds of sale of their catches⁷⁵⁴. The question arose whether these fishermen, despite not receiving a steady monetary wage but instead a share of the catch proceeds, could still be considered workers under EU law. Thus, the key fact in the original case was that the share fishermen were exclusively remunerated based on a share of the catch. This meant that their income was entirely dependent on the success of their fishing activities, and the height of their earnings was effectively in their own hands. Crucially, they did not bear operational liabilities or financial risks beyond the variability of their income. This suggests that while they were exposed to the commercial success of the business, they did not assume commercial risk in the sense of being financially responsible for losses or business decisions. The impression persists that in the original case, commercial risk did not actually refer to liability in the strict sense but rather to participation in commercial success as the sole source of remuneration. Furthermore, despite mentioning the concept of commercial risk, the CJEU ultimately decided that it did not matter whether the fishermen were paid on a share basis, i.e., participated in the commercial success. This suggests that commercial risk, as framed in the original proceedings, was either irrelevant or at most a secondary consideration in determining worker status. The core reasoning appears to be that fluctuating income alone does not negate worker status. The CJEU in the case *FNV Kunsten* even partially contradicts its statements from the case *Agegate*. While the statement in the case *Agegate* was more focused on the principle ‘primacy of facts’, the CJEU in the case *FNV Kunsten* places particular emphasis on this specific criterion, which in part

751 CJEU, *FNV Kunsten*, para. 33.

752 *Ibid.*, para. 36.

753 Opinion of Advocate General *Mischo* delivered on 18 November 1988, *Agegate*, C-3/87, EU:C:1988:503, para. 13.

754 Cf. CJEU, *Agegate*, para. 6.

runs counter to this principle. It leads to critical oversimplification in the case *FNV Kunsten*. The *FNV Kunsten* judgment appears to misinterpret *Agegate* by narrowing the assessment for worker status to a few key factors such as commercial risk sharing. This interpretation diverges from the original intent of *Agegate* in two significant ways. First, *Agegate* did not establish the absence of commercial risk as a conclusive criterion for worker status; rather, it highlighted commercial risk alongside other issues, such as control over working conditions and autonomy. Second, the underlying situation did not involve any questions of commercial risk in a sense of commercial liability, but merely the participation of the working individual in commercial success. Moreover, in the case *Agegate*, the CJEU ultimately ruled that the fishermen's share-based remuneration did not affect their worker status. This means that the very aspect of financial commercial risk played little or no role in the CJEU's final decision. The sharing of commercial risk in the case *Agegate* was only mentioned in connection with a clarification describing the 'primacy of facts' principle, i.e. that all and any circumstances can be important and must be at least considered – including but not necessarily the sharing of commercial risk⁷⁵⁵. Thus, *FNV Kunsten* seems to misapply the *Agegate* reasoning by overemphasizing commercial risk as a decisive criterion – the actual statement was meant to convey more the exact opposite. The fact that the sharing of commercial risk is likewise used in such a simplified manner in the case *Yodel* is problematic and could potentially lead to misunderstandings.

Despite not being a deciding criterion in the final judgment, it should be noted that a similar oversimplification can be observed in the CJEU's statement in the case *FNV Kunsten* that service providers are, in principle, undertakings within the meaning of Art. 101 para. 1 TFEU if they perform their activities as independent economic operators in relation to their principal⁷⁵⁶. This statement is a reference to the case *Confederación Española de Empresarios de Estaciones de Servicio*, where the concept of forming an economic unit was originally linked to whether a commercial agent followed instructions and bore financial risk. In this case, the CJEU determined that a commercial agent could be considered an integral part of the undertaking if they followed instructions and did not bear financial risk similar to an independent trader⁷⁵⁷. The origins of this statement go back to the already mentioned judgment in the case *Suiker Unie*⁷⁵⁸ from 1975 (via *Volkswagen AG and VAG Leasing GmbH*⁷⁵⁹ and *Confederación Española de Empresarios de Estaciones de Servicio*⁷⁶⁰) in which the CJEU had to answer the question of whether a working individual formed an economic unit with the undertaking.

755 Ibid., para. 36.

756 CJEU, *FNV Kunsten*, para. 27.

757 CJEU, Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784.

758 CJEU, *Coöperatieve Vereniging 'Suiker Unie' UA*.

759 CJEU, Judgment of 24 October 1995, *Volkswagen AG and VAG Leasing GmbH*, C-266/93, EU:C:1995:345, para. 19.

760 CJEU, *Confederación Española de Empresarios de Estaciones de Servicio*, para. 43, 44.

It was decided that a trade representative according to national law having the obligation by their principal to sell products in the name and for account of the principal, follows its instructions and promotes its interest in certain territories could in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions. Building on this, the CJEU stated that if this is given, the trade representative is still not forming an economic unit if they carry out duties that are 'from an economic point of view' similar to those of independent dealers in a way that the trade representative carries the risks of the sales or the performance of the contracts entered into with third parties⁷⁶¹. The CJEU therefore drew the question of integration primarily from the obligation to follow instructions. In a second step, it established that an independent dealer relationship can nevertheless (despite performance of duties based on instructions and integration) exist if the trade representative performs duties similar to those of an independent dealer from an economic point of view. The obligation to follow instructions and the integration were therefore directly related in their origin. At the same time, the bearing of financial risks was already expressed there, albeit in the form of a two-stage test and not as an equally weighty criterion such as the obligation to follow instructions and integration.

3.5.3.5. Forming an integral part of an economic unit with the work provider's undertaking

Against the backdrop of the oversimplified statements, the question arises whether a similar oversimplification was repeated concerning the second characteristic from the judgment in the case *FNV Kunsten* – namely, the fact that the person forms an integral part of that employer's undertaking, thereby creating an economic unit with it⁷⁶². On this point, the judgment in *FNV Kunsten* refers to Para. 26 of the judgment in the case *Becu*. There, it states:

“It must therefore be concluded that the employment relationship which recognized dockers have with the undertakings for which they perform dock work is characterized by the fact that they perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as ‘workers’ <...>. Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute ‘undertakings’ within the meaning of Community competition law”⁷⁶³.

It becomes evident that this statement has been taken as well out of context by the judgment in the case *FNV Kunsten*. It evidently was not meant to define an additional criterion for worker status under EU law. Instead, it was merely a clarification that dockworkers, while working for a company, could logically not simultaneously be

761 CJEU, *Coöperatieve Vereniging ‘Suiker Unie’ UA*, para. 538–541.

762 CJEU, *FNV Kunsten*, para. 36.

763 CJEU, Judgment of 16 September 1999, *Becu*, C-22/98, EU:C:1999:419, para. 26.

considered undertakings themselves for the purposes of competition law. This is another oversimplification, which has since been reflected in CJEU case law and distorts the actual statement of the CJEU in the case *Becu*.

Therefore, the *FNV Kunsten* judgment can, to some extent, be seen as the outcome of a game of ‘chinese whispers’ in relation to the principles established in *Agegate*, *Becu*, and also *Suiker Unie*. By giving at least the impression to treat the absence of commercial risk as a decisive criterion for worker status and conflating economic integration with it, the judgment oversimplifies its own prior reasoning. Thus, these two characteristics, from which the CJEU derived its reasoning in the case *FNV Kunsten*, were in their original sources rather insignificant. An oversimplification that was further perpetuated in the case *Yodel* where the type of analysis typical of competition law, in which it holds some degree of legitimacy, was transferred to the interpretation of a secondary legal act intended to protect workers within the framework of social policy⁷⁶⁴.

However, a correct reading of prior case law necessitates a holistic assessment of the broader working relationship rather than an overreliance on these isolated criteria. Since in both *FNV Kunsten* and *Yodel*, these characteristics were merely listed without revealing the underlying considerations, they do provide only limited substantive guidance, because they could have different meanings. The core statement in the case *Agegate* was that all aspects of the individual case must be considered, which could include examining the share of commercial risk. However, looking at the facts of the *Agegate* case, the emphasis seemed to be more on participation in commercial success by the working individual. Following Advocate General *Wahl*’s reasoning in *FNV Kunsten*, the focus would be on the division of rights and obligations⁷⁶⁵. Both approaches have their justification if the specific case requires it. There also seems to be a different understanding in the literature as to what exactly is meant by the sharing of commercial risk derived from *FNV Kunsten*. *Menegatti* sees this as a form of the economic reality test. In his opinion it is about the loss-bearing of the working individual⁷⁶⁶. If one refers to *Davulis*’ comments to Art. 32 para. 3 LR DK, it would be more a matter of only a person who takes commercial and industrial risks, can work autonomously in a profit-oriented manner⁷⁶⁷. *Wank*, on the other hand, even identifies his concept of entrepreneurial opportunities in this criterion⁷⁶⁸. All these different understandings can be correct, but the individual case is decisive. In this context, one aspect that has received virtually no attention in literature thus far when it comes to the sharing of commercial risk is the importance of identifying who is making the legal claim and what exactly is being contested. It matters greatly whether a criterion is just

764 Cf. Claudia Schubert, “Arbeit in der Plattformökonomie,” *NZA Beilage*, 2022, 9.

765 Cf. Opinion of AG Wahl, para. 45.

766 Cf. Emanuele Menegatti, “The Evolving Concept of ‘Worker’ in EU Law,” *Italian Labour Law E-Journal* Vol 12 (July 23, 2019): 80, doi:10.6092/ISSN.1561-8048/9699.

767 Cf. Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13.

768 Cf. Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 41, 46.

a descriptive criterion which is merely a reflection of the legal status assigned under national law. For instance, if a working individual is treated as an employee under national law and does not share the commercial risk just because of this fact, but claims to be self-employed, such a descriptive criterion may be inadequate to be considered in the assessment. Following the case law of the CJEU, such characteristics – if they arise directly from the legal classification as an employee under national law – should not influence the autonomous ‘worker’ under EU law, because it would be the national status which ultimately decides the classification under EU law⁷⁶⁹.

Therefore, a rigid focus on the sharing of commercial risk as a blanket criterion runs counter to the principle of the ‘primacy of facts’. These flaws are certainly correctable, as the CJEU does not assign any weighting or hierarchy to the criteria it develops. It established that the criteria must be taken into account in the assessment; however, it leaves open the crucial questions of how and to what extent individual criteria must be applied in the overall assessment. The typological method would likely be followed here. Also in the case *Yodel*, the CJEU reiterated its core criteria but refused to impose a uniform test. Nevertheless, the two criteria from the *FNV Kunsten* judgment in their shorted way bear the risk that they could contribute to further misunderstandings and oversimplifications. For instance, Directive (EU) 2019/1152 refers blanketly to the criteria developed by the case law of the CJEU for interpreting its personal scope of application⁷⁷⁰. The same in the ultimately unsuccessful Proposal for a Directive on improving working conditions in platform work⁷⁷¹. Whereby the latter reference was not taken up in this form into the final directive⁷⁷². Both referenced certain specific judgments, one of which was the judgment in *FNV Kunsten*, which must be understood as a blank reference to the ‘sharing of commercial risk’ and the characteristic of ‘forming an integral part of and an economic unit’ with the work provider’s undertaking⁷⁷³ – however, without providing further context.

769 CJEU, *Ruhrlandklinik*, para. 27.

770 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, *EUR-Lex*, recital 8, accessed March 16, 2025, <https://eur-lex.europa.eu/eli/dir/2019/1152/oj/eng>.

771 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work - COM(2021) 762 Final, *EUR-Lex*, recital 20, accessed July 1, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0762>.

772 Instead, the reference to the judgments only refers to the principle that “the classification of a self-employed person under national law does not prevent that person from being classified as an employee under EU law if that person’s independence is only fictitious and thus a working relationship is disguised”, cf. Directive (EU) 2024/2831, recital 28.

773 Unless, as provided for in Directive (EU) 2024/2831, it is only intended to indicate that the classification of a self-employed person under national law does not preclude classification as a worker under EU law if the self-employment of that person is only fictitious and thus disguises an employment relationship, cf. *ibid.*, 28.

3.5.3.6. Further criteria developed in the case *Yodel*

Additionally, the CJEU stated in the case *Yodel* that if a person is afforded discretion

- to use subcontractors or substitutes to perform the services;
- to accept or not accept the various tasks offered by the work provider or to unilaterally choose the number of those tasks;
- to provide their services to any third party, including direct competitors of the putative employer;
- and to fix their own work hours within certain parameters as well as tailoring time to suit their personal convenience rather than solely the interests of the putative employer;
- the person shall not be considered a worker⁷⁷⁴.

The reasoning of the CJEU appears to rely solely on an agreed obligation of obedience⁷⁷⁵ – typically derived from the contract and the work provider’s right to issue instructions. It was not evaluated whether the need to accept the tasks offered by the work provider must always be based on an explicit duty of the working individual to accept the tasks assigned, or whether economic pressure resulting from a position of economic dependence or any soft form of economic sanctioning through rating systems or nudging may suffice to compel task acceptance. The same ambiguity arises regarding the criterion of freedom to provide services to third parties. While a working individual may be formally permitted to work for multiple work providers, the nature, intensity, or structure of the tasks may significantly limit this freedom in practice. Thus, even in the absence of formal exclusivity, the working individual may effectively be bound to a single work provider. A similar dynamic exists with regard to the discretion to use subcontractors or substitutes. Even if the contractual terms allow for delegation, the substantive characteristics of the task – such as the requirement of specific skills, qualifications, or personal involvement – may effectively prevent such delegation. The CJEU did not place much importance on the fact that the working individual in the case at hand had to undergo a certain amount of training in order to perform the task⁷⁷⁶, as in such cases, the right to appoint a substitute may exist in theory but becomes meaningless in practice due to the inherent demands of the service to be provided.

The reasoning of the CJEU, on the first look, shows a certain similarity with the mutual obligations test in the UK and seems to contradict the CJEU’s previous case law which did not recognize this test in the context of the EU’s worker concept⁷⁷⁷. However, again the context is decisive. The judgment in the case *Yodel* concerned the question of when workers are considered such solely under Directive 2003/88/EC concerning

774 CJEU, *Yodel*, para. 45.

775 Cf. *ibid.*, para. 9, 10, 11, 40, 45.

776 *Ibid.*, para. 4, 9.

777 CJEU, *Allonby*, para. 72.

certain aspects of the organization of working time (so-called Working Time Directive). In this context, the statement of the CJEU can be considered valid as working individuals able to reject tasks on their own discretion are typically not as vulnerable as other employed persons when it comes to working time issues due to their limited time commitment. However, these findings cannot be transferred blanketly to each and every other issue of EU law. As a result, the only remaining substantive concept for defining the concept of an EU ‘worker’ in each and every case, appears to be the *Lawrie-Blum* formula, which is often regarded as a universally applicable distinction principle – particularly concerning the aspects of control and autonomy. However, questions remain also regarding its universal applicability. The underlying issue is that the very existence of a ‘general’ EU concept of worker remains highly contested.

3.5.3.7. Universal applicability of the *Lawrie-Blum* formula

Recent developments in EU legislation suggest a trend toward a unified concept of worker under EU law⁷⁷⁸. The CJEU has also contributed to this perception⁷⁷⁹. It ruled in the case *May* that certain basic principles it had established in the course of its case law on Art. 45 TFEU⁷⁸⁰, also apply to the concept under Art. 288 TFEU, thus reinforcing the impression that the concept of worker under Art. 45 TFEU applies whenever a concept of worker is to be defined under EU law⁷⁸¹. The criteria mentioned in the case *May* are the performance during a certain period of time of an actual and genuine activity, whereby the activity cannot be so small that it is completely insignificant. This performance must be for remuneration and in accordance with the instructions of the work provider⁷⁸². In the case *May*, the CJEU clearly relied on the *Lawrie-Blum* formula. It indeed appears that the CJEU has increasingly moved towards one general EU concept of worker in secondary law⁷⁸³. Nonetheless, this presumed trend remains contested⁷⁸⁴. Importantly, the CJEU itself has acknowledged that the meaning of ‘worker’ may vary based on the specific legal context in which the term is used⁷⁸⁵. In the following, it will therefore be examined whether a general EU worker concept based on the *Lawrie-Blum* formula exists and whether this creates an automatic mechanism for

778 Cf. Directive (EU) 2019/1152, art. 1 para. 2 and recital 8.

779 E.g., CJEU, *May*, para. 21.

780 *Ibid.*, para. 22.

781 An impression that seems to be also reflected in the literature, cf. Davulis, “Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką,” 73.

782 *Ibid.*, para. 21.

783 Gruber-Risak and Dullinger, *The Concept of “Worker” in EU Law*, 25.

784 Cf. R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and Another [2020] EWHC 3050, para. 82 (a); BAG, Urt. v. 25.6.2020 - 8 AZR 145/19, NZA, 2020, para. 70; Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 33.

785 CJEU, Judgment of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, para. 31; CJEU, *Allonby*, para. 63; CJEU, Judgment of 7 June 2005, *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364, para. 27.

universally applying it to new cases.

This question has been dealt with in detail by *Junker*. He emphasizes three reasons why the uniform EU interpretation of the concept of worker does not result in a general EU concept of worker⁷⁸⁶: First, he mentions that distinct lines of traditions exist for the concept⁷⁸⁷. Second, the concept serves varied functions – ranging from protecting workers to facilitating the free movement of persons⁷⁸⁸. Third, *Junker* points out the evolving and often not always comprehensible paradigms which are triggered by the fact that the CJEU rarely discloses the considerations in adopting or disregarding particular criteria⁷⁸⁹.

It has already become evident from the preceding analysis that the CJEU's reasoning often appears to shift between paradigms, creating an impression of inconsistency. This perception is largely due to the CJEU's frequent failure to disclose the underlying considerations that have led to the inclusion – or exclusion – of specific criteria in its interpretation of the worker concept. As a result, it remains unclear whether the variation in legal reasoning stems from genuinely different conceptual approaches, or whether it is merely the reflection of case-specific justifications that were not made explicit in the judgments themselves. While the emergence of distinct concepts cannot be definitively ruled out, there is no conclusive evidence that the CJEU has in fact applied fundamentally different legal concepts; rather, the inconsistencies may result from a lack of transparency regarding the underlying rationale. However, it is worth engaging in the following more closely with *Junker's* two other arguments.

According to *Junker*, the possibility of establishing a universal EU concept of worker is undermined by the fact that the legal meaning of the term continues to evolve across different regulatory contexts, drawing on divergent conceptual and doctrinal traditions⁷⁹⁰. The point he is making becomes evident upon a closer analysis of the example he cites – the case *Holterman*⁷⁹¹. This case concerned Mr. Freiherr Spies von Büllenheim, who served both as managing director and minority shareholder of a Dutch company, as well as the managing director of three German subsidiaries of that same company. After resigning from all contractual positions, Mr. Freiherr Spies von Büllenheim – who resided in Germany – was sued by the four companies before a court in the Netherlands for damages resulting from alleged breaches of his managerial duties. Jurisdictional competence under Regulation (EC) No. 44/2001 (Brussels I Regulation) was at issue. If the defendant was to be considered a worker under Art. 18 para. 1 of the

786 *Junker*, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 190.

787 *Ibid.*, 190–91.

788 CJEU, *Levin*, para. 13 – “it must be stressed that these concepts define the field of application of one of the fundamental freedoms guaranteed by the treaty and, as such, may not be interpreted restrictively.”

789 *Junker*, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 195.

790 *Ibid.*, 190–91.

791 Cf. CJEU, *Holterman*.

Regulation, then, pursuant to Art. 20 para. 1, proceedings could only be brought before the courts of the member state in which he resided. Thus, the classification of the legal relationship became central to determining the court's authority. This question of jurisdiction did not arise in a legal vacuum. Before the Brussels I Regulation entered into force in 2002, the relevant rules were codified in the 1968 Brussels Convention, a multilateral treaty between member states. The principle of interpretative continuity requires that the provisions of Brussels I be interpreted consistently with their equivalents in the 1968 Brussels Convention. The CJEU accordingly began its legal reasoning by referring to earlier case law interpreting Art. 5 para. 1 of the 1968 Brussels Convention, notably the case *Shenavai v Kreischer*⁷⁹². This case emphasized the worker's integration into the employer's organizational structure as a central definitional element⁷⁹³. In the *Holterman* judgment, the CJEU also cited the *Jenard and Möller Report* on the Lugano Convention, which highlighted an alternative emphasis: the worker's subordination⁷⁹⁴. Lastly, the CJEU brought in the *Lawrie-Blum* formula and instructed the national court to examine Mr. Freiherr Spies von Bülllesheim's worker status on the basis of all the criteria set out – i.e., in addition to the *Lawrie-Blum* formula, it must also be examined whether Mr. Freiherr Spies von Bülllesheim was “bound by a lasting bond which brought him to some extent within the organisational framework of the business of that company”⁷⁹⁵, a concept embedded in the doctrinal framework of international jurisdiction. A similar compelling example as the case *Holterman* is the already extensively analyzed case *Yodel*, which, however, in certain respects runs counter to *Junker's* argument. This case, too, incorporates criteria that originate from distinct legal traditions – on the one hand, the law of fundamental freedoms (*Lawrie-Blum*), and on the other, competition law (*FNV Kunsten*) – but it even transfers these into an entirely different legal context: that of social policy.

Junker's last argument highlights the fact that different aspects of the EU worker concept must fulfill different functions depending on the legal context in which it is applied. *Junker* takes a closer look at a principle frequently employed by the CJEU – the ‘broad’ interpretation of the EU worker concept and its different functions in different contexts. In the context of Art. 45 TFEU, this broad reading aims to widen the personal scope of the freedom of movement for workers, ensuring that individuals engaged in even marginal economic activity can invoke EU mobility rights⁷⁹⁶. In contrast, within the framework of Directive 98/59/EC on collective redundancies, it serves a different purpose: it extends the applicability of EU law to individuals who might otherwise fall outside the scope of national employment legislation⁷⁹⁷. Accord-

792 Ibid., para. 39.

793 CJEU, Judgment of 15 January 1987, *Shenavai v Kreischer*, C-266/85, EU:C:1987:11, para. 16.

794 CJEU, *Holterman*, para. 40.

795 Ibid., para. 45.

796 Cf. CJEU, *Levin*, para. 13.

797 Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 192–93.

ing to *Junker*, the same applies in the case of ‘real and genuine activity’. *Junker* refers to the case *Genc* as an example, where rights linked to the status of worker were granted only if the employment activity was economically significant enough to trigger a legal consequence⁷⁹⁸. However, *Junker* argues that importing this economic relevance criterion into the core application of employment law is not only unhelpful but potentially counterproductive, as it may obscure the central legal issues. He illustrates this concern through the case *O*, in which the question whether a marginal and temporary activity qualified as ‘real and genuine activity’ was discussed in detail⁷⁹⁹. As *Junker* points out, this question had limited bearing on the actual legal issue at hand – namely non-discrimination under Directive 2000/78/EC⁸⁰⁰. Similarly, the aspect of the ‘amount and origin of the remuneration’ in the area on the free movement of persons serves to ensure that “neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law”⁸⁰¹, that the training purpose of an activity does not preclude the status of worker⁸⁰², and that remuneration can also be “remuneration paid from public funds”⁸⁰³. Transferring this interpretation into the field of substantive employment law would shift its function. It would lead to the application of substantive employment law to persons whom the member states had excluded from the scope of national employment law⁸⁰⁴.

On the one hand, the previously outlined development of the EU’s competences support *Junker*’s arguments – initially not aimed at the protection of working individuals but more focused on the development of a functioning single market in which context CJEU’s judgment have generally been issued at the time, protective aims became increasingly important which require a different approach. However, this overlooks the fact that the CJEU frequently transposes established legal concepts into new regulatory contexts. A case in point is its interpretation of the principle of equal pay: whereas this provision was initially understood primarily as a mechanism to safeguard fair competition among employers within the single market, the CJEU has since reframed it as a binding social obligation. In doing so, the CJEU has emphasized that the principle of equal pay is not merely an economic tool, but a normative standard that requires all employers to respect gender equality in remuneration, irrespective of competitive considerations⁸⁰⁵. This shows that the CJEU is, to some extent, engaged

798 CJEU, *Genc*, para. 19 ff., 28.

799 CJEU, *O*, para. 22 ff.

800 Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 194–95.

801 CJEU, Judgment of 30 March 2006, *Mattern*, C-10/05, EU:C:2006:220, para. 22.

802 CJEU, Judgment of 21 November 1991, *Le Manoir*, C-27/91, EU:C:1991:441, para. 2 ff., 9.

803 CJEU, *Kempf*, para. 14.

804 Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 194.

805 CJEU, *Deutsche Telekom*, para. 57.

in a process of converging distinct legal concepts drawn from different periods and doctrinal traditions, reinterpreting their original purposes considering evolving legal and social contexts. At the same time, it underscores once again the CJEU's tendency to develop autonomous legal concepts without clearly articulating the underlying considerations on which it is based. And in doing so, it contradicts its own case law⁸⁰⁶.

However, an alternative line of reasoning lends support to *Junker's* hypothesis that there is no automatic or uniform mechanism for determining the EU worker concept. This becomes particularly evident considering some key CJEU judgments referenced in Recital 8 of Directive (EU) 2019/1152, which explicitly calls on member states to take into account certain criteria developed by the CJEU when defining worker status for the purposes of transposing the directive's personal scope of application⁸⁰⁷. If one only takes the example judgments listed in Recital 8 (*Lawrie-Blum*, *Union Syndicale Solidaires Isère*, *Balkaya*, *FNV Kunsten* and *Ruhrlandklinik*), the following picture emerges.

In the case *Lawrie-Blum*, the question was to whom the EU's fundamental freedom of free movement of workers pursuant to Art. 45 TFEU is applicable. Unlike the primary protective purpose of employment law and subsequent directives, however, Art. 45 TFEU has the purpose of abolition of any difference in treatment of workers of the member states based on nationality with regard to employment, remuneration and other working conditions⁸⁰⁸. It is not the application of employment law versus pure civil law that is at issue, but the applicability of a fundamental freedom and the distinction regarding which fundamental freedom applies⁸⁰⁹. Unlike in traditional employment law, where the criteria serve a protective function, the determination of applicability in this context can also rely on descriptive criteria – such that just describe the person subject to the fundamental freedom, as even independent self-employed individuals can benefit from these rights under the principles of freedom of establishment and freedom to provide services⁸¹⁰. Thus, it is less a question whether a right applies or not, but which of only two baskets of rights apply – either the free movement of workers or the freedom of establishment and the freedom to provide services. This is particularly relevant in cases where the issue is not the distinction between a worker and a genuine self-employed person, but rather whether individuals who enjoy a special status under national law are also covered by the EU worker concept. In the context of the worker concept under Art. 45 TFEU, subordination or personal dependence under the *Lawrie-Blum* formula do not serve as the legal justification for the right, as it does in traditional employment law. Rather, they merely describe the legal relationship

806 CJEU, *Allonby*, para. 64.

807 Directive (EU) 2019/1152, recital 8.

808 TFEU, art. 45.

809 Cf. Wank, "Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff," 24; Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht*, 179 ff.

810 Cf. Lianos, Countouris, and De Stefano, "Re-Thinking the Competition Law/Labour Law Interaction," 295.

in fairly broad terms, as they represent a typical characteristic of an employment relationship and subsequently a worker.

In the case *Union Syndicale Solidaires Isère* the issue was the interpretation of the personal scope of application of Directive 2003/88/EC⁸¹¹, which includes: „all sectors of activity, both public and private, within the meaning of Art. 2 of Directive 89/391/EEC”⁸¹². In this case, the CJEU interpreted the Directive according to its purpose and found that the purpose of “encouraging improvements in the health and safety of workers at work”⁸¹³ requires the personal scope of Directive 2003/88/EC to be particularly broad. This adds a further function to the principle of the ‘broad’ interpretation – one not explicitly identified by *Junker* – which the CJEU derives directly from the underlying purpose of the relevant directive. However, this also means that the broad interpretation of the term worker in this context is an exception that is due to the particular purpose of Directive 2003/88/EC and cannot be transferred to other situations without further ado, except where the purpose of another directive also provides for such a broad definition. Furthermore, the primary focus is clearly the protective function of safeguarding the working individual. As a result, the criteria of the *Lawrie-Blum* formula do not merely serve a descriptive role but also fulfill a protective function. In this sense, these criteria evolve into functional criteria, ensuring that working individuals receive the rights and safeguards intended by the Directive.

The case *Balkaya* concerned the question of the interpretation of Directive 98/59/EC⁸¹⁴ and the extent to which a managing director could also be considered a worker in the context of a collective dismissal where national law defines the contractual relationship between the managing director and the company as solely one of company law and not of employment law. In this regard, the CJEU decided further that a member of the board of directors of a capital company must be regarded as a worker within the meaning of the Directive 98/59/EC⁸¹⁵, since such an individual is appointed by another body of that company and may be revoked from this position at any time against the individual’s will. Furthermore, the managing director is, in the exercise of their functions, subject to the direction and supervision of the other body, and, in particular, to the requirements and restrictions that are imposed on them in that regard⁸¹⁶. The CJEU referred to the objective of the Directive from Recital 2: “greater protection should be afforded to workers in the event of collective redundancies”⁸¹⁷ and that “in accordance with that objective, a narrow definition cannot be given to the concepts

811 Directive 2003/88/EC.

812 *Ibid.*, art. 1 para. 3.

813 CJEU, *Union Syndicale Solidaires Isère*, para. 21, 22.

814 Council Directive 98/59/EC of 20 July 1998 on the Approximation of the Laws of the member states Relating to Collective Redundancies, *EUR-Lex*, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01998L0059-20151009>.

815 CJEU, *Balkaya*, para. 43.

816 *Ibid.*, para. 40.

817 Directive 98/59/EC, recital 2.

that define the scope of that directive”⁸¹⁸. As in the case *Union Syndicale Solidaires Isère*, the CJEU thus interpreted the term worker explicitly broader after assessing the purpose of Directive 98/59/EC. And as in the case *Union Syndicale Solidaires Isère*, however, this is once again an exception that cannot be transferred blanketly to other situations. Similarly as the personal scope of application in the Directive 98/59/EC, the primary focus is clearly the protective function of safeguarding the working individual – albeit with a different focus. Again, as a result, the criteria of the *Lawrie-Blum* formula do not merely serve a descriptive role but also fulfill a protective function, i.e., these criteria evolve into functional criteria, ensuring that working individuals receive the rights and safeguards intended by the Directive.

The case *Ruhrlandklinik* concerned the interpretation of Directive 2008/104/EC. It refers to the respective national worker concept when defining the term worker: “any person who, in the member state concerned, is protected as a worker under national employment law”⁸¹⁹. This is also noted by the CJEU⁸²⁰. However, to then refer to the established case law of the CJEU:

„the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard”⁸²¹.

In this way, the essential characteristics of the worker concepts of EU law and the national concepts are equated by the CJEU. However, while the essential features based on which workers receive protection under national law may be similar to the CJEU concepts, they are not the same. The peculiarity of this judgment is thus that it interprets the concept of worker according to the purpose despite the Directive’s reference to the national concept of worker. However, it is also true here again that these arguments of the case cannot be transferred blanketly to other circumstances as the personal scope of application of other directives that follow a different methodology. This demonstrates that while all four judgments reached similar results, their reasoning was heavily dependent on the specific case circumstances and the particular EU provisions under review.

That this may give rise to differing legal concepts becomes apparent from the fact that EU norms are rarely consistent in how they methodologically define their personal scope of application. They often use terms like ‘employment contract’, ‘employment relationship’, or ‘worker’ without providing comprehensive definitions. Despite attempts to define the term ‘worker’ comprehensively by mirroring the *Lawrie-Blum*

818 CJEU, *Balkaya*, para. 44.

819 CJEU, *Ruhrlandklinik*, para. 25.

820 *Ibid.*, para. 26.

821 *Ibid.*, para. 27.

formula⁸²² during the reform of the Transparent and Predictable Working Conditions Directive (EU) 2019/1152, there is to date no such definition. Nevertheless, EU directives still establish a framework for these definitions, albeit in different methodological ways.

Some directives do not use definitions (means definitions in such a way that they can be used to distinguish workers/employees from self-employed persons), such as:

- Clause 3 para. 1 Framework Agreement on the Fixed-term Work Directive 1999/70/EC defines the ‘fixed-term worker’ as a person ‘having an employment contract’ or ‘relationship entered into’ directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event⁸²³;
- Art. 1 para. 1 Insolvency Directive 2008/94/EC speaks of ‘employees’ claims’ arising from contracts of employment or employment relationships⁸²⁴;
- Art. 2 para. 1 Youth Employment Protection Directive 94/33/EC also mentions persons “having an employment contract or an employment relationship”⁸²⁵;
- Art. 3 para. 1 lit. a of Directive 2000/43/EC simply mentions ‘employment’⁸²⁶;
- Art. 3 lit a of Directive 89/319/EC on the introduction of measures to encourage improvements in the safety and health of workers at work includes definition by enumeration, but which says nothing about the actual distinction between worker or self-employed person: worker is “any person employed by an employer, including trainees and apprentices but excluding domestic servants”⁸²⁷.

Some directives refer to a basic concept of worker but, by their very purpose, cover only certain workers, such as:

822 Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union - COM(2017) 797 Final, *EUR-Lex*, art. 2 para. 1 lit. a, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797>.

823 Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, art. 3 para. 1.

824 Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the Protection of Employees in the Event of the Insolvency of Their Employer, *EUR-Lex*, art. 1 para. 1, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008L0094-20151009>.

825 Directive 94/33/EC, art. 2 para. 1.

826 Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, *EUR-Lex*, art. 3 para. 1 lit. a, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0043>.

827 Directive 89/391/EEC, art. 3 lit. a.

- Art. 2 lit. c of the Display Screen Equipment Directive 90/270/EC includes only such workers defined by Art. 3 lit a of the Directive 89/319/EC who work predominantly at display screens⁸²⁸;
 - Fixed-Term Work Directive 1999/70/EC in Clause 2 No. 1 Framework Agreement on Fixed-Term Work only includes workers employed for a fixed term⁸²⁹;
 - The Part-Time Work Directive in Clause 3 No. 1 of the Framework Agreement on Part-Time Work Directive 97/81/EC only refers to part-time workers⁸³⁰;
 - Art. 1 para. 1 of the Temporary Agency Workers Directive 91/383/EEC only covers employment relationships governed by a fixed-duration contract of employment concluded directly between the employer and the worker, where the end of the contract is established by objective conditions such as: reaching a specific date, completing a specific task or the occurrence of a specific event⁸³¹;
 - Art. 1 para. 2 of the Insolvency Directive 2008/94/EC allows member states to exempt certain groups of employees because of the special nature of the employment contract;
 - Art. 2 para. 2 of the Youth Employment Protection Directive 94/33/EC allows member states to make legislative or regulatory provision for this Directive not to apply, within the limits and under the conditions which they set by legislative or regulatory provision, to occasional work or short-term work involving (a) domestic service in a private household, or (b) work regarded as not being harmful, damaging or dangerous to young persons in a family undertaking⁸³²;
- Some directives refer to national law to determine the concept of worker, such as:
- Clause 2 para. 1 of the Framework Agreement on Fixed-Term Work only includes workers employed for a fixed term as defined in each member state⁸³³;

828 Council Directive of 29 May 1990 on the Minimum Safety and Health Requirements for Work with Display Screen Equipment (Fifth Individual Directive within the Meaning of Article 16 (1) of Directive 89/391/EEC) (90/270/EEC), *EUR-Lex*, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01990L0270-20190726>.

829 Council Directive 1999/70/EC.

830 Council Directive 97/81/EC of 15 December 1997 Concerning the Framework Agreement on Part-Time Work Concluded by UNICE, CEEP and the ETUC, *EUR-Lex*, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01997L0081-19980525>.

831 Council Directive of 25 June 1991 Supplementing the Measures to Encourage Improvements in the Safety and Health at Work of Workers with a Fixed-Duration Employment Relationship or a Temporary Employment Relationship (91/383/EEC), *EUR-Lex*, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01991L0383-20070628>.

832 Directive 94/33/EC.

833 Council Directive 1999/70/EC, clause 2 para. 1.

- Art. 2 para. 2 of the Posting of Workers Directive 96/71/EC applies the law of the member state to which the worker is posted⁸³⁴;
- Art. 2 para. 1 lit. d of the Transfer of Undertakings Directive 2001/23/EC defines an ‘employee’ as any person who, in the member state concerned, is protected as an employee under national employment law⁸³⁵;
- Art. 2 para. 1 of the Youth Employment Protection Directive 94/33/EC includes any person under 18 years of age having an employment contract or an employment relationship under national law⁸³⁶;
- Art. 2 lit. d of the Information and Consultation Directive 2002/14/EC defines an ‘employee’ as any person who is protected as an employee under national employment law and in accordance with national practice⁸³⁷;
- Art. 1 para. 1 lit. b of the Collective Redundancies Directive 98/59/EC defines ‘workers’ representatives’ as provided for by national law⁸³⁸;

Furthermore, it must be noted that even if a directive expressly refers to the fact that the concept of worker or employee is to apply according to national law, the CJEU nevertheless defined in some cases a worker concept itself by invoking ‘effet utile’⁸³⁹.

A case in which an EU concept is used in addition to the national concept, can be found in the already mentioned the Transfer of Undertakings Directive 2001/23/EC⁸⁴⁰. On the one hand, it concerns the factual occurrence of a transfer of an undertaking, typically involving the transfer of an economic entity composed of assets, including the employment relationships. In this context, an autonomous EU law concept of ‘worker’ applies⁸⁴¹. On the other hand, according to Art. 2 of the Directive, the national definition is used for the understanding of ‘employee’, ‘contract of employment’ or ‘employment relationship’. Furthermore, the Directive formulates which contracts of employment or employment relationships cannot be excluded from the scope of the

834 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, *EUR-Lex*, art. 2 para. 2, accessed March 21, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01996L0071-20200730>.

835 Council Directive 2001/23/EC of 12 March 2001 on the Approximation of the Laws of the member states Relating to the Safeguarding of Employees’ Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses, art. 2 para. 1 lit. d, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02001L0023-20151009>.

836 Directive 94/33/EC, art. 2 para. 1.

837 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 Establishing a General Framework for Informing and Consulting Employees in the European Community, art. 2 lit. d, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002L0014-20151009>.

838 Directive 98/59/EC, art. 1 para. 1 lit. b.

839 CJEU, *Ruhrlandklinik*, para. 36 ff.

840 Directive 2001/23/EC.

841 Cf. Rolf Wank, “Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?,” *EuZA*, 2008, 184-185.

Directive⁸⁴².

Recently, EU legislation seems to follow a new trend towards uniform overarching worker concepts:

1. hybrid definition of the term ‘worker’ without legal presumption, i.e. reference to the national concept of worker or employee with simultaneous reference to an EU concept of worker⁸⁴³;
2. hybrid definition of the term ‘worker’ with legal presumption, i.e. reference to the national concept of worker or employee with simultaneous reference to an EU concept of worker. In addition, an employment relationship is assumed if at least a certain number of legally defined criteria are met⁸⁴⁴;
3. hybrid definition of the term ‘worker’ with legal presumption, i.e. reference to the national concept of worker or employee with simultaneous reference only to principles set by the CJEU; in addition, an employment relationship is assumed if certain conditions are met⁸⁴⁵.

Whereas many earlier directives relied on national definitions of ‘worker’ or ‘employee’, a shift has recently begun to emerge. One key factor behind this development is the European Commission’s observation, as noted in the 2017 *REFIT* evaluation, that divergent interpretations of terms such as ‘employee’, ‘employment relationship’, and ‘employment contract’ across member states have created legal uncertainty. This lack of clarity, particularly in relation to new and atypical forms of employment, poses a significant barrier to the effective application of certain pieces of EU legislation⁸⁴⁶.

Efforts have been made to establish uniform definitions, notably in the Proposal Directive for a reform of Directive 91/533/EEC⁸⁴⁷. However, this approach has not been pursued further for the time being. Instead, the focus has shifted toward the aforementioned hybrid approaches. A prominent example is Directive (EU) 2019/1152, which adopts such a hybrid model. Its personal scope of application is based on the national concept of ‘worker’ or ‘employee’⁸⁴⁸. On the other hand, member states should take the case law of the CJEU into consideration⁸⁴⁹. It appears that this approach is currently being further developed, i.e., in the Directive (EU) 2022/2041 on adequate minimum

842 Ibid, art. 2.

843 Directive (EU) 2019/1152, chap. I art. 1 para. 2; Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union, *EUR-Lex*, art. 2, recital 21, accessed March 17, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2041>.

844 Proposal for a Directive on Improving Working Conditions in Platform Work, chap. I art. 2 para. 1 no. 4, art. 4, recital 20.

845 Directive (EU) 2024/2831, art. 2 para. 1 lit. d, 5, recital 28.

846 “REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC),” 25.

847 Proposal for a Directive on Transparent and Predictable Working Conditions, chap. 1 art. 2 para. 1 lit. a.

848 Directive (EU) 2019/1152, chap. 1 art. 1 para. 2.

849 Ibid.

wages in the EU⁸⁵⁰. The proposal for a directive on platform work⁸⁵¹ not only pursues the hybrid approach, but additional legal presumptions are included. Furthermore, reference is made to the national concepts in defining the worker and the case law of the CJEU is to be considered⁸⁵². Both hybrid models seem to be based on the assumption that there is a general EU worker concept⁸⁵³. However, the adopted version of the Platform Work Directive no longer refers to any specific criteria developed by the CJEU but instead only to developed principles⁸⁵⁴.

The CJEU itself has already rejected the blanket assumption of a general EU worker concept in subsequent judgments, which was initially suggested by itself in the case *May*⁸⁵⁵. This new practice of the EU legislator to make blanket reference to criteria derived from a handful of judgments of the CJEU is therefore criticized in recent literature⁸⁵⁶ and the idea that there is a general EU concept of worker is at least under pressure by national case law⁸⁵⁷.

In the case *Allonby*, the CJEU noted, that “it is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty”⁸⁵⁸. Although the CJEU’s interpretation in the case *Allonby* ultimately reaffirmed the core elements of the *Lawrie-Blum* formula, it nevertheless underscored that the concept of worker must be interpreted in light of its specific legal context and may, in principle, vary depending on that context.

In the case *O’Brien*, Advocate General Kokott stated: “All the parties have pointed out that there is no single definition of worker in EU law”⁸⁵⁹.

In the case *Fenoll*, Advocate General Mengozzi stated: “There is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied”⁸⁶⁰. He concluded as follows:

850 Directive (EU) 2022/2041, art. 2, recital 21.

851 Cf. Proposal for a Directive on Improving Working Conditions in Platform Work.

852 *Ibid.*, chap. 1 art. para. 1 no. 4, art. 1 para 2, note 62: in addition to the judgments referred to in Directive (EU) 2019/1152: CJEU, *UX* and *Yodel*.

853 *Ibid.*, recital 20.

854 Directive (EU) 2024/2831, recital 28.

855 Cf. CJEU, *Martínez Sala*, para. 31; CJEU, *Allonby*, para. 63.

856 Advocating a more teleological interpretation approach, i.a. Gruber-Risak and Dullinger, *The Concept of “Worker” in EU Law*, 45; Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 49; Hohe, *Arbeitnehmerbegriffe im Recht der Europäischen Union*, 244.

857 R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another [2020] EWHC 3050, para. 82 lit. a; BAG, Urt. v. 25.6.2020 - 8 AZR 145/19, para. 70.

858 CJEU, *Allonby*, para. 64.

859 Opinion of Advocate General Kokott delivered on 17 November 2011, *O’Brien*, C-393/10, EU:C:2011:746, para. 25.

860 Opinion of Advocate General Mengozzi delivered on 12 June 2014, *Fenoll*, C-316/13, EU:C:2014:1753, para. 29.

“The court therefore considers that the worker to whom Directive 2003/88 [the Working Time Directive] is addressed is defined in the same way – save for one reservation which I shall set out below – as the worker to whom article 45 TFEU is addressed. Reference may therefore usefully be made in this opinion to the classic case law of the court in the field of freedom of movement for workers”⁸⁶¹.

While the outcome once again aligned with the *Lawrie-Blum* formula, the reasoning makes it clear that this result was not assumed automatically. Rather, a deliberate assessment was undertaken as to whether the adoption of the same or a similar concept of ‘worker’ – as developed in the context of the free movement of persons – would be appropriate in a legal area unrelated to that context. In this sense, the interpretation is teleological in nature, leaving room for different conceptualizations of ‘worker’ in future contexts. This does not suggest that each directive requires a distinct worker concept, but rather that related subject matters should be clustered and interpreted consistently within their respective legal frameworks⁸⁶². The concept of worker as developed in the context of the freedom of movement may serve as a point of reference or orientation⁸⁶³. However, it is essential to examine whether, and to what extent, contextual factors warrant a deviation from that reference point. In each case, a teleological interpretation is required, as the overall legal and factual circumstances are decisive⁸⁶⁴. Various scholars have repeatedly pointed out that EU law does not recognize catch-all provisions such as ‘employee-like persons’ in Germany or intermediary statuses such as ‘limb (b) workers’ in the UK. This observation is truly correct, in particular with regard to fundamental freedoms where there are in this respect only two baskets of rights – either the free movement of workers or the freedom of establishment and the freedom to provide services. However, the conclusion that EU law – like Lithuanian employment law – must therefore rely on a strictly binary classification system in other contexts, overlooks the fact that EU secondary legislation is fragmented across various legal acts addressing different aspects of employment law, each potentially featuring its own, and at times broader, personal scope of application. As a result, any personal scope defined more broadly than the usual case can have an effect similar to that of a catch-all provision under national law regarding a specific aspect of national employment law. However, this does not necessarily have to result in the creation of a catch-all provision in national law but may instead be addressed through alternative methodological approaches.

It thus becomes evident that the EU concept(s) of ‘worker’ can, in theory, exhibit a considerable degree of flexibility – that is, the definition may vary depending on

861 Ibid.

862 Cf. Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 37. Rolf Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff”, *EuZA* (2023), 22-49, at 37.

863 Cf. Wank, “Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen,” 341.

864 CJEU, *Allonby*, para. 64.

the purpose and context of the respective EU legal instrument⁸⁶⁵. On the other hand, the concept of ‘worker’ generally possesses an independent and autonomous meaning within the EU legal order⁸⁶⁶. This implies that the concept of ‘worker’ must be interpreted uniformly across member state borders. In other words, a person working under specific conditions and within a particular work structure in Germany must be treated in the same way as a person in an identical situation in Lithuania. If the CJEU continues to uphold this approach, this would suggest that the EU concept of ‘worker’ is contextually flexible – adapting to the purpose of the specific legal act – but nonetheless consistent and identical in its application across all member states. Methodological parallels can be drawn with the RESC, which likewise adopts an autonomous concept of ‘worker’. However, the substantive scope of this concept is also determined by the purpose and objectives of the specific provision of the RESC in which it is applied⁸⁶⁷.

Building on this, the subsequent analysis in this dissertation cannot rely on the assumption that the criteria set by EU law for determining personal scope of application are always based on the *Lawrie-Blum* formula and could therefore, in individual cases, also encompass freelance workers who do not meet the control criteria of this formula.

3.6. Interim Conclusion

It is true that the Lithuanian legal framework is fundamentally based on EU requirements⁸⁶⁸. However, as has been shown, the concept of the employment contract in Lithuania concentrates largely on a narrow organizational subordination necessitating some kind of obligation of the working individual to obey to instructions or to the regulations in force at the workplace. This narrow wording of Art. 32 para. 2 LR DK leaves little room for new interpretations.

Therefore, the question arises to what extent the worker concept of the EU differs from the concept of the employment contract and ultimately the employee according to the LR DK. Art. 32 LR DK includes indisputably the following criteria: (i) a natural person⁸⁶⁹ who (iii) performs services for and (iv) under the direction of another person (v) in return for remuneration⁸⁷⁰. Also, the criterion (ii) for a certain period of time would have been met. According to Lithuanian case law, the function⁸⁷¹ has a continuous nature and is not linked to a deliverable (an assignment or a service rendered within a specific time)⁸⁷².

865 CJEU, *Martínez Sala*, para. 31; CJEU, *Allonby*, para. 63; CJEU, *Dodl and Oberhollenzer*, para. 27.

866 CJEU, *Balkaya*, para. 33.

867 On the different personal scopes of application of the RESC, cf. Chapter 4.2.2. of this dissertation.

868 Cf. Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13.

869 LR DK, art. 21 para. 2.

870 *Ibid.*, art. 32 para. 1.

871 *Ibid.*

872 LAT, 2002 m. vasario 11 d. nutartis civilinėje byloje Nr. 3K-3-264/2002.

Therefore, the criteria would initially be similar to the *Lawrie-Blum* formula according to the wording. However, if EU law is applicable, the interpretation of the terms of Lithuanian employment law would be beyond the scope of established national court practice and in the event of a dispute, they would have to be interpreted in a ‘European way’. Yet, the CJEU’s jurisprudence is often difficult to predict, as it decides on a case-by-case basis and draws upon a relatively limited set of interpretative sources. Consequently, the mere fact that the CJEU ultimately has the final say in interpreting terms under EU law tends to result in the EU concept of ‘worker’ being, almost by default, one interpretative step or ‘legal cubit’ broader than any of its national counterparts.

This poses particular challenges for individuals operating in the ‘grey area’ between employee and self-employed status – especially in jurisdictions like Lithuania, where employment law recognizes only a binary classification. In such cases, there is a risk that these individuals may either fall entirely outside the scope of employment protection or to overextending the scope inappropriately. As long as the applicable EU concept of ‘worker’ largely adheres to the *Lawrie-Blum* formula, its influence on national interpretations may remain limited. However, should the CJEU deviate from the *Lawrie-Blum* approach in a given case, this could have far-reaching implications for Lithuanian employment law, which operates on a rigid ‘all-or-nothing’ classification system. In response, Lithuania could consider introducing intermediate categories or catch-all provisions in certain areas of the law – similar to developments in Germany or the UK – and potentially move towards a two-or-more tier regulatory framework⁸⁷³. Alternatively, it could address this challenge by adopting varying interpretations of the concept of subordination within its national employment law. This would entail moving away from an approach that interprets subordination solely based on the factual circumstances of the individual case. Instead, interpretation would also take into account the specific legal context, including the relevant area of (employment) law and the purpose of the applicable legal norm. However, as a result, several distinct concepts of ‘employee’ and ‘employment contract’ could emerge within Lithuanian law, partially diverging from the uniform wording of the domestic legal definition found in the LR DK. Such a development would resemble the German approach, where the national concept is interpreted strictly in line with the EU definition only in those legal areas falling within the scope of EU law and the jurisdiction of the CJEU⁸⁷⁴, which leads, e.g., to situations in which a managing director can be considered an employee only under provisions that fall within the scope of EU law, but not in other contexts governed solely by national law.

By this approach, it would be expedient to examine whether an EU worker concept

873 Advocating the use of the intermediary statuses, cf. Rolf Wank, “Workers’ Protection National Study for Germany for the ILO” (ILO), accessed April 15, 2025. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/genericdocument/wcms_205364.pdf; Menegatti, “The Evolving Concept of ‘Worker’ in EU Law,” 82.

874 Cf. BGH, Urt. v 26.03.2019 - II ZR 244/17, *NJW*, 2019, 2086–91.

would be applicable in relation to domestic legal norm; this would have to be examined in terms of content, and then the scope of application of this norm would have to be determined possibly far from the wording of the domestic definition. However, the latter approach would, compared to Germany, face certain practical limitations. This is because the German concept of ‘employee’ is significantly more flexible and adaptable due to the use of the typological method, in contrast to the respective narrower Lithuanian concept. A direct interpretation in line with EU law is in Germany always possible to some extent, as the EU concept of ‘worker’ – regardless of its specific formulation – can invariably be accommodated within the flexible terminology and factors established by German law. In contrast, the question arises in Lithuania whether an interpretation that departs from the national definitions of ‘employee’ and ‘employment contact’ would be permissible only in vertical legal relationships, but not in horizontal ones – since directives, by their nature, cannot have direct horizontal effect⁸⁷⁵. This limitation also applies to the personal scope of a directive. This could result in a fragmentation of Lithuanian employment law – divided by horizontal and vertical employment relationships. While Lithuania’s codified personal scope of application – resulting in an ‘all-or-nothing’ principle, but defined through clear criteria – appears to offer the highest degree of legal certainty for the parties involved, this overlooks an important reality: EU social and employment law is not consolidated in a single code with a uniform personal scope. Instead, different EU directives may apply different personal scopes, creating a situation in which stakeholders cannot rely solely on the national definition but must also take into account the relevant EU provisions (at least in vertical employment relationships and, in some instances, even in horizontal relationships where principles of EU law become relevant). Consequently, fragmentation – or even atomization – of employment law may already arise whenever a subject matter is governed by EU law and the personal scope of an EU directive diverges from the national definition. There can be a tension between legal certainty and the need for regulatory flexibility: on the one hand, clear and narrowly defined categories promote predictability, but on the other hand, definitions that are too restrictive may fail to capture all individuals in need of protection and may even facilitate circumvention.

In this context, it is important to consider that German law emphasizes a strong contextual approach in such analyses. Accordingly, under EU law, e.g., not all managing directors would be classified as workers; in general, external managing directors – those who are not themselves shareholders – are considered as such. However, even here, further distinctions must be made, as ultimately the degree of decision-making influence exercised by the individual shareholder is decisive. Thus, in otherwise nearly identical cases, the individual may, in one instance, qualify as an employee, while in another, they may not⁸⁷⁶. This distinction becomes particularly evident in the case of a so-called ‘one-person GmbH’ (‘Ein-Mann-GmbH’), i.e., limited liability companies

875 Regarding the vertical and horizontal effects of EU directives, cf. Chapter 4.3.2. of this dissertation.

876 On the provision of temporary employment services by the managing director themselves, cf. BAG, *Urt. v. 17.1.2017 - 9 AZR 76/16, NZA, 2017, 572-77.*

where only one person is at the same time the sole shareholder and the managing director. The reasoning is that while ‘external’ managing directors are generally subject to the authority of the company’s governing bodies, if these bodies effectively consist of the same individual (i.e., the managing director giving instructions to themselves), the criteria established by the CJEU for classifying a ‘worker’ are, according to German interpretation, not satisfied in reality⁸⁷⁷ – especially in relation to the fundamental freedoms. This approach is logical, as otherwise the ‘sole shareholder-managing director’ (‘Alleingeschafter-Geschäftsführer’) could selectively invoke either the right to the freedom to provide services and establishment or the freedom of movement for workers, depending on what is more advantageous in a given situation – or even simultaneously. In contrast, Lithuanian company law mandates that an employment contract must always – with the exception of only certain types of companies – be concluded with a managing director⁸⁷⁸, who is therefore generally regarded as an employee⁸⁷⁹. However, following the German perspective, such a managing director would not automatically qualify as a worker under EU law. An additional layer of complexity arises under German law when a work order is placed with a limited liability company that has only one shareholder who simultaneously acts as the sole managing director. In such cases, at least under German social security law, the managing director can be considered an employee of the work provider (and should also be considered worker under EU law) if the services are provided solely by the individual ‘sole shareholder-managing director’⁸⁸⁰. This approach is also reflected in the CJEU’s decision in the case *Danosa*, where the individual’s influence over the decision to terminate their own employment must be taken into account⁸⁸¹. Although the distinction is not easy to draw, it is clear that if the decision is made solely by the individual themselves, albeit in a different capacity, they cannot be classified as a worker under EU law.

This demonstrates the highly context-sensitive interpretation of the German version of the ‘primacy of facts’ principle, which, in contrast to Lithuanian law, extends well beyond the mere consideration of the contractual intent of the parties – even more in social security law. Also in UK law, the latter approach is known⁸⁸². Accordingly, this

877 Cf. CJEU, *Danosa*, 46–50; CJEU, *Balkaya*, para. 48.

878 LR ABĮ, *e-TAR*, art. 37 para. 4, accessed April 17, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.E22116F1B0E0/asr>; LR DK, art. 101 para. 1.

879 Even though it is recognized that the relationship with the managing director constitutes a ‘dual’ legal relationship, cf. LAT, 2001 m. spalio 16 d. nutartis civilinėje byloje Nr. 3K-7-760; Tomas Bagdanskis, “Darbdaviui atstovaujančio asmens materialinės atsakomybės problemos,” *Jurisprudencija* 56, no. 48 (2004): 88; cf. Agnė Tikniūtė and Jūratė Usonienė, “Vienasmenio valdymo organo teisinis statusas: ar įmanomas vienareikšmiškumas?,” *Jurisprudencija* 20, no. 3 (2013): 1095–1111, doi:10.13165/JUR-13-20-3-12.

880 Cf. BSG, Urt. v. 20.7.2023 - B 12 BA 1/23 R, *BeckRS* 37800 (2023); BSG, Urt. v. 20.7.2023 - B 12 R 15/21 R, *Neue Zeitschrift für Sozialrecht*, 2024, 262–68; BSG, Urt. v. 20.7.2023 - B 12 BA 4/22 R, *Neue Zeitschrift für Gesellschaftsrecht*, 2024, 1003–8.

881 CJEU, *Danosa*, para. 50.

882 Cf. “Provisional List of Suggestions for Amendments to the Employment Rights Bill 2024,” 17.

strongly contextual methodology is evidently relevant not only for managing directors but also for freelance workers who operate through a limited liability company but, in substance, do nothing more than offer their labor to a single or a very limited number of work providers and would therefore be false self-employed.

Additionally, the division of German employment law into different legal acts allows for a much simpler categorization of specific topics under topics governed by EU law. In contrast, assigning issues within Lithuania's comprehensive LR DK would likely prove much more challenging. There is a risk that a broader interpretation of the Lithuanian definitions could overlap with areas that are not governed by EU law at all. As a result, the general concept of an employment contract in the LR DK could become overly expansive and ever more inflated combined with the risk that the CJEU could indirectly gain interpretative power over the entire Lithuanian employment law.

Ultimately, it remains to be seen how this will be dealt with in practice. It is significant that the decisive half-sentence concerning the consideration of the criteria developed by the CJEU was entirely ignored when the transposition of Directive (EU) 2019/1152 into national law was examined and nevertheless a full transposition of Art. 1 para. 2 of Directive (EU) 2019/1152 was assumed⁸⁸³. Presumably, this rests on the assumption that the national concept of 'employee' and 'employment contract' and the CJEU's concept of 'worker' are congruent. However, this cannot be the case, as the CJEU's case law is inherently unpredictable and develops on a case-by-case basis. At best, the two concepts may overlap to a significant extent, but full alignment cannot be presumed without a teleological analysis of the underlying directive's personal scope of application.

The Proposal for a Directive on Platform Work from 2021 which was not adopted as such included further dangers to soften the Lithuanian concept⁸⁸⁴. Again, reference was made to the national concepts in defining a worker, again the case law of the CJEU was to be considered⁸⁸⁵, and again it was suggested that there is a general CJEU's worker term⁸⁸⁶. This is supplemented by a rule of presumption for the existence of worker status⁸⁸⁷. This emerging pattern in the practice of the EU legislator has the consequence that, in the transposition of EU directives, not only some form of 'general' EU worker concept must be taken into account, but also those aspects of the concept that possibly extend beyond the national definitions of 'employee' and 'employment contract'. This inevitably requires that the scope of application of specific provisions transposing such EU legislation be defined more broadly than the national definitions

883 "Direktyvos (ES) 2019/1152 Ir Nacionalinių Teisės Aktų Atitikties Lentelė," *e-Seimas*, art. 1 para. 2, accessed March 21, 2025, https://e-seimas.lrs.lt/rs/lasupplement/TAP/c802b760a69211ecaf79c2120caf5094/c65c06f9a82c11ecaf79c2120caf5094/format/ISO_PDF/.

884 Cf. Proposal for a Directive on Improving Working Conditions in Platform Work.

885 *Ibid.*, chap. 1 art. para. 1 no. 4, art. 1 para 2, note 62: in addition to the judgments referred to in Directive (EU) 2019/1152: CJEU, *UX* and *Yodel*.

886 *Ibid.*, recital 20.

887 *Ibid.*, art. 4.

of 'employee' and 'employment contract' do actually allow – a challenge to which Lithuanian law provides, thus far, no clear answers. Whether this potential challenge has already given rise to practical challenges will be examined in the following, based on the requirements set by higher-ranking legal norms concerning the personal scope of rights and social guarantees for working individuals.

4. REQUIREMENTS FOR THE APPLICABILITY OF EMPLOYMENT AND COMPREHENSIVE SOCIAL SECURITY LAW BY HIGHER-RANKING LAW TO FREELANCE WORKERS IN LITHUANIA

In Lithuania, the applicability of employment and social security laws is shaped by a complex interplay of various legal norms and higher-ranking law principles. This chapter seeks to elucidate these requirements and their implications for freelance workers by examining the relevant legal hierarchies and standards. To begin, the chapter explores the regulatory hierarchy within Lithuania, which defines the relative authority of different legal sources and sets the foundation for how employment and social security laws are structured and applied.

Next, the chapter delves into the question of how higher-ranking law and principles shape the Lithuanian employment and social security landscape and whether it sets requirements for the inclusion of certain self-employed individuals (which would be qualified as such under Lithuanian law) into its regulatory framework. It begins with an overview of the requirements set by international law, highlighting how it influences national regulations and whether and how it potentially requires freelance workers to be afforded appropriate protection. It will clarify the alignment of Lithuanian law with international law. The discussion then turns to EU law, examining how EU legislation impacts the Lithuanian legal framework and shapes the treatment of freelance workers within the EU context. This includes an analysis of how well EU law integrates with Lithuanian legislation or *vice versa*.

Finally, the chapter addresses Lithuanian constitutional law, which plays a crucial role in shaping employment rights and social guarantees. This section explores how constitutional principles might influence the applicability of employment and social security law to freelance workers and ensures that national legislation aligns with fundamental rights and guarantees. Through this comprehensive analysis, the chapter aims to provide a clear understanding of how higher-ranking law frameworks intersect with employment and social security laws to affect the legal treatment of freelance workers in Lithuania.

4.1. Regulatory hierarchy

In order to enable a systematic interpretation of legal norms in the following analysis, it is first necessary to examine the normative structure of Lithuanian employment and social security law more closely. Lithuanian employment law is, for the most part, part of the civil law tradition. This is evident in the fact that the legal norms and principles governing civil relations may be applied to labor relations where a regulatory gap exists – provided such application does not contradict the essence of the legal regulation of labor relations⁸⁸⁸. Accordingly, the employment contract is, in principle,

888 LR DK, art. 4 no. 2.

also subject to the principle of contractual freedom, albeit within the strict limits set by employment law⁸⁸⁹. By legal definition, employment law in Lithuania is governed by the following sources⁸⁹⁰:

1. the Constitution of the Republic of Lithuania;
2. the LR DK;
3. other laws regulating labor relations;
4. legal acts of the EU;
5. international treaties of the Republic of Lithuania;
6. decisions of the Government of the Republic of Lithuania and normative legal acts of other state institutions;
7. collective agreements;
8. agreements between the employer and the works council and other local normative legal acts.

This list is followed by a hierarchical structure of norms⁸⁹¹. However, the highest level is not elaborated in detail in this hierarchy: constitutional law. The Constitution of the Republic of Lithuania represents the supreme source of employment law. It cannot be superseded by any other source and forms the legal basis for the adoption and review of all other laws⁸⁹². Notably, EU law – particularly EU primary law and directly applicable regulations – is not explicitly mentioned in the hierarchy but nonetheless takes precedence. The supremacy of EU law derives from the Constitutional Law on the Membership of the Republic of Lithuania in the European Union. This law provides that legal acts of the EU, insofar as this follows from its treaties, are directly applicable and, in the event of a conflict, take precedence over national laws and legal acts, including the LR DK⁸⁹³. Thus, Lithuanian employment law follows here the principle of ‘*lex superior derogat legi inferiori*’ with regard to constitutional and directly applicable EU law norms, i.e. that a higher norm supersedes the lower norm of the LR DK.

With regard to other laws, the LR DK enjoys priority under the principle ‘*lex specialis derogat legi generali*’, i.e. a norm of the LR DK has precedence over other laws as *lex specialis*, unless the LR DK gives precedence to the norms of other laws⁸⁹⁴. Such precedence is given to laws on mobilization, martial law, crisis management and civil security⁸⁹⁵. A point of legal conflict arises, for instance, with Art. 18-1 LR KTK which stipulates that passenger transport services for a fee using light vehicles are provided by individuals engaged in independent activities, who have a contract only with the

889 LR CK, art. 6.156 para. 4.

890 LR DK, art. 3 para. 1.

891 *Ibid.*, art. 3 para. 2–7.

892 Davulis, *LR DK komentaras*, 33.

893 Lietuvos Respublikos Konstitucijos papildymo Konstituciniu aktu ‘Dėl Lietuvos Respublikos narystės Europos Sąjungoje’ ir Lietuvos Respublikos Konstitucijos 150 straipsnio papildymo įstatymas, *e-TAR*, art. 2 sentence 2, accessed March 17, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.7BBBC89D161E>.

894 LR DK, art. 3 para. 2.

895 *Ibid.*, art. 3 para. 2–1.

passenger transport organizer (e.g., platforms such as Uber or Bolt)⁸⁹⁶. However, since the LR DK does not give precedence to the LR KTK, the LR DK must prevail⁸⁹⁷. This applies all the more if EU law stipulates that these individuals providing such services must be qualified as workers.

The LR DK also explicitly formulates the possibility that other laws, when implementing EU legislation, may establish the labor relations standards laid down in the LR DK. This means that only when indirect EU legislation, i.e., mainly EU directives, is implemented by national laws or regulations, these national acts may take precedence over pre-existing laws⁸⁹⁸. The same applies in relation to international treaties if these result in a direct application to labor relations⁸⁹⁹.

Decisions of the Government of the Republic of Lithuania and normative legal acts of other state institutions may be subject to the principle of ‘ultra vires’, i.e. government decisions and normative legal acts of other state institutions may regulate labor relations only within the scope of the LR DK. If these decisions or legal acts exceed the powers granted by the LR DK or are not in conformity with it, they may be considered unlawful⁹⁰⁰.

Provisions of collective agreements and agreements between employers and works councils regulate the mutual rights and obligations of employers and employees within their scope of application and are binding on them⁹⁰¹.

The employment contract is another legal source one level below. It is only indirectly mentioned in the norm hierarchy, but its hierarchical place is clear from the context of the law: the employer’s local acts are mentioned. According to this, the employer can issue them within the legal framework in addition to using the right to organize the work of subordinate employees on the basis of the employment contract⁹⁰². This means that the employment contract as the basis takes in general precedence. The use of the right to organize the work of subordinate employees on the basis of the employment contract is not the employment contract itself, but the employer’s right to issue instructions⁹⁰³. It is therefore complemented by the employer’s local acts.

This ‘pyramid of norms’ gets interrupted by a favorability principle. According to this, the most favorable norm for the employee applies⁹⁰⁴. This means that if there are

896 LR KTK, sec. 18–1.

897 Other opinion, cf. Davulis, “Ar legalus yra maisto išvežiojų ‘streikas?’” – “This legal provision essentially eliminates the possibility of challenging the civil legal nature of the relationship between the driver of the platform and the platform itself, as the driver providing the escort service is self-employed under the laws of the Republic of Lithuania.”

898 LR DK, art. 3 para. 3.

899 Ibid., art. 3 para. 4.

900 Ibid., art. 3 para. 5.

901 Ibid., art. 3 para. 6.

902 Ibid., art. 3 para. 7.

903 Ibid., art. 32 para. 2.

904 Ibid., art. 6 para. 2.

doubts about the terms of the employment contract or contradictions between employment contracts and collective agreements governing labor relations, they will be interpreted in favor of the working individual⁹⁰⁵. Following this hierarchy of norms, EU law and constitutional law take precedence. However, it must also be examined whether there are also any international treaties which also take precedence. The following chapter will therefore take a closer look at the requirements under international law, EU law and Lithuanian constitutional law for granting special rights and social guarantees to freelance workers.

4.2. Requirements by international law

4.2.1. European Convention on Human Rights (ECHR)

The ECHR is a treaty under international law and one of the central instruments for the protection of human rights in Europe. Since entering into force in 1953, it has been ratified by all Council of Europe member states, including Germany, the UK, and Lithuania. By ratifying the ECHR, these states accept legally binding obligations, which are subject to enforcement by the ECtHR. Although the ECHR does not focus primarily on labor rights, several of its provisions influence them indirectly – most notably, the right to respect for private life under Art. 8 ECHR⁹⁰⁶. However, only two rights within the ECHR explicitly address labor issues: the prohibition of slavery, servitude, and forced labor (Art. 4), and the right to form and join trade unions (Art. 11)⁹⁰⁷. As the prohibition in Art. 4 falls outside the scope of this dissertation, the analysis will center on trade union rights as protected by Art. 11.

In interpreting the ECHR, the ECtHR adheres to general principles applicable to international treaties, as outlined in the VCLT. Under the heading ‘Freedom of Assembly and Association’, Art. 11 ECHR establishes that “everyone has the right to freedom of peaceful assembly and to freedom of association with others”. It specifically highlights that everyone has the right “to form and to join trade unions for the protection of his interests”. However, lawful restrictions on the exercise of these rights for members of the armed forces, police, or state administration are explicitly permitted⁹⁰⁸. Art. 11 ECHR positions trade union rights as a distinct subset within the broader framework of freedom of association. While its primary function is to shield individuals from unjustified interference by public authorities, it may also impose positive

905 Cf. Genovaitė Dambrauskienė, “Konstitucinės teisės į darbą garantijos ir Lietuvos Respublikos naujasis darbo kodeksas,” *Jurisprudencija* 30, no. 22 (2002): 87.

906 In the case of *Sidabras and Others v. Lithuania*, the ECtHR read the right to work into Art. 8 ECHR, which protects the right to private life, cf. ECtHR, Judgment of 23 June 2015, *Sidabras and Others v. Lithuania* (Nos. 50421/08 and 56213/08).

907 Cf. ECHR, art. 4, 11.

908 *Ibid.*, art. 11 para. 2.

duties on states to ensure these rights are effectively realized⁹⁰⁹. The universal applicability of this right – clearly stated in the use of the term ‘everyone’ – along with the fact that exceptions are explicitly defined, reinforces the notion that all individuals, regardless of employment status, are entitled to it. This interpretation is underscored by the ECtHR’s landmark decision in *Demir & Baykara v. Turkey*, which dealt with a ban preventing public officials from forming trade unions or entering into collective agreements. It emphasized that “the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention”. The ECtHR further stated that it is irrelevant whether a country has ratified “the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned”⁹¹⁰. Additionally, the ECtHR emphasized that evolving international and domestic norms – reflected in the practices of the majority of Council of Europe member states and international bodies – should influence the interpretation of labor rights, including trade union freedoms. This reinforces the idea that labor rights, including trade union freedoms, must be interpreted in light of evolving international and domestic legal standards⁹¹¹. The ECtHR found that a blanket ban on collective bargaining for civil servants was therefore in violation of Art. 11 ECHR⁹¹². In reaching this conclusion, it referred to Art. 2 of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, which affirms the right of all workers, without exception, to establish and join organizations of their own choosing⁹¹³. The ECtHR also referred to repeated affirmations of this right by the CEACR “on a number of occasions”⁹¹⁴, as well as to Art. 12 para 1 CFR and its broad approach to the right to organize, stating, among other things, that ‘everyone’ has the right to form and join trade unions to protect their interests⁹¹⁵. Furthermore, it referred to Art. 5 RESC which underscores the widely accepted principle that civil servants in general must enjoy the fundamental right of association⁹¹⁶. Ultimately, the ECtHR clarified that, with regard to the right to form and join trade unions in its various forms, Art. 2 of ILO Convention No. 87, Art. 12 para. 1 CFR, Art. 5 RESC, and Art. 11 ECHR may not have identical personal scopes of application but must at least provide a consistent level of protection.

A similar reliance to Art. 2 of ILO Convention No. 87 by the ECtHR was evident in the case of *Sindicatul ‘Păstorul Cel Bun’ v. Romania*. However, the ECtHR faced the

909 ECtHR, Judgment of 9 July 2013, *Sindicatul ‘Păstorul Cel Bun’ v. Romania* (No. 2330/09), para. 131.

910 ECtHR, *Demir and Baykara v. Turkey*, para. 85–86.

911 Ibid.

912 Ibid., para. 107.

913 Cf. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), art. 2, accessed March 21, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

914 ECtHR, *Demir and Baykara v. Turkey*, para. 101–102.

915 Ibid., para. 105.

916 Ibid., para. 103.

issue that, while international law standards suggest that public servants could also be considered workers under ILO Convention No. 87, it was much less clear who else might qualify as such. This ambiguity arose from the lack of a binding international definition. Nevertheless, the ECtHR found it necessary to look to international instruments for guidance. It referenced in this regard Recommendation No. 198 concerning the employment relationship, specifically the principle of ‘primacy of facts’⁹¹⁷, which holds that the nature of the employment relationship should be determined by the realities of the work performed and remuneration received, irrespective of how the arrangement is labeled by the parties⁹¹⁸.

The ECtHR applied this principle to the joint interpretation of Art. 2 of ILO Convention No. 87 and Art. 11 ECHR. As the ECtHR emphasized that it applies the criteria laid down in the relevant international instruments, it raises the suspicion that further parts of Recommendation No. 198 might also be referenced, such as the example factors and indicators from the Recommendations Sec. 12 and 13⁹¹⁹. However, there was no explicit reference to them. The only parallelism could be seen in the fact that the priests in the underlying case discharged their activities based on a decision by the bishop who appoints them, sets out their rights and obligations, and supervises the tasks they perform under their leadership. Beyond that, the ECtHR identified its own criteria from the specific case to determine the existence of an employment relationship. These included criteria such as members of the clergy being responsible for the sale of liturgical items as well as the priests paying income tax, contributing to the national social security scheme, and being entitled to the same welfare benefits as regular employees⁹²⁰, i.e., rather descriptive criteria. The use of such criteria made sense in this context, as there was no distinction between traditional employees and self-employed individuals. Instead, the question at hand was whether employment rights should apply to individuals who, as members of a religious organization, undeniably work in quasi-employment-like conditions, yet were exempt from it due to a special status.

Art. 11 ECHR affords members of a trade union the right for their union to be heard to protect their interests but does not guarantee them any particular treatment by the state. What the ECHR requires is that under national law, trade unions must be enabled to strive for the protection of their members’ interests⁹²¹. In this regard, bargaining with the employer is one of the essential elements of the right to form and

917 ECtHR, *Sindicatul ‘Păstorul Cel Bun’ v. Romania*, para. 142.

918 Employment Relationship Recommendation, 2006 (No. 198), accessed March 21, 2025, sec. 9, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535.

919 Cf. *ibid.*, sec. 12, 13.

920 ECtHR, *Sindicatul ‘Păstorul Cel Bun’ v. Romania*, para. 143.

921 ECtHR, Judgment of 6 February 1976, *Swedish Engine Drivers’ Union v. Sweden* (No. 5614/72),” para. 39–40; ECtHR, Judgment of 27 October 1975, *National Union of Belgian Police v Belgium* (No. 4464/70),” para. 38–39.

join trade unions for the protection of a working individual's interests⁹²². The question of whether certain self-employed individuals, e.g., due to pure economic dependence, should be included in the personal scope of Art. 11 ECHR has not yet been definitively resolved by the ECtHR. However, if one follows its reasoning that labor rights are evolving in nature, it seems to be only a matter of time until the ECtHR provides clarity in favor of including such individuals. Until then, following the systematics of the ECtHR, the answer must be sought in further international instruments beyond the ECHR.

4.2.2. (Revised) European Social Charter (RESC)

The European Social Charter, adopted in 1961, provides a more expansive framework for labor rights and social guarantees than the ECHR. Lithuania ratified its revised version (RESC)⁹²³. While the ECHR primarily focuses on protecting fundamental civil and political rights, the RESC is dedicated to guaranteeing social rights. These rights encompass key aspects of individual employment law, such as working conditions (Art. 2 RESC), occupational safety and health (Art. 3 RESC), remuneration (Art. 4 RESC) and protections for specific worker groups (Art. 7 and 8 RESC). Additionally, the RESC includes safeguards against gender-based discrimination (Art. 20 RESC). Beyond individual employment law, it also addresses collective employment rights, including the freedom of association (Art. 5 RESC), the right to collective bargaining (Art. 6 RESC) and employee information and consultation rights (Art. 21 RESC) – however, without containing a specific personal scope of application. Furthermore, Art. 12 RESC includes a right to social security⁹²⁴.

The RESC's employment related rights predominantly refer in their scopes of application to 'worker'/'travailleurs', which is translated as 'darbuotojai' in the Lithuanian version and 'Arbeitnehmer' in the German version. However, the authoritative versions are in English and French, and their interpretation is not determined by the specific legal traditions of individual contracting states, but must be interpreted autonomously to ensure a uniform social standard across the contracting states⁹²⁵.

Also fueled by the ECtHR's interpretation of Art. 11 ECHR, there is at least

922 ECtHR, *Demir and Baykara v. Turkey*, para. 145–154; It should be noted, however, that Art. 11 ECHR does not include the right to strike. When applicants argued that the right to establish and join a trade union encompasses also a right to strike, their claim was denied, cf. ECtHR, Judgment of 6 February 1976, *Schmidt and Dahlström v. Sweden* (No. 5589/72); Likewise, the right to consultation and a union's right to recognition for collective bargaining were not considered fundamental aspects of Art. 11 ECHR, cf. ECtHR, Judgment of 27 October 1975, *National Union of Belgian Police v Belgium* (No. 4464/70).

923 Lietuvos Respublikos įstatymas dėl 1996 metų Europos socialinės chartijos (pataisytos) ratifikavimo, *e-TAR*, accessed March 22, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.AAF0286E0F48>.

924 Cf. RESC.

925 ECSR, Decision on the Merits: *European Youth Forum (YFJ) v. Belgium*, Complaint No. 150/2017, para. 119.

consensus that the personal scope of application of Art. 6 RESC (right to bargain collectively), when referring to the terms ‘worker’/’travailleur’, does not depend on whether the employment is based on a private-law employment relationship or a public-law relationship⁹²⁶. On the other hand, the ECSR has ruled that interns are not classified as workers under Art. 4 (right to a fair remuneration), unless their actual work conditions demonstrate that they are employed in the same way as regular workers⁹²⁷.

The question of whether certain rights under the RESC also extend to labor relations beyond traditional employment relationships has already been addressed by the ECSR. In the case *Irish Congress of Trade Unions v. Ireland*, the ECSR extended the scope of application of Art. 6 para. 2 RESC (right to bargain collectively) to self-employed individuals in need of social protection⁹²⁸, being *de facto* dependent on one or more work provider. The reason for this inclusion was that collective agreements aim to correct structural imbalances between contracting parties and protect weaker working individuals by regulating working conditions collectively⁹²⁹. Additionally, such agreements can prevent distortions of competition between employees and self-employed individuals, mitigating a ‘race to the bottom’ in a unified market⁹³⁰. Consequently, the RESC is interpreted based on its protective function(s)⁹³¹.

Although no clear criteria exist for distinguishing which self-employed persons fall under Art. 6 para. 2 RESC, it is evident that not all self-employed persons are covered. In 2022, with regard to Art. 101 TFEU, the European Commission issued guidelines on not applying EU competition law to collective agreements for solo self-employed individuals if they are “in a situation comparable to that of workers”⁹³². These guidelines intend to exempt solo self-employed workers working ‘side-by-side’ with workers for

926 ECSR, Decision on the Merits: *European Council of Police Trade Unions (CESP) v. Portugal*, Collective Complaint No. 11/2001, para. 58; Schubert, “Teil I,” para. 7; Lörcher, “Arbeitsrecht in europäischer Perspektive: Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte (Zu den EGMR-Urteilen v. 12.11.2008, Demir und Baykara, und 21.4.2009, Enerji Yapi-Yol Sen),” 233; Dumke, *Streikrecht i.S. des Art. 6 Nr. 4 ESC und deutsches Arbeitskämpfrecht*, 76 ff.; Andrzej Świątkowski, *Charter of Social Rights of the Council of Europe* (Alphen aan den Rijn/Frederick: Kluwer Law International, 2007), 192, 215, 230.

927 ECSR, *European Youth Forum (YFJ) v. Belgium*, para. 121 ff.

928 ECSR, Decision on the Merits: *Irish Congress of Trade Unions v. Ireland*, para. 37; Nicola Kountouris, “The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope,” *ILJ* 47, no. 2 (July 2, 2018): 221 ff., doi:10.1093/inldaw/dwx014.

929 Schubert, “Teil I,” para. 10.

930 Cf. Opinion of AG Wahl, para. 74 ff.

931 Schubert, “Teil I,” para. 10.

932 European Commission, “Commission Guidelines on the Application of EU Competition Law,” para. 20.

the same counterparty⁹³³, platform workers, and economically dependent⁹³⁴ solo self-employed persons from the antitrust prohibition, ensuring their fundamental rights are not restricted⁹³⁵. However, whether the CJEU would confirm this interpretation remains unclear – as well as whether this actually represents the minimum threshold for opening the personal scope of Art. 6 para. 2 RESC. It shows, however, that there is a shift in societal thinking regarding this issue, which might also influence the future interpretation of Art. 11 ECHR by the ECtHR.

A similar situation applies to the occupational safety provisions under Art. 3 RESC, which may extend to self-employed individuals working in environments controlled by the work provider⁹³⁶. If such individuals work in an environment that is significantly influenced and controlled by the work provider, protection similar to that of traditional employees may be necessary. This shows that rights of the RESC are not exclusively designed for personally dependent or subordinated employees. Some scholars therefore support generally a broad interpretation⁹³⁷, while others argue for limiting protection to only employees in a personal dependent employment relationship when the required safeguards are linked to subordination or personal dependence⁹³⁸, i.e., applying a purpose-driven interpretation. As a result, the personal scope of the RESC is not uniform but context-specific – leading to the situation that the RESC’s personal scope(s) of application must be interpreted autonomously, but may vary depending on the purpose and content of the respective article. A purpose-driven interpretation would look like as follows.

For instance, Art. 2 RESC (right to just conditions of work) could apply to self-employed individuals who, while having some independence in organizing their work, are in a long-term contractual relationship with and regularly provide services to one work provider. This means they are still subject to certain time constraints. In such cases, the right to fair working conditions could also apply to them in order to regulate their working hours and rest periods, especially if they are exposed to similar pressures as traditional employees due to their dependence on a single work provider.

Economically dependent self-employed persons who derive their income primarily from one or a few work providers could, under certain conditions, fall under Art.

933 A solo-self employed person who provides their services to a certain extent under the direction of their counterparty and does not bear the commercial risks, but enjoys sufficient independence as regards the performance of the economic activity concerned.

934 A solo self-employed person who provides their services exclusively or predominantly to one counterparty, i.e., a certain similarity could be identified with an ‘employee-like person’ under German law.

935 Cf. European Commission, “Commission Guidelines on the Application of EU Competition Law,” 26 ff., 28 ff., 32 ff.

936 Cf. *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050, para. 17.

937 Schubert, “Teil I.,” para. 8; Świątkowski, *Charter of Social Rights of the Council of Europe*, 84, 191.

938 Schubert, “Teil I.,” para. 8.

4 RESC (right to fair remuneration). Art. 4 RESC requires a fair remuneration that not only secures the livelihood of the individuals concerned but also of their families. Therefore, the protection of this right goes far beyond the individual protection of a person based on a specific contractual relationship. Typically, a self-employed entrepreneur has means of production, such as equipment or employees themselves, to multiply or scale the value of their own pure labor. The same applies analogue to highly skilled self-employed individuals, who usually receive a higher financial output for a similar pure labor input. However, if the person only has their labor to offer and no specific skills which ensures them a good negotiation position on the market, they might require certain protection notwithstanding the structure of the work arrangement.

It goes without saying that discrimination based on gender must be prohibited regardless of the structure of the work relationship (Art 4 para. 3 RESC).

Although Art. 4 para. 5 (the right to a reasonable period of notice for termination) is originally aimed at employees, it could also be applied to self-employed individuals if their working relationship effectively resembles a permanent employment relationship. If the working individual is in a long-term contractual relationship with the work provider and, for this reason, possibly aligns their personal life around this activity, relying on its continuity and is thus unable to easily switch their source of income, the protection against sudden dismissal could also apply to them. This is particularly true if the individual is particularly disadvantaged in this regard, e.g., due to disability.

However, all this does not imply that national employment law must follow suit. The RESC only mandates protection for covered groups but does not prescribe how states must implement it. Special regulations in other law areas may therefore sufficiently serve as alternative protective measures⁹³⁹.

4.2.3. Instruments of the International Labour Organization (ILO)

When it comes to ILO instruments, the question arises whether they apply exclusively to workers traditionally considered the primary beneficiaries of labor protections – namely, those employed within a conventional employment contract or relationship. This issue is particularly relevant for two reasons: first, because these instruments influence the interpretations by the ECtHR, and second, because they can impose binding obligations on member states. Since Lithuania is a member of the ILO, it is relevant to first examine the ILO framework in order to approach the concepts of employee and worker and to see to what extent the ILO sets framework conditions that Lithuania should or even must follow.

Lithuania has ratified a number of ILO instruments aimed at improving working conditions, workers' rights and social justice. Ratification means that Lithuania is obliged to develop and enforce national laws and practices in line with these international standards. However, even if Lithuania did not ratify some of the instruments,

939 Ibid., para. 9.

the fundamental principles and rights related to work established by the ILO can universally apply, meaning they extend to all ILO member states, regardless of whether a country has ratified the corresponding fundamental convention⁹⁴⁰. These protections apply to all workers, irrespective of their employment arrangement or contract type⁹⁴¹. ILO instruments could even have a horizontal effect in certain contexts, although they are primarily designed for vertical application between states and international organizations. The horizontal effect in this context refers to how international norms can influence relationships between private actors, such as companies and employed individuals. In Lithuania, courts could theoretically refer to ratified ILO conventions when interpreting national laws. Claimants in Lithuania frequently invoke ILO conventions, but courts rarely accept these arguments, usually deferring to implementation through national law⁹⁴².

Many ILO instruments were logically designed with the labor structures of the 20th century in mind, as they could not have anticipated modern forms of work like platform work at the time of their adoption. However, it would be reasonable to extend their application to these emerging work models. Otherwise, as new forms of employment become more widespread, the relevance of ILO instruments could diminish in the very countries where these changes are taking place⁹⁴³.

First and foremost, it is important to note that the ILO legal framework does not provide a single, universal, and definitive definition of an ‘employment contract’ or ‘employment relationship,’ nor does it establish a standardized international concept of a ‘worker’ or ‘employee’⁹⁴⁴. However, the question arises whether ILO instruments at least provide the foundation for a substantive definition – if not explicitly, then perhaps by outlining certain exclusion criteria.

On the one hand, there are examples such as the Termination of Employment Convention No. 158, which has traditionally been understood to apply exclusively to traditional subordinate employment and does not extend to certain self-employed forms of work⁹⁴⁵. Moreover, some conventions explicitly exclude self-employed individuals from their scope, such as Art. 1 of the Home Work Convention No. 177⁹⁴⁶. However, doubts arise regarding the Domestic Workers Convention No. 189. Its Art. 1 states:

940 “Declaration on Fundamental Principles and Rights at Work and Its Follow-Up” (Geneva: ILO, 2022), 9, https://www.ilo.org/sites/default/files/2024-04/ILO_1998_Declaration_EN.pdf.

941 De Stefano, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 9–10.

942 Cf., e.g., Vilnius Apygardos Teismas, 2023 m. kovo 7 d. nutartis civilinėje byloje Nr. eB2-1502-577/2023, para. 23.

943 Cf. De Stefano, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 2.

944 *Ibid.*, 3.

945 *Ibid.*, 2.

946 Home Work Convention, 1996 (No. 177), art. 1, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322.

“the term ‘domestic work’ means work performed in or for a household or households; (b) the term ‘domestic worker’ means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker”⁹⁴⁷.

This definition leaves room for interpretation, particularly concerning the boundaries of an employment relationship in this context⁹⁴⁸. According to *De Stefano*, if Lit. b were interpreted as limiting the scope of Convention No. 189 solely to domestic work performed within a formal employment contract or relationship, it would significantly restrict the Convention’s reach. This narrow interpretation could exclude some of the most vulnerable domestic workers – such as informal or undocumented workers – from its protections⁹⁴⁹. However, *De Stefano*’s perspective overlooks the fact that the issue of informal or undocumented workers cannot be resolved by merely expanding the definition of who qualifies as a worker. Instead, it is the principle of ‘primacy of facts,’ seemingly recognized by the ECtHR as a universal principle of (European) international law, that could provide protection to these workers based on the reality of their work situation rather than formal documentation. *De Stefano*’s view appears to assume that the existence of an employment relationship is necessarily tied to formal documentation, such as a written contract⁹⁵⁰. Against this background, the conclusion that this instrument also applies to the self-employed or other workers outside the scope of an employment relationship – despite its explicit reference to ‘an employment relationship’ in the text – is therefore questionable.

One recent example where this is certainly the case is the Violence and Harassment Convention No. 190. The Convention addresses a wide spectrum of unacceptable conduct and practices in the world of work that are intended or at least likely to cause physical, psychological, sexual, or economic harm. It recognizes that such conduct may occur in various settings, including the workplace itself, areas where working individuals take breaks or meals, during work-related travel, and even while commuting to or from work. The Convention’s personal scope of application is exceptionally broad. It protects not only workers or employees but also “other persons in the world of work.” This category encompasses employees as defined by national law, as well as “persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or

947 *Ibid.*, art. 1.

948 Domestic Workers Convention, 2011 (No. 189), art. 1, accessed March 21, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::p12100_ILO_CODE:C189.

949 *De Stefano*, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 4.

950 *Ibid.*, 5.

responsibilities of an employer⁹⁵¹. It covers the formal and informal economy, as well as all sectors, including the public sector⁹⁵² and certainly non-standard forms of work, such as platform work and self-employed home-based workers. It is recognized that such emerging working arrangements make working individuals even more vulnerable to violence and harassment⁹⁵³. One reason why the Convention's personal scope of application needed to be defined broadly was that the understanding of 'worker' could change across contexts and over time⁹⁵⁴. It aligns with the most recent statistical definition of 'work' adopted by the International Conference of Labour Statisticians⁹⁵⁵. The most recent Resolution II (2023) introduced an updated International Classification of Status at Work⁹⁵⁶. It encompasses all jobs and work activities across all forms of work⁹⁵⁷. Work – regardless of whether it is formal or informal, or whether the activity is lawful – encompasses any activity performed by individuals to provide services either for others or for own use. In this sense, it covers a wide range of situations and human interactions. Excluded from this definition are activities that do not involve the production of goods or services (such as begging or stealing), activities related to self-care (such as personal grooming and hygiene), and activities that cannot be carried out by another person on one's behalf (such as sleeping, learning, or engaging in personal recreation)⁹⁵⁸. This definition clearly extends far beyond any traditional understanding of work relationships. Violence and harassment may amount to violations of human rights, and accordingly, every person has the right to a world free from violence and harassment and not only to a world of work free from violence and harassment⁹⁵⁹. In

951 Violence and Harassment Convention, 2019 (No. 190), art. 1, 2, 3, accessed November 1, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3999810.

952 ILO, "2.2 Who Is Protected?" *C190Guide*, accessed November 1, 2025, <https://c190guide.ilo.org/en/ratify-c190-chapters/page/2/>; "Provisional Record 8B(Rev.1), 107th Session" (Geneva: International Labour Conference, 2018), para. 63, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_631807.pdf.

953 "Provisional Record 8B(Rev.1), 107th Session," para. 326.

954 *Ibid.*, para. 328.

955 Cf. International Labour Office, *Care Work and Care Jobs for the Future of Decent Work* (Geneva: International Labour Organization, 2018), 3, accessed November 1, 2025, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms_633135.pdf.

956 Cf. Resolution II to Amend the 19th ICLS Resolution Concerning Statistics of Work, Employment and Labour Underutilization, 21st International Conference of Labour Statisticians (Geneva: Department of Statistics, 2023), accessed November 1, 2025, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@stat/documents/normativeinstrument/wcms_230304.pdf.

957 Cf. ILOSTAT, *International Classifications of Status in Employment and Status at Work* (ICSE and ICSaW), accessed November 1, 2025, <https://ilostat.ilo.org/methods/concepts-and-definitions/classification-status-at-work/>.

958 Cf. Resolution II to Amend the 19th ICLS Resolution Concerning Statistics of Work.

959 Convention No. 190, preamble.

this sense, the broad definition could be understood to mean that the ILO seeks a fight against violence and harassment wherever it has competence. This implies that certain self-employed persons also fall within the Convention's scope, and that a considerable number of, though certainly not all, business interactions between self-employed individuals are covered. This does not mean, however, that violence and harassment are permissible in contexts beyond the ILO's jurisdiction; rather, it reflects the institutional limits of the ILO's mandate. Therefore, applying such an expansive interpretation of working individuals to general employment law would likely be impractical. It would imply that nearly any form of human interaction involving the production of goods or services – apart from activities such as theft, self-care, or basic physiological processes – would fall under the definition, which would not be workable for the purposes of employment regulation.

An extension beyond the traditional understanding of employment relationships can further be observed in other instruments. The ILO's official *Manual for Drafting ILO Instruments* explicitly states:

“On many occasions, it has been emphasized that, if the subject matter of a given instrument is not limited only to employed workers, or the instrument does not provide for any specific exclusion in respect of one or more categories of workers, then ‘worker’ is understood to cover all workers”⁹⁶⁰.

De Stefano highlights that the *travaux préparatoires* of Convention No. 11 indicates that the expression ‘engaged in agriculture’⁹⁶¹ was deliberately chosen to extend the instrument's scope beyond traditional employment⁹⁶². In some cases, such broader interpretations can be directly inferred from the text of the instruments themselves. For instance, the Safety and Health in Construction Convention No. 167⁹⁶³ explicitly imposes occupational health and safety obligations on the self-employed. Similarly, other instruments – such as the Transition from the Informal to the Formal Economy Recommendation No. 204⁹⁶⁴, and the Rural Workers' Organisations Convention No. 141 also address workers beyond the standard employment framework⁹⁶⁵.

960 ILO, *Manual for Drafting ILO Instruments. Office of the Legal Adviser. Second Edition* (Geneva: International Labour Organization, 2006), para. 125.

961 Right of Association (Agriculture) Convention, 1921 (No. 11), art. 1, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312156:NO.

962 De Stefano, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 6.

963 Safety and Health in Construction Convention, 1988 (No. 167), art. 2, 7, 8, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C167.

964 Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), art. 4, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204.

965 Rural Workers' Organisations Convention, 1975 (No. 141), art. 2, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C141.

Furthermore, there are cases where supervisory bodies had to reaffirm worker protections when assessing domestic laws or practices that conflicted with the universal application of fundamental principles and rights at work. These cases involved various worker categories, including temporary workers, temporary agency workers, workers employed by contractors, casual workers, domestic workers, and informal workers⁹⁶⁶. The CFA has determined that Convention No. 87 on freedom of association and Convention No. 98 on the right to organize and collective bargaining include self-employed individuals⁹⁶⁷. It expressly requires members states

“to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining”⁹⁶⁸,

even in such cases where a self-employed-person has the ownership of the work equipment, works independently without specific supervision and oversight by the work provider and bears the overall costs incurred on the job (i.e., in case no integration into the organization of the work provider exists), such as heavy goods vehicle drivers⁹⁶⁹. These interpretations are not legally binding, but carry considerable weight in international employment law practice.

Unlike in the RESC or EU law, however, there is in general no principle of autonomy for the concept of ‘worker’ in the ILO context, and the principle of ‘effet utile’ does not exist. This results in the personal scope of the instruments varying from one member state to another. A plausible approach to deriving at least universal guidance what constitutes a ‘worker’ would be to refer to the Employment Relationship Recommendation No. 198. Both Lithuanian and foreign literature frequently refer to it or its

966 ILO, *Non-Standard Employment around the World*, 208–17.

967 ILO, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (Geneva: International Labour Office, 2018), 387 ff.; Countouris and De Stefano, “New Trade Union Strategies for New Forms of Employment,” 50 ff.; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

968 “Report No. 363, Case 2602” (Geneva: ILO Committee on Freedom of Association, 2012), para. 461, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_176577.pdf.

969 *Ibid.*, para. 449, 460.

supposed guidelines⁹⁷⁰, and even the ECtHR has done so⁹⁷¹. The latter reference supports the argument that at least the principle ‘primacy of facts’ holds a certain degree of universal significance in the international context. The CJEU also applies this principle in essence as part of its consistent jurisprudence when defining the EU’s autonomous ‘worker’ concept⁹⁷² and individual ILO member states likewise follow it in principle when interpreting their national legal concepts⁹⁷³ that determine an employment relationship⁹⁷⁴. Furthermore, Directive (EU) 2024/2831 on improving working conditions in platform work includes a reference to the Recommendation⁹⁷⁵, suggesting a significance even beyond traditional employment relationships to new forms of work by attempting to draw universal conclusions about the characteristics of an employment relationship based on the example factors mentioned in the Recommendation’s Chap. II, Sec. 12 (namely, ‘subordination’ and ‘dependence’) and the example indicators outlined in Sec. 13. The UK’s case law seems to attribute an even somewhat binding effect to these example factors and indicators. In the case of *IWUGB v Central Arbitration Committee*⁹⁷⁶, the Court of Appeal, when dealing with the autonomous definition of the employment relationship within Art. 11 ECHR, mentioned that the

970 E.g., Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” n. 27; Povilaitienė, *Darbo sutartis ir kitos teisinės darbo panaudojimo formos*, 40, 73 ff.; Vaidotas Granickas, “Teisingo apmokėjimo už darbą principo įgyvendinimo bruožai,” *Socialinių Mokslų Studijos* 3, no. 7 (2010): 231; Vaidotas Granickas, “Kintamosios darbo užmokesčio dalies nustatymo ir keitimo problemos siekiant įgyvendinti teisingo darbo apmokėjimo principą,” *Socialinių Mokslų Studijos* 4, no. 4 (2012): 1595; Zbigniew Hajn, “The International Labour Organisation’s Recommendation No. 198 and Self-Employed Workers,” *Acta Universitatis Lodziensis. Folia Iuridica* 107 (June 30, 2024): 43, doi:10.18778/0208-6069.107.03; T. E. Coleman and L. G. Mpedi, “Collective Bargaining and the Representation in the Gig Economy in South Africa,” *Journal for Juridical Science* 48, no. 2 (2023): 63; Paul Schoukens, Eleni De Becker, and Charlotte Bruynseraede, “The Evolution of Standard Work,” *SSRN Electronic Journal*, 2024, 5, doi:10.2139/ssrn.4682600; Paul Schoukens and Alberto Barrio, “The Changing Concept of Work: When Does Typical Work Become Atypical?,” *ELLJ* 8, no. 4 (December 2017): 309, doi:10.1177/2031952517743871; Eva Kocher, “Digitale Plattformarbeit – Die Verantwortung von Marktorganisatoren,” *ZEuP*, 2021, 606–33.

971 However, only referring to the principal ‘primacy of facts’, cf. ECtHR, *Sindicatul ‘Păstorul Cel Bun’ v. Romania*, para. 142.

972 Cf. CJEU, *Union Syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, para. 29; CJEU, *Danosa*, para. 46; CJEU, *Balkaya*, para. 37.

973 E.g., in Lithuania: LAT, 2001 m. sausio 31 d. nutartis civilinėje byloje Nr. 3K-3-123; in Germany: BGB, sec. 611a; in the UK: *Autoclenz Ltd v Belcher* [2011] UKSC 41.

974 Only in principle, as this concept may take different forms in practice. Kocher notes that, e.g., in German law, there is debate over whether the national definition seeks to reflect the actual intentions of the contracting parties – a specific application of the ‘falsa demonstratio non nocet’ principle. In contrast, the principle in the Recommendation seems aimed at preventing ‘creative compliance’ with employment law obligations, cf. Kocher, “Digitale Plattformarbeit – Die Verantwortung von Marktorganisatoren,” 614.

975 Directive (EU) 2024/2831, recital 27; Proposal for a Directive on Improving Working Conditions in Platform Work, recital 21.

976 Commonly also referred to as ‘Deliveroo’.

Recommendation provides no “(recommended) definition”⁹⁷⁷. However, the UKSC later followed the statement of *Underhill* LJ in the Court of Appeal that the Recommendation recognizes an underlying concept of subordination and identifies “a number of familiar indicators” of the existence of such a relationship and relied in its decision on some of the example factors and indicators^{978, 979}.

However, the *travaux préparatoires* of the Recommendation clearly shows that Chap. II offers only a suggested approach for member states to define the employment relationship methodically, without providing explicit recommendations on the substance of a potential worker concept. No universal correlation exists between the example factors outlined in Sec. 12 and the example indicators detailed in Sec. 13 of the Recommendation. The factors and indicators can have different meanings depending on the national definitions⁹⁸⁰. The list of indicators (and factors) is non-exhaustive, i.e. one, several, or none of the examples may be adopted. These indicators are intended solely to guide and inspire member states in formulating their national policies⁹⁸¹. In terms of content, the employment relationship should be defined solely in the context of national law and practice⁹⁸². As previously discussed, while Lithuania, Germany, and the UK all rely on some form of subordination or dependence as crucial factors in their respective legal frameworks, the precise interpretation and application of these concepts vary considerably across jurisdictions. Applying indicators from the Recommendation appropriate to the German or UK context directly to the Lithuanian concept of organizational subordination could lead to divergent outcomes. Therefore, within the system established by the Recommendation, when clustering indicators in the process of determining subordination under Lithuanian law, it is essential that these indicators correspond to and accurately reflect the specific factor as defined by national legislation. This approach ensures that the assessment remains

977 *The Independent Workers Union of Great Britain v The Central Arbitration Committee* [2021] EWCA Civ 952, para. 58.

978 *Independent Workers Union of Great Britain v Central Arbitration Committee and another* [2023] UKSC 43, 41, 60, 61(3), 68(3), 71.

979 The UKSC referred to the previously mentioned decision of the ECHR in the case of *Sindicatul 'Păstorul cel Bun' v. Romania* and thereby justified the possibility of incorporating the example factors and indicators of the Recommendation to assess whether an employment relationship exists. However, while the ECHR had broadly stated that it “will apply the criteria laid down in the relevant international instruments” with reference to the Recommendation, it only referred to the principle of ‘primacy of facts’, not the content of the example factors and indicators, cf. ECtHR, *Sindicatul 'Păstorul Cel Bun' v. Romania*, para. 57, 142.

980 The author of this dissertation has addressed this issue in more detail in: Hans Lauschke, “The Applicability of ILO’s Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally,” *Teisė* 135 (2025): 85-104, doi:10.15388/Teise.2025.135.5.

981 Cf. “Provisional Record 21, 95th Session” (Geneva: International Labour Conference, 2006), para. 409, <https://webapps.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/pr-21.pdf>.

982 cf. “GREEN PAPER Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 Final,” n. 32.

consistent with the relevant legal framework and correctly identifies either direct or indirect manifestations of organizational subordination.

In terms of personal scope of application of ILO instruments, in most cases, it is entirely up to the discretion of member states to determine the personal scope of application. This applies not only to the Recommendation's example factors and indicators but also to the recommended principle of 'primacy of facts,' as the Recommendation itself is not binding in the ILO context – despite the ECtHR attempt to give it a universal status under its jurisdiction⁹⁸³. Therefore, whenever a convention encompasses the personal scope of 'worker' or a similar term, there is yet no automatic mandatory extension to cover working individuals who do not qualify as 'employee' except in a very few cases where the instrument specifically highlights it.

4.3. Requirements by EU law

The following chapter discusses the relevance and the personal scope of application of the CFR as well as EU secondary legislation, both of which play the most significant role in the field of employment and social policy under EU law. Other instruments of EU primary law will be examined within this analysis.

4.3.1. Charter of Fundamental Rights (CFR)

The EU's CFR was officially proclaimed in 2000. It serves as a comprehensive codification of fundamental rights applicable to individuals within the EU's jurisdiction and includes several provisions specifically addressing labor rights. The legal significance of the CFR was elevated with the entry into force of the Treaty of Lisbon in 2009, which conferred binding legal status on the CFR. As a result, the CFR now holds the same legal value as the EU treaties themselves⁹⁸⁴. The CFR applies to EU institutions and bodies, as well as to the member states when they are implementing EU law⁹⁸⁵. This ensures that the CFR's provisions are directly applicable in cases where EU law is relevant. The CFR in general has no direct effect on pure national law, as it requires that member states are bound only when implementing EU law⁹⁸⁶. In such a case, however, it has direct effect and takes precedence⁹⁸⁷. The applicability of EU law entails the applicability of the fundamental rights guaranteed by the CFR⁹⁸⁸, i.e., they are applicable in all situations governed by EU law, but not outside such situations. Therefore, the CJEU has no power to examine the compatibility of national legislation with the CFR

983 Cf. ECtHR, *Sindicatul 'Păstorul Cel Bun' v. Romania*, para. 142.

984 TEU, art. 6 para. 1.

985 CFR, art. 51 para. 1.

986 *Ibid.*

987 Ramunė Guobaitė-Kiršlienė, "Socialinė partnerystė," in *Kolektyvinė darbo teisė: vadovėlis*, ed. Rytis Krauskas (Vilnius: Mykolo Romerio Universitetas, 2013), 167.

988 CJEU, Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 21.

when the matter lies outside the scope of EU law⁹⁸⁹.

4.3.1.1. Relevance of the CFR for national law

From the start, the CFR has been shaped and progressively developed by the jurisprudence of the CJEU. Notably, the CJEU has expanded effectively both the scope and application of the CFR's provisions, following the CFR's acquisition of binding legal status through the Treaty of Lisbon. A pivotal point in this expansion is the CJEU's broad interpretation of Art. 51 para. 1 CFR which governs the scope of the CFR. All national measures falling within the material scope of the TFEU must be assessed against the fundamental rights enshrined in the CFR⁹⁹⁰. The CFR distinguishes between 'rights' and 'principles'. CFR rights are enforceable individual entitlements, allowing their holders to bring legal action before courts in the event of a violation. CFR principles, in contrast, as described in Art. 52 para. 5 CFR⁹⁹¹, do not in themselves create subjective rights. They require implementation⁹⁹² through legislative or executive action before they can produce a subjective right that can be asserted as such⁹⁹³. Determining whether a CFR provision constitutes a right or a principle can be complex in practice. Labor rights in the broad sense under the CFR include CFR rights, CFR principles and some provisions contain both elements. Art. 30 CFR, concerning protection against unjustified dismissal, is a notable example where this distinction is not clearly established.

In the area of directive transposition, the CFR must be applied in the entire regulatory area directly covered by a directive. However, as outlined, the CFR does not apply to purely national legal measures, as the CFR itself requires in Art. 51 para. 1 that the member states are bound only when implementing EU law⁹⁹⁴. Fundamental rights guaranteed by the CFR must therefore be complied with where national legislation falls within the scope of EU law⁹⁹⁵, i.e., a (sufficient) 'connection' to EU law must ex-

989 Ibid., para. 19.

990 CJEU, Judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, para. 23; CJEU, Judgment of 11 July 1985, *Cinéthèque SA*, C-60 and C-61/84, EU:C:1985:329, para. 26; CJEU, Judgment of 29 May 1997, *Kremzow*, C-299/95, EU:C:1997:254, para. 15; CJEU, Judgment of 18 December 1997, *Annibaldi*, C-309/96, EU:C:1997:631, para. 13; CJEU, Judgment of 10 April 2003, *Steffensen*, C-276/01, EU:C:2003:228, para. 70.

991 CFR, art. 52 para. 5.

992 CJEU, Judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, para. 78.

993 Ibid.

994 CFR, art. 51 para. 1.

995 CJEU, Judgment of 30 April 2014, *Pfleger*, C-390/12, EU:C:2014:281, para. 33.

ist⁹⁹⁶, the measure of the member states is connected to the measure of EU law⁹⁹⁷, and a degree of connection exists, “which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other”⁹⁹⁸. This means that there must be a sufficiently specific link between the national measure and the relevant EU provision. A sufficient link would be missing, if “the provisions of EU law in the subject area concerned imposed no obligation on member states with regard to the situation at issue in the main proceedings”⁹⁹⁹. The prerequisite is that the area in question is actually regulated or co-regulated by EU law. The fact that it could be regulated because the EU has the corresponding competences is alone not sufficient¹⁰⁰⁰, i.e., if mere objectives or tasks of the EU are affected, such as the objectives of social policy in Art. 151 TFEU¹⁰⁰¹. It is also insufficient if only the EU’s financial interests are affected if they are not reflected in concrete regulations¹⁰⁰². Furthermore, the facts of the case must be currently affected by the application of EU law¹⁰⁰³. Thus, CFR rights are only relevant if EU law applies to the relevant facts of the case. In this respect, the scope of application of the CFR is first opened if the fundamental freedoms are affected by restrictions under national law¹⁰⁰⁴. If fundamental freedoms are restricted by collective agreements or collective action, national collective action law is also subject to the protection of the CFR¹⁰⁰⁵. In addition, the CJEU has invoked the free movement of workers in the case of discrimination by the employer¹⁰⁰⁶. In the case *Åkerberg Fransson*¹⁰⁰⁷, the CJEU confirmed that the CFR must be observed whenever a member state is acting within the scope of EU law – including when implementing EU requirements. However, in the case *Siragusa*, the CJEU refined this position by holding that a mere

996 CJEU, Order of 1 March 2011, *Chartry*, C-457/09, EU:C:2011:101, para. 25; CJEU, Judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, para. 21 ff.

997 CJEU, *Siragusa*, para. 24; CJEU, Judgment of 10 July 2014, *Hernández*, C-198/13, EU:C:2014:2055, para. 34; CJEU, Order of 7 September 2017, *Demarchi Gino S.a.s.*, C-177/17, EU:C:2017:656, para. 19.

998 CJEU, *Siragusa*, para. 24; CJEU, *Hernández*, para. 34; CJEU, *Demarchi Gino S.a.s.*, para. 19.

999 CJEU, Order of 24 September 2019, *QR*, C-467/19, EU:C:2019:776, para. 41; CJEU, *Demarchi Gino S.a.s.*, para. 21; CJEU, Judgment of 19 April 2018, *Catania Multiservizi SpA*, C-152/17, EU:C:2018:264, para. 53.

1000 CJEU, *Hernández*, para. 36; CJEU, Judgment of 19 November 2019, *TSN*, C-609/17 and C-610/17, EU:C:2019:981, para. 46.

1001 CJEU, Judgment of 5 February 2015, *Nisttahuz Poclava*, C-117/14, EU:C:2015:60, para. 40.

1002 Cf. CJEU, *Åkerberg Fransson*, para. 28.

1003 CJEU, Judgment of 27 March 2014, *Marcos*, C-265/13, EU:C:2014:187, para. 36; CJEU, Judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, para. 67.

1004 CJEU, *Pfleger*, para. 35; CJEU, Judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, 63 ff.

1005 CJEU, *Viking Line*, para. 43 ff.; CJEU, *Laval*, para. 90 ff.

1006 CJEU, Judgment of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296, para. 34 ff.; CJEU, *Raccanelli*, para. 45; CJEU, Judgment of 28 June 2012, *Erny*, C-172/11, EU:C:2012:399, para. 36.

1007 Cf. CJEU, *Åkerberg Fransson*.

indirect impact is insufficient; a tangible legal link to an EU norm is required¹⁰⁰⁸. Action without reference to EU law, as in the case *Hernandez*¹⁰⁰⁹, does not fall within the scope of the CFR.

For employment law specifically, CFR applicability is closely tied to the implementation of EU secondary legislation within the competences outlined in Art. 153 TFEU¹⁰¹⁰. This seems to significantly limit the CFR's practical impact in employment law¹⁰¹¹. This applies particularly in areas on social policy, which, according to Art. 153 para. 4 TFEU, may only serve minimum harmonization, as confirmed in the case *TSN*¹⁰¹². Nonetheless, the CFR must be taken into account in discussions on the legal treatment of freelance workers, especially given that the CFR continues to apply even where EU directives afford member states certain flexibility in implementation through various methods or policy options¹⁰¹³. Such discretion does not negate the obligation to faithfully transpose EU directives and thus to act within the scope of implementation of a directive¹⁰¹⁴; and the scope of application of the CFR could be open in such cases as well¹⁰¹⁵. Whether the national provision concerned is sufficiently related to EU law depends on: whether its purpose is to implement a provision of EU law, the nature of that provision, whether it pursues objectives other than those covered by EU law, even if it may indirectly affect EU law, and whether there is a rule of EU law which is specific to that area or which may affect it¹⁰¹⁶. It is insufficient that „the matters covered being closely related or one of those matters having an indirect impact on the other”¹⁰¹⁷. A merely hypothetical reference to EU law is in any case insufficient¹⁰¹⁸. However, the extent to which this commitment to EU fundamental rights extends beyond the implementation of EU law remains subject to debate. In its case law, the CJEU has shown a tendency to expand the binding effect of fundamental rights. To

1008 CJEU, *Siragusa*, para. 24.

1009 Cf. CJEU, *Hernández*.

1010 Cf. TFEU, art. 153.

1011 Stefan Witschen, “Which Labour Rights Are Fundamental Rights? Horizontal Direct Effect of the Charter of Fundamental Rights of the EU,” *IJCLLIR* 39, issue 2 (June 1, 2023): 223, doi:10.54648/IJCL2023015.

1012 CJEU, *TSN*, para. 47 ff.

1013 CJEU, Judgment of 20 May 2003, *Österreichischer Rundfunk*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, para. 70 ff.; CJEU, Judgment of 27 June 2006, *Parliament/Council*, C-540/03, EU:C:2006:429, 104 ff.; CJEU, Judgment of 21 December 2011, *N. S.*, C-411/10 and C-493/10, EU:C:2011:865, para. 55 ff., 68.

1014 TFEU, art. 288 para. 3.

1015 CJEU, *Österreichischer Rundfunk*, para. 70 ff.; CJEU, *Parliament/Council*, 104 ff.; CJEU, *N. S.*, para. 55 ff., 68.

1016 CJEU, *Siragusa*, 25; CJEU, Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, para. 79; CJEU, Judgment of 8 May 2013, *Ymeraga*, C-87/12, EU:C:2013:291, para. 41.

1017 CJEU, *QR*, para. 40; CJEU, *Siragusa*, para. 24; CJEU, *Hernández*, para. 34.

1018 CJEU, Judgment of 14 November 2018, *Nova Kreditna*, C-215/17, EU:C:2018:901, para. 44 ff.

mitigate the resulting legal uncertainty in both legislative processes and legal application, it is therefore advisable – particularly in cases of doubt – to consistently assess national measures against the standards set by the CFR. This is all the more important in the context of the legal treatment of freelance workers, where inclusion within the personal scope of application can, in the worst-case scenario, determine whether an individual enjoys full fundamental rights protection – or none at all. However, it must also be noted that EU fundamental rights could compete with national fundamental rights, which remain applicable in parallel and make the balancing of interests in individual cases all the more complex. The CFR holds particular significance in this context with regard to the effect of EU secondary legislation – an issue that will be addressed for methodological reasons in Chapter 4.3.2. of this dissertation.

4.3.1.2. CFR's personal scope(s) of application

Following the analysis of the CFR as a source of EU law, it is crucial to examine its concrete implications for national legal systems. This section investigates when the CFR may apply to intermediary categories of working individuals at the border between employees and self-employed persons – those who may be classified as self-employed under one national law but could be considered ‘workers’ under EU law. This legal ambiguity stems from the fact that EU law does not explicitly recognize a third status between employed and self-employed persons. This binary approach has often been criticized as a shortcoming of EU employment law¹⁰¹⁹. The CJEU faces the challenge of having to classify these individuals as either workers or self-employed persons while simultaneously also upholding the principle of autonomy in the definition of ‘worker’. Furthermore, there is the previously discussed issue that individual legal instruments of the EU adopt methodologically divergent approaches in defining their personal scope of application. There is not only methodological variation, but also at least the potential for substantive differences in how that scope is ultimately understood and applied.

Similar issues are also faced with regard to the CFR. While the CFR references the term ‘worker’ in several provisions, it does not provide a definition of its own, nor does it defer to national concepts. This implies that the term must be understood as an autonomous EU law concept – aligned with the CFR’s purpose of providing a uniform and visible standard of fundamental rights throughout the EU. As it remains debated whether a general concept of ‘worker’ exists under EU law, whether such a definition should apply uniformly within the context of the CFR, is debatable as well. The following section will therefore examine selected provisions of the CFR relevant for the dissertation’s topic and, drawing on the insights developed thus far in this dissertation, and assess whether certain provisions may also extend beyond the traditional understanding of employment relationships. In this context, it is essential to consider how previously analyzed international legal sources and their personal scopes of

1019 Cf. Wank, “Beschäftigungsverhältnisse außerhalb des Arbeitsrechts im Unionsrecht,” 129–32.

application can be utilized in the interpretation of the CFR. Art. 52 para. 3 CFR stipulates that, insofar as the CFR contains rights which correspond to those guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR. However, this provision does not preclude EU law from offering more extensive protection¹⁰²⁰. For this reason, it is essential to examine whether the CFR contains a provision mirroring Art. 11 ECHR.

Although the RESC cannot itself be interpreted in light of the CFR, the reverse is possible. While the EU is not a party to the RESC, and the RESC therefore holds no binding legal status within the EU's legal framework, all its member states are. It can serve at least as an important interpretative aid. This is particularly relevant given the substantial overlaps and normative parallels between many of the social rights enshrined in the CFR and those protected under the RESC. Notably, during the drafting of the CFR, the RESC was explicitly identified as one of its sources¹⁰²¹. Moreover, Art. 151 TFEU explicitly references fundamental social rights such as those contained in the RESC, affirming their relevance in the implementation of EU's social policy¹⁰²². Both the European Commission and the European Parliament regularly cite the RESC in positive terms within social policy initiatives, most notably in the context of the European Pillar of Social Rights, which incorporates many of the RESC's principles¹⁰²³. Nevertheless, because the RESC – unlike the ECHR – is not part of the EU's legal acquis, the CJEU tends to avoid direct reliance on the RESC in its jurisprudence. That said, the CJEU has occasionally referred to the RESC as an interpretative aid, as seen, for instance, in the case *Laval*¹⁰²⁴. Accordingly, while the RESC does not carry binding legal force, it should be taken into account when interpreting the social rights protected under the CFR.

Access to work in general is guaranteed by Art. 15 CFR. It provides that every individual has the right to engage in work and to pursue a freely chosen or accepted occupation. EU citizens enjoy the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any member state. Third-country nationals who are authorized to work in the EU are entitled to working conditions equivalent to those of EU citizens, subject to applicable EU and national laws¹⁰²⁵. Accordingly, no fundamental barriers should be placed in the way of individuals seeking to work, regardless of the structure or form of the work they pursue. This principle applies equally to prospective employees, freelance workers, and genuinely self-employed persons. At its core, the provision aims to ensure equal and non-discriminatory access to the market. Art. 29 CFR plays an important role in this context. It guarantees that

1020 CFR, art. 52 para. 3.

1021 Cf. "Explanations relating to the Charter of Fundamental Rights."

1022 TFEU, art. 151.

1023 Cf. European Commission, *European Pillar of Social Rights*, preamble no. 3, 16.

1024 Cf. CJEU, *Laval*, para. 90.

1025 CFR, art. 15.

placement services must be accessible to assist individuals in seeking employment, regardless of their nationality or current employment status. As this right is granted to everyone, the individual's present work situation is irrelevant when requesting access to such services¹⁰²⁶.

In addition, the CFR contains several provisions that address the principle of equal treatment. Art. 21 para. 1 CFR prohibits discrimination on a broad range of grounds, including sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinions, membership in a national minority, property, birth, disability, age, or sexual orientation. Art. 21 para. 2 CFR, in turn, prohibits discrimination on the basis of nationality¹⁰²⁷. While Para. 1 applies to all natural persons, Para. 2 is limited to individuals who hold EU citizenship under Art. 20 TFEU¹⁰²⁸.

Art. 23 CFR, which constitutes both a right and a principle under the CFR, provides for equality between women and men in all areas, including employment, work, and pay¹⁰²⁹. The personal scope of this provision includes all natural persons, not limited exclusively to workers or employees, though the exact reach may vary depending on the specific context in which it is invoked. The decisive question in this context is whether equal situations are being treated unequally or unequal situations are being treated equally. Specifically, must female freelance workers be treated equally to male employees who work for the same client or work provider? It could be argued that the situations are not comparable, as both individuals operate under different legal statuses. However, since a fundamental right is at stake, access to that right cannot depend solely on the employment status conferred by national employment law. Instead, any assessment must be conducted on a case-by-case basis and must relate to the specific circumstances at hand. In certain cases, equal treatment between self-employed freelance workers and employees may be required – where differential treatment cannot be justified solely by reference to the employment status and its underlying classification criteria.

Art. 31 CFR guarantees fair, safe, healthy, and just working conditions, as well as the protection of workers' dignity. This includes, but is not limited to, limitations on maximum working hours, daily and weekly rest periods, and an annual period of paid leave¹⁰³⁰. Reference can be made to the prevailing opinion in German legal

1026 Cf. Claudia Schubert, "GRC Art. 29 Recht auf Zugang zu einem Arbeitsvermittlungsdienst," in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 7.

1027 CFR, art. 21.

1028 Thorsten Kingreen, "§ 13 Verbot der Diskriminierung wegen der Staatsangehörigkeit," in *Europäische Grundrechte und Grundfreiheiten*, ed. Dirk Ehlers (Berlin: De Gruyter, 2014), para. 4, doi:10.1515/9783110363166; different opinion, cf. Walter Frenz, *Handbuch Europarecht: Band 1: Europäische Grundfreiheiten* (Berlin: Springer, 2012), para. 3962.

1029 CFR, art. 23.

1030 Ibid., art. 31.

scholarship¹⁰³¹, according to which the personal scope of application under Art. 31 CFR should be interpreted considering its normative context, with distinctions made between the different elements of the provision. From this perspective, self-employed individuals may fall within the protective scope of Art. 31 para. 1 CFR, particularly with regard to the safeguarding of workplace dignity¹⁰³². In most cases, however, the extension of Art. 31 para. 2 CFR to self-employed individuals – such as freelance workers – appears more doubtful, largely due to the typically minimal or non-existent time commitments associated with their work arrangements¹⁰³³. The CJEU in the case *Yodel* seems to share such a reasoning when it comes to working time issues¹⁰³⁴. The High Court in the UK, in the case *IWUGB v SSWP*, has hinted at a broader understanding of the personal scope of application of Art. 31 para. 1 CFR. It established a connection between Art. 31 CFR and its examination of the personal scope of application of Directive 89/391/EEC. It suggested that it must be interpreted broadly, extending to a wide range of employment relationships. This interpretation positions the CFR as a tool for safeguarding the rights and protection of individuals engaged in various forms of labor, including those occupying intermediary or atypical employment statuses. According to the High Court, the fact that Directive 89/391/EEC confers to the right to “working conditions which respect their health, safety and dignity” on “every worker”,¹⁰³⁵ would support an interpretation of its Art. 3 as broad as possible and therefore does not only “include” employees, but also limb (b) workers¹⁰³⁶. As Art. 31 CFR contains the same wording, the same interpretation could be applied reciprocally. However, the High Court set one restriction: Art. 31 CFR is not suitable to overwrite the exclusion of domestic servants in the Directive’s personal scope of application¹⁰³⁷. Interestingly, this would mean that secondary legislation determines the personal scope of protection of the CFR. However, there are also other views. Accordingly, the EU concept of ‘worker’ based on the *Lawrie-Blum* formula could be applied¹⁰³⁸. According to this view, this would not be changed by the fact that Directive 89/391/EEC could extend

1031 Bernd Hüpers and Birgit Reese, “GRCh Art. 31 Gerechte und angemessene Arbeitsbedingungen,” in *Charta der Grundrechte der Europäischen Union*, by Jürgen Meyer et al. (Baden-Baden: Nomos, 2019), para. 32.

1032 *Ibid.*, 31 ff.; different opinion regarding working time, cf. Hans Hanau, “Zum Flexibilisierungspotenzial der Arbeitszeitrichtlinie,” *EuZA*, 2019, 434.

1033 Cf. Wank, “Die personelle Reichweite des Arbeitnehmerschutzes aus rechtsdogmatischer und rechtspolitischer Perspektive,” 186.

1034 Cf. CJEU, *Yodel*, para. 45.

1035 *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050, para. 82 (n).

1036 *Ibid.*, para. 143.

1037 Hüpers and Reese, “Art. 31,” para. 31 ff.; different opinion regarding working time, cf. Hanau, “Zum Flexibilisierungspotenzial der Arbeitszeitrichtlinie,” 434.

1038 CJEU, Judgment of 16 July 2020, *UX*, C-658/18, EU:C:2020:572, para. 88 ff.; Achim Seifert, “Arbeitszeitrechtlicher Arbeitnehmerbegriff – Horizontalwirkung des Rechts auf bezahlten Urlaub (Art. 31 Abs. 2 GRCh),” *EuZA*, 2015, 503.

its scope beyond workers to include certain self-employed individuals, as it contains only one of several normative references for Art. 31 para. 1 CFR, so it does not alone establish a broader personal scope. However, it is also important to note that the ECSR has already extended the application of certain provisions of the RESC beyond the traditional distinction between employment and self-employment. Specifically, it has called for all workers, including ‘non-employees’, to be covered by occupational health and safety regulations under Art. 3 para. 1 RESC, on the grounds that they are exposed to the same risks as employees¹⁰³⁹. A coherent interpretation of fundamental rights norms could therefore also support a broad interpretation of Art. 31 CFR in line with Art. 3 para. 1 RESC – at least as long as Art. 31 CFR relates strictly to their health, safety and dignity, including working hours, daily and weekly rest periods and an annual period of leave when they serve to prevent accidents and ensure the working individual’s health. The latter may particularly apply to working individuals who are economically dependent on a single work provider and are therefore exposed to similar pressures as traditional employees due to their reliance on this single work provider. Accordingly, the scope of application must be determined with careful attention to the specific circumstances of the individual case and cannot be based solely on a fixed or formal status of the working individual.

By contrast, the extension of Art. 30 CFR to certain self-employed individuals appears rather doubtful. It provides protection in the event of unjustified dismissal in accordance with Union or national law for ‘every worker’¹⁰⁴⁰. While the personal scope of application extends to all natural persons, regardless of nationality¹⁰⁴¹, it applies only insofar as they qualify as a ‘workers’. In this context, a narrower interpretation of the term ‘worker’, as understood under Art. 45 TFEU, could likely be more appropriate¹⁰⁴². The definition may encompass in this context apprentices and interns but generally excludes certain self-employed individuals¹⁰⁴³. Although the wording of the provision refers to ‘every’ worker, the protection under Art. 30 CFR refers to ‘dismissal’ and presupposes the existence of a traditional employment relationship¹⁰⁴⁴. Even though the

1039 ECSR, *European Social Charter: Conclusions XVI-2 Vol. 1* (Strasbourg: Council of Europe Publ., 2003), 25–26 – “The Committee recalls that for the purposes of Article 3§1 of the Charter, all workers, including non-employees, must be covered by health and safety at work regulations <...>. It has consistently maintained this interpretation, on the grounds that employed and non-employed workers are normally exposed to the same risks in this area.”

1040 CFR, art. 30.

1041 Hans D. Jarass, “EU-Grundrechte-Charta Art. 30 Schutz bei ungerechtfertigter Entlassung,” in *Charta der Grundrechte der Europäischen Union*, by Hans D. Jarass (Munich: C.H. Beck, 2021), para. 5.

1042 Christian Picker and Leander Rathmann, “Europäisierung des Kündigungsschutzes? - Zur Kompetenz der EU und Relevanz der RL 2019/1152/EU für das Kündigungsrecht,” *RdA*, 2022, 64.

1043 Bernd Hüpers and Birgit Reese, “GRCh Art. 30 Schutz bei ungerechtfertigter Entlassung,” in *Charta der Grundrechte der Europäischen Union*, by Jürgen Meyer et al. (Baden-Baden: Nomos, 2019), para. 13.

1044 The Lithuanian version of the CFR uses the term ‘atleidimas’, the German version the term ‘Entlassung’ which are both terms used typically only in a traditional employment law context.

CJEU has, at times, interpreted ‘dismissal’ quite broadly¹⁰⁴⁵, the concept nonetheless refers to a termination occurring within a stable structure or definable entity, and is not intended to cover every isolated or ad hoc contract termination. It does likely not extend to the ‘termination’ of all civil or commercial contracts, even in cases of long-term engagements.

Art. 33 CFR, however, must be distinguished from the foregoing. It provides special protection for certain vulnerable groups of workers, such as pregnant individuals and parents on maternity or parental leave¹⁰⁴⁶. The personal scope of this provision is not limited to mothers or employees but generally extends to all individuals¹⁰⁴⁷. By its nature, Art. 33 CFR is less centered on traditional labor protection measures, as it does not mandate adjustments to working conditions specifically for the protection of mothers. Rather, its primary objective is to facilitate the reconciliation of family and professional life¹⁰⁴⁸. Art. 33 para. 2 CFR first and foremost provides protection against dismissal. The use of terminology identical to that found in Art. 30 CFR suggests that the provision presupposes the existence of a traditional employment relationship. Consequently, it would likely not extend protection against termination in self-employed contractual arrangements. Moreover, while both paid maternity leave and parental leave are regulated under the provision, they are subject to different legal requirements. Although these instruments are generally framed with reference to traditional employees under social policy law, Art. 33 para. 2 CFR – insofar as it relates to maternity leave – applies exceptionally regardless of whether the individual concerned is an employee or self-employed¹⁰⁴⁹. This interpretation is supported by the fact that the initial restriction on employees was intentionally removed during the drafting process of the CFR¹⁰⁵⁰. This, too, results in differing personal scopes of application.

Art. 27 CFR refers to ‘workers or their representatives’ without reference to nationality and provides a right to information and consultation within the undertaking¹⁰⁵¹. On the one hand, its personal scope of application clearly includes traditional employees. On the other hand, it could be argued that Art. 27 CFR may provide an opening for the inclusion of certain self-employed individuals, as its underlying

1045 Cf. CJEU, *Danosa*.

1046 CFR, art. 33.

1047 CJEU, Judgment of 16 September 2010, *Chatzi*, C-149/10, EU:C:2010:534, para. 63; CJEU, Judgment of 7 September 2017, *H./Land Berlin*, C-174/16, EU:C:2017:637, para. 32; Thorsten Kingreen, “EU-GRCharta Art. 33 Familien- Und Berufsleben,” in *Europäische Grundrechte und Grundfreiheiten*, ed. Dirk Ehlers (Berlin: De Gruyter, 2014), para. 6, doi:10.1515/9783110363166; Hans D. Jarass, “EU-Grundrechte-Charta Art. 33 Familien- und Berufsleben,” in *Charta der Grundrechte der Europäischen Union*, by Hans D. Jarass (Munich: C.H. Beck, 2021), para. 15; Kristin Rohleder, “GRCh Art. 33 Familien- und Berufsleben,” in *Charta der Grundrechte der Europäischen Union*, by Jürgen Meyer et al. (Baden-Baden: Nomos, 2019), para. 36.

1048 Kingreen, “Art. 33,” para. 6; Rohleder, “Art. 33,” para. 33.

1049 Rohleder, “Art. 33,” para. 36.

1050 Jarass, “Art. 33,” para. 15.

1051 CFR, art. 27.

purpose does not fully align with the free movement rationale typically used to define worker status. Such individuals, despite not being formally employed, may require equivalent protection regarding rights to information and consultation – particularly when they are in an economically dependent relationship with a single work provider and their livelihood is therefore tied to the continuation of that work relationship similar to those of employees. This broader interpretation would involve viewing Art. 27 CFR through a human rights lens¹⁰⁵², rather than anchoring it solely in the traditional framework of EU employment law.

An additional key provision addressing matters of collective employment law in the broader sense is Art. 12 para. 1 CFR. It guarantees the right to peaceful assembly and freedom of association at all levels, with particular emphasis on the right to form and join trade unions. This provision applies to all natural and legal persons, regardless of nationality¹⁰⁵³. In addition, Art. 28 CFR explicitly guarantees the right to collective bargaining and collective action. Notably, the right to strike is expressly mentioned¹⁰⁵⁴, although member states retain the discretion to regulate the modalities and limitations governing the exercise of such action¹⁰⁵⁵. Accordingly, it is closely linked to Art. 12 para. 1 CFR. Art. 28 does not limit its personal scope of protection to workers' and employers' organizations but includes the workers and employers themselves¹⁰⁵⁶. The rights enshrined in Art. 12 para. 1 CFR are to be interpreted in line with Art. 11 ECHR, as required by Art. 52 para. 3 CFR. It is disputed whether also certain self-employed working individuals could fall under Art. 28 CFR¹⁰⁵⁷. The literature partly advocates for including employee-like individuals (independent workers) within the personal scope of protection¹⁰⁵⁸. Like Art. 12 para. 1 CFR, Art. 28 CFR must be interpreted in conjunction with Art. 11 ECHR, as the ECtHR has recognized the right to collective

1052 Bernd Hüpers and Birgit Reese, "GRCh Art. 27 Recht auf Unterrichtung und Anhörung der Arbeitnehmerinnen und Arbeitnehmer im Unternehmen," in *Charta der Grundrechte der Europäischen Union*, by Jürgen Meyer et al. (Baden-Baden: Nomos, 2019), para. 17.

1053 CFR, art. 12 para. 1.

1054 Ibid., art. 28.

1055 Cf. "Explanations relating to the Charter of Fundamental Rights," explanation on Article 28.

1056 Carsten Herresthal, "Die Re-Individualisierung des kollektiven Arbeitsrechts in der europäischen Integration am Beispiel der Tarifautonomie," *EuZA*, 2011, 13 ff.

1057 Different opinion, cf. Sebastian Krebber, "AEUV Art. 153 (ex-Art. 137 EGV) [Unionskompetenzen]," in *EUV/AEUV*, by Christian Calliess et al. (Munich: C.H. Beck, 2022), para. 3; Claudia Schubert, "GRC Art. 28 Recht auf Kollektivverhandlungen und Kollektivmaßnahmen," in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 18.

1058 Verena Zwinger and Elisabeth Brameshuber, "Collectively Agreed (Minimum) Labour Conditions as Protection Boosters," *IJCLLIR* 34, issue 1 (March 1, 2018): 107 ff., doi:10.54648/IJCL2018004; Johannes Heuschmid, "§ 11 Der Arbeitskampf im EU-Recht," in *Arbeitskampfrecht: Handbuch für die Rechtspraxis*, ed. Wolfgang Däubler (Baden-Baden: Nomos, 2018), para. 34; Bernd Hüpers and Birgit Reese, "GRCh Art. 28 Recht auf Kollektivverhandlungen und Kollektivmaßnahmen," in *Charta der Grundrechte der Europäischen Union*, by Jürgen Meyer et al. (Baden-Baden: Nomos, 2019), para. 29.

action as an essential element of trade union freedom¹⁰⁵⁹. This does not explicitly include the right to strike¹⁰⁶⁰. However, in this regard, Art. 28 CFR goes beyond this interpretation of Art. 11 ECHR by affirmatively guaranteeing the right to strike¹⁰⁶¹. Despite its broader material scope, it follows logically that the personal scope of application under Art. 28 CFR should be interpreted exactly as broadly as under Art. 11 ECHR. The question of whether also certain self-employed individuals – particularly those who are economically dependent – fall within the personal scope of Art. 11 ECHR remains so far unresolved by the ECtHR. Nonetheless, given the ECtHR’s established jurisprudence that labor rights are of an evolving nature, it appears to be only a matter of time before the ECtHR offers a more definitive clarification, potentially in favor of including such individuals within the protective scope of Art. 11 ECHR. The CFA has at least determined that ILO Convention No. 87 on freedom of association and ILO Convention No. 98 on the right to organize and collective bargaining should also include self-employed individuals¹⁰⁶². A source of interpretation which also the ECtHR would take into consideration. Furthermore, the ECSR has already addressed the question of whether certain rights under the RESC apply beyond conventional employment relationships. In the case *Irish Congress of Trade Unions v. Ireland*, the ECSR extended the personal scope of Art. 6 para. 2 RESC concerning the right to collective bargaining to self-employed individuals who needed social protection and were de facto economically dependent on one or more contracting parties¹⁰⁶³. The rationale for this inclusion was that collective agreements serve to redress structural power imbalances between contracting parties and safeguard more vulnerable workers by regulating their working conditions collectively. Additionally, such agreements help to prevent unfair competition between employees and self-employed individuals, thereby avoiding a downward spiral in labor standards within a unified market. Accordingly, the RESC is interpreted by the ECSR in light of its protective function. Despite this development, no definitive criteria have been established to determine precisely which self-employed individuals fall within the scope of Art. 6 para. 2 RESC. However, guidance has emerged at the EU level. In 2022, the European Commission issued guidelines clarifying that EU competition law should not apply to collective agreements involving solo self-employed individuals, provided they are in ‘a situation comparable to that of workers’¹⁰⁶⁴. This includes, solo self-employed individuals work-

1059 ECtHR, *Sindicatul ‘Păstorul Cel Bun’ v. Romania*, para. 131; ECtHR, *Demir and Baykara v. Turkey*, para. 109–110.

1060 Cf. ECtHR, *Schmidt and Dahlström v. Sweden*.

1061 Cf. CFR, art. 28.

1062 ILO, *Freedom of Association*, para. 387 ff.; Countouris and De Stefano, “New Trade Union Strategies for New Forms of Employment,” 50 ff.; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1063 ECSR, *Irish Congress of Trade Unions v. Ireland*, para. 37; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1064 Cf. European Commission, “Commission Guidelines on the Application of EU Competition Law.”

ing alongside employees for the same work provider, platform workers, and those who are economically dependent on a limited number of work providers. The aim is to ensure that their fundamental rights are not unduly restricted by antitrust rules. Nevertheless, it remains uncertain whether the CJEU will confirm this interpretation, or whether this position reflects the minimum threshold necessary to bring such individuals within the scope of Art. 6 para. 2 RESC. Ultimately, it will be up to the CJEU or the ECtHR (indirectly) to determine whether Art. 12 and 28 CFR also apply to certain categories of self-employed persons. The prevailing tendency in legal interpretation is indeed moving towards including economically dependent or otherwise vulnerable self-employed individuals within their personal scopes. Art. 12 CFR not only guarantees the right to form and join trade unions but also encompasses broader participatory rights at various levels of engagement but the precise contours of the group of protected individuals remain ambiguous. It is unclear whether the personal scope should be limited – as per the Commission’s 2022 Guidelines – to economically dependent solo self-employed individuals, platform workers, and those working ‘side-by-side’ with employees, or whether even a broader scope of working individuals may be encompassed. A coherent interpretation of international law, however, could support a broad interpretation of Art. 11 ECHR and, consequently, a corresponding interpretation of Art. 12 and 28 CFR.

In conclusion, the examination of the CFR’s legal influence highlights its significant role in shaping EU law. The CFR’s provisions, while not explicitly defining terms such as ‘worker’, establish an autonomous EU law concept that does not rely on member states’ definitions. A final determination as to whether, and to what extent, specific provisions of the CFR apply to certain self-employed individuals can ultimately only be made by the CJEU – or, indirectly, by the ECtHR – in relation to Art. 12 and 28 CFR. Nevertheless, a clear trend towards a punctually broader interpretation is emerging. This is particularly evident given the CFR’s underlying purpose of providing a uniform and visible standard of fundamental rights across the EU, which supports a broad interpretation that includes all individuals in need of respective protection.

This tendency is also apparent in the area of equal treatment, a fundamental principle of EU law. Here, it is not appropriate to rely on rigid classifications of work relationships – especially not those defined by national legal systems. Instead, an individual assessment must be carried out to determine whether equal cases are treated unequal or unequal cases are treated equal. In certain aspects of a work relationship, it may therefore be necessary to treat self-employed freelance workers and employees equally where the criteria underlying the legal classification of their contractual relationship fail to justify differential treatment.

The same reasoning applies to the provisions on occupational health and safety in the broadest sense, as set out in Art. 31 CFR. However, a distinction must be made in this context. The potentially broader scope of application – particularly with regard to entitlements such as paid leave and limits on maximum working hours – is likely restricted to those aspects that pertain to exceptionally important values, such as the health, safety and dignity of the working individual. Moreover, this extended

application would only apply to individuals who are exposed to comparable risks as traditional employees. This may particularly include individuals, who – due to their reliance on a single work provider – may be subject to similar pressures and exposed to the same types of hazards as traditional employees. In such cases, the rationale underlying occupational health and safety protections could make it necessary to extend specific rights under Art. 31 CFR to certain categories of self-employed individuals.

Art. 33 para. 2 CFR – insofar as it relates to maternity leave – applies regardless of whether the individual concerned is an employee or self-employed¹⁰⁶⁵. Some doubts remain, however, regarding the right to information and consultation of workers within the undertaking, as enshrined in Art. 27 CFR. Even so, there can be an argument made that economically dependent individuals, particularly freelance workers who are effectively affected by, e.g., measures in connection with mass dismissal situations, may experience a level of vulnerability comparable to that of traditional employees. In such cases, their economic dependence on a single work provider may justify extending similar protections under Art. 27 CFR.

By contrast, there is a much clearer trend with regard to the right to form and join trade unions, as well as the right to collective agreements and action. As discussed in earlier chapters of this dissertation concerning the ECHR and the RESC, both the ECtHR and the ECSR appear to be developing a tendency towards a broad interpretation of the concepts within their respective mandates. This evolution may systematically influence the interpretation of the personal scopes of Art. 12 and 28 CFR. Moreover, the CFR explicitly enshrines the right to strike, which implies that certain self-employed individuals could also be entitled to this right. However, the practical application of such a right would remain unclear, particularly because the right to strike typically presupposes a corresponding obligation to work in the moment of the strike. It also remains unresolved how broadly the personal scope of application would be defined. This raises the question of whether it will align with the European Commission's guidelines, which reference economically dependent solo self-employed persons, platform workers, and individuals working side-by-side with employees – or whether it will be interpreted even more expansively.

Overall, the CFR's role concerning working individuals' rights is profound, but its application to certain self-employed working individuals is complex and further considerations are necessary. This is where EU secondary law comes into play.

4.3.2. EU secondary law

4.3.2.1. Relevance of EU secondary law for national law

First, it is necessary to clarify how EU secondary law operates and to what extent it can have a direct impact on national law, potentially overriding national scopes of application.

¹⁰⁶⁵ Rohleder, "Art. 33," para. 36.

In principle, EU directives and their provisions have only indirect effect. According to Art. 288 para. 3 TFEU, EU directives “are binding, as to the result to be achieved, upon each member state to which they are addressed, but leave to the national authorities the choice of form and methods”.¹⁰⁶⁶ This means they are addressed to member states, not directly to individuals. This differentiates directives from EU regulations, which are of general application, binding in their entirety, and directly applicable in all member states¹⁰⁶⁷. By contrast, directives must be transposed into national law in order to take effect. The manner of transposition depends on the requirements set out in the directive itself. Where a directive imposes mandatory obligations, these must be fully implemented in national law. At first glance, the wording of Art. 288 para. 3 TFEU appears to preclude any direct effect of directives, as they are explicitly directed at states and become operative in domestic law only through national transposition measures¹⁰⁶⁸. However, the CJEU has moved away from this strict interpretation. It has acknowledged the direct effect of individual provisions of directives, provided certain conditions are met, in order to protect individual rights¹⁰⁶⁹. The CJEU has emphasized that the direct applicability of regulations does not preclude other legal acts, such as directives, from having similar effects¹⁰⁷⁰. It offers two primary justifications for recognizing direct effect of directives. First, the practical effectiveness (‘effet utile’) of the directive would be undermined if individuals could not invoke relevant provisions of a directive before national courts¹⁰⁷¹. Second, member states may not be allowed to benefit from their own failure to transpose a directive properly or on time and would therefore have to accept a directly applicable directive against them after expiry of the deadline¹⁰⁷² (this follows the principle of ‘legitimate expectation’¹⁰⁷³). Furthermore, ex-

1066 TFEU, art. 288 para. 3.

1067 Ibid., art. 288 para. 2.

1068 Ibid., art. 288 para. 3.

1069 CJEU, Judgment of 19 January 1982, *Becker*, C-8/81, EU:C:1982:7, para. 29; CJEU, Judgment of 4 December 1986, *Federatie Nederlands Vakbeweging*, C-71/85, EU:C:1986:465, para. 24.

1070 CJEU, Judgment of 1 February 1977, *Nederlandse Ondernemingen*, C-51-76, EU:C:1977:12, para. 20–24; CJEU, Judgment of 5 April 1979, *Ratti*, C-148/78, EU:C:1979:110, para. 19; CJEU, *Becker*, para. 21, 29.

1071 CJEU, Judgment of 4 December 1974, *van Duyn/Home Office*, C-41-74, EU:C:1974:133, para. 12; CJEU, *Nederlandse Ondernemingen*, para. 20–24; CJEU, Judgment of 23 November 1977, *Enka*, C-38-77, EU:C:1977:190, para. 9; CJEU, Judgment of 29 November 1978, *Delkvist*, C-21/78, EU:C:1978:213, para. 18–21; CJEU, *Ratti*, para. 21; CJEU, *Becker*, para. 23; CJEU, Judgment of 22 February 1990, *Busseni*, C-221/88, EU:C:1990:84, para. 22; CJEU, Judgment of 12 July 1990, *Foster/British Gas*, C-188/89, EU:C:1990:313, para. 16.

1072 CJEU, *Ratti*, para. 22; CJEU, *Becker*, para. 24; CJEU, Judgment of 26 February 1986, *Marshall I*, C-152/84, EU:C:1986:84, para. 47; CJEU, *Federatie Nederlands Vakbeweging*, para. 14; CJEU, Judgment of 24 March 1987, *McDermott and Cotter*, C-286/85, EU:C:1987:154, para. 14; CJEU, Judgment of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431, para. 14; CJEU, *Foster/British Gas*, para. 16; CJEU, *Busseni*, para. 22; CJEU, Judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, para. 23 ff.

1073 Cf. CJEU, *Ratti*, para. 46.

cluding the possibility of direct effect is inconsistent with the binding nature of directives under Art. 288 para. 3 TFEU¹⁰⁷⁴ and conflicts with the principle of legal certainty¹⁰⁷⁵. Art. 267 TFEU also presupposes that individuals may rely on directives before national courts¹⁰⁷⁶. The CJEU thus treats direct effect as a minimum guarantee¹⁰⁷⁷ and requires the following conditions to be met:

1. The deadline for transposition has expired without proper transposition by the Member State; a directive cannot have direct effect before the deadline has expired¹⁰⁷⁸;
2. The directive has either not been transposed, or has been incorrectly transposed by the member state, i.e., it does not fulfill the objectives as required under Art. 288 para. 3 TFEU¹⁰⁷⁹; the same therefore applies if the directive has been transposed but the interpretation by national institutions and courts is contrary to CJEU practice;
3. The directive's provision in question of the directive must be:
 - *unconditional*, i.e., it is fully applicable without the need for further action by EU or national institutions¹⁰⁸⁰ and irrespective of whether member states have been given options elsewhere in the directive or whether the directive provides for the adoption of accompanying provisions to simplify application¹⁰⁸¹; and
 - *sufficiently precise*¹⁰⁸², i.e. it clearly sets out an obligation that can be applied by a court without additional elaboration¹⁰⁸³;
 - the application of the directive must not result in an obligation for a private third party¹⁰⁸⁴, i.e. *de facto* obligations on third parties may occur, but not legal obligations¹⁰⁸⁵.

1074 CJEU, *van Duyn/Home Office*, para. 12; CJEU, *Nederlandse Ondernemingen*, para. 20–24; CJEU, *Delquist*, para. 18–21; CJEU, *Ratti*, para. 20; CJEU, *Becker*, para. 22; CJEU, *Marshall I*, para. 47; CJEU, *McDermott and Cotter*, para. 12; CJEU, *Kolpinghuis Nijmegen*, para. 8.

1075 CJEU, *van Duyn/Home Office*, para. 13, 14.

1076 *Ibid.*, para. 12.

1077 CJEU, Judgment of 6 May 1980, *Commission/Belgium*, C-102/79, EU:C:1980:120, para. 12; CJEU, *Becker*, para. 29; CJEU, Judgment of 17 September 1997, *Dorsch*, C-54/96, EU:C:1997:413, para. 44; CJEU, Judgment of 20 March 1997, *Commission/Germany*, C-96/95, EU:C:1997:165, para. 37.

1078 CJEU, *Ratti*, para. 43 ff.; CJEU, Judgment of 3 March 1994, *Vaneetveld*, C-316/93, EU:C:1994:82, para. 16 ff.

1079 CJEU, *Marshall I*, C-152/84, para. 46; CJEU, Judgment of 20 September 1988, *Moormann*, C-190/87, EU:C:1988:424, para. 23.

1080 CJEU, *van Duyn/Home Office*, para. 13, 14.

1081 CJEU, *Becker*, para. 30; CJEU, *McDermott and Cotter*, para. 15; CJEU, Judgment of 9 September 1999, *Freyer*, C-374/97, EU:C:1999:397, para. 24.

1082 CJEU, *Ratti*, para. 23; CJEU, *Becker*, para. 25; CJEU, *Federatie Nederlands Vakbeweging*, para. 13; CJEU, *Kolpinghuis Nijmegen*, para. 7; CJEU, *Foster/British Gas*, para. 16.

1083 CJEU, Judgment of 22 May 1980, *Santillo*, C-131/79, EU:C:1980:131, para. 13.

1084 CJEU, Judgment of 7 January 2004, *Delena Wells*, C-201/02, EU:C:2004:12, para. 56.

1085 Cf. *Ibid.*, para. 56 ff.

This direct effect is addressed in general only to the state and does not apply to private parties, i.e. there is a vertical, but no horizontal direct effect of a directive¹⁰⁸⁶. However, the CJEU defines the term ‘state’ broadly, so that it also includes, e.g., public employers¹⁰⁸⁷ and makes no difference regarding what form the state acts¹⁰⁸⁸; this means that ‘state’ also includes any public employers, state-controlled bodies, or any entity entrusted with a public service and endowed with special powers normally not found in private law relationships¹⁰⁸⁹ – including the legal successors of state-owned provider monopolies. This means that if such a ‘state’ company engages a freelance worker as a self-employed person, and an EU directive contains unconditional and sufficiently precise rights that according to the directives’ autonomous personal scope of application extend to individuals who do not fall under the traditional concept of ‘employee’, the freelance worker may invoke these rights against the contracting entity once the directive’s transposition deadline has passed, due to the state’s failure to implement the directive fully or correctly. If the requirements for direct effect are fulfilled, national courts are obliged to apply the relevant provisions of the directive on their own motion, even if the individual has not expressly invoked them¹⁰⁹⁰. A national court may independently determine the relevance of EU law in a case¹⁰⁹¹. If a directive grants the member states a range of acceptable implementation options, the failure to transpose the directive does not give rise to an individual’s legitimate expectation that the most favorable option will be applied¹⁰⁹². In addition, all national authorities are required to apply provisions of directives that have direct effect¹⁰⁹³. This means the authority is bound not by conflicting national law, but by the directive itself, including its EU-conform interpretation¹⁰⁹⁴. If the personal scope of a directive is broader than that of national law, the broader EU scope will prevail and apply directly. However, interpretation in conformity with the directive is limited by the acceptable methods of legal interpretation (i.e., it must not be *contra legem*) and must comply with general principles of law, such as legal certainty and the prohibition of retroactivity¹⁰⁹⁵.

Although directives cannot produce horizontal direct effect, they may indirectly

1086 CJEU, *Faccini Dori*, para. 19 ff.

1087 CJEU, *Marshall I*, para. 49, 51.

1088 *Ibid.*, para. 49; CJEU, Judgment of 15 May 1986, *Johnston*, C-222/84, EU:C:1986:206, para. 56.

1089 CJEU, *Foster/British Gas*, para. 20; CJEU, Judgment of 11 July 1991, *Verholen*, C-87/90, C-88/90 and C-89/90, EU:C:1991:314, para. 15.

1090 CJEU, *Verholen*, para. 15.

1091 *Ibid.*, para. 12 ff.

1092 CJEU, *Feyrer*, para. 31.

1093 CJEU, Judgment of 22 June 1989, *Fratelli Costanzo*, C-103/88, EU:C:1989:256, para. 31, 33.

1094 *Ibid.*

1095 CJEU, Judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, para. 25.

result in a horizontal outcome¹⁰⁹⁶ with the same or even broader result. This is because the CJEU affirmed that general principles of EU law can apply in horizontal relationships without any limitations – even before the directive’s transposition deadline has expired¹⁰⁹⁷. Here, i.a., the CFR comes into play. The CJEU stated that Art. 51 CFR does not include regulations regarding private persons, so that it cannot be interpreted as precluding a direct right between private persons¹⁰⁹⁸. Furthermore, an employer’s fundamental rights obligation does not arise explicitly from Art. 51 para. 1 CFR, as it only names the EU and the member states as having a fundamental rights obligation when implementing EU law. However, a horizontal direct effect of a Treaty is possible if the provision of a Treaty is clear and unconditional, i.e. it does not include any qualification by any reservation on the part of the member state which could make its implementation conditional on a positive legislative measure under national law¹⁰⁹⁹. This means that for having horizontal effect, the provision must:

- fall within the scope of the rights and principles recognized by a Treaty, particularly those related to employment (to trigger the application of the Treaty);
- be sufficiently clear, precise, and unconditional to be enforceable by individuals in their relations with private entities (to trigger the direct effect of a Treaty provision);
- be capable of producing legal effects that directly benefit individuals and can be invoked before national courts (to trigger the direct effect of a Treaty provision);
- must give a concrete expression to a general principle of EU law (to trigger not only a vertical direct effect, but also a horizontal direct effect)¹¹⁰⁰.

The CJEU has decided that such provision if it is a Treaty provision can apply to vertical and horizontal legal relations¹¹⁰¹. Since the CFR has the same legal value as an EU Treaty pursuant to Art. 6 para 1 TEU, such a direct effect can also be possible for the CFR¹¹⁰² as the CJEU has transferred the direct horizontal applicability approach of Treaty provisions also to CFR provisions¹¹⁰³. For instance, in the cases

1096 Kristina Ambrazevičiūtė, “Diskriminacijos dėl amžiaus draudimas Europos Sąjungos teisingumo teismo praktikoje,” *Jurisprudencija* 24, no. 1 (2017): 135.

1097 Cf. CJEU, *Mangold*; CJEU, *Kücükdeveci*.

1098 CJEU, Judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, para. 87; CJEU, Judgment of 6 November 2018, *MPG*, C-684/16, EU:C:2018:874, para. 76.

1099 Cf. CJEU, *Van Gend & Loos*.

1100 Cf. CJEU, Judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, para. 48; CJEU, Judgment of 15 January 2014, *AMS*, C-176/12, EU:C:2014:2, para. 45.

1101 CJEU, *Walrave*, para. 17; CJEU, Judgment of 8 April 1976, *Defrenne*, C-43-75, EU:C:1976:56, para. 39; CJEU, *Bosman*, para. 87; CJEU, *Angonese*, para. 36; CJEU, Judgment of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, para. 21.

1102 Cf. CJEU, Judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 77; CJEU, Judgment of 22 January 2019, *Cresco*, C-193/17, EU:C:2019:43, para. 77.

1103 Cf. CJEU, Judgment of 24 June 2019, *Popławski II*, C-573/17, EU:C:2019:530, para. 63.

Mangold and *Kücükdeveci*, the CJEU recognized that the general principle prohibiting age discrimination applies to employment relationships between working individuals and private employers (entities that do not qualify as ‘state’, even under the CJEU’s expansive definition)¹¹⁰⁴. Since the EU directives at issue in each case were adopted under Art. 19 TFEU and reflected the pre-existing fundamental right to equal treatment as a general principle of EU law, the CJEU held that this general principle – specifically, the prohibition of age discrimination – must prevail over conflicting national law, even in disputes between private parties. The CJEU further recognized that violations of such directives could simultaneously constitute violations of the underlying fundamental rights. In doing so, it effectively equated or merged the directive with the associated fundamental right, including the assessment of whether the interference with that right was justified¹¹⁰⁵. In the case *Egenberger*, the CJEU extended this approach to discrimination on grounds of religion, as enshrined in Art. 21 para. 1 CFR¹¹⁰⁶. It can therefore be concluded that whenever a substantive provision of a directive reflects the constitutional right enshrined in Art. 21 CFR, that provision must be given direct effect even in horizontal relationships. Logically, this must also extend to the underlying personal scope of application; otherwise, the protection of this fundamental right would be rendered illusory for some individuals. Therefore, the CFR can have a strengthened effect on EU secondary law. A violation of fundamental rights leads to the inapplicability of national law, if no interpretation in conformity with a directive was possible¹¹⁰⁷. The wider the scope of protection of the fundamental right, the more effect the fundamental right has as a prohibition norm for national law. One of the most controversial developments in this regard is the recognition of the horizontal effect of Art. 31 para. 2 CFR in the cases *Bauer and Willmeroth* as well as *MPG*.¹¹⁰⁸ The CJEU assumes for Art. 31 para. 2 CFR that it is a fundamental right which grants the worker a subjective right against the employer, provided that the scope of application of the CFR is open for the facts at issue. For this, the CJEU refers on the one hand to the fact that according to the wording of the fundamental right ‘every worker’ has a ‘right’ to ‘paid annual leave’ and that this does not depend on the regulations of the EU or the member states¹¹⁰⁹. On the other hand, it is an essential principle of the EU’s social law from which, as a fundamental right, derogations may only be made in accordance with Art. 52 para. 1 CFR¹¹¹⁰. According to the CJEU, the right is sufficiently

1104 Cf. CJEU, *Mangold*.

1105 Ibid., para. 67; CJEU, *Kücükdeveci*, para. 50 ff.

1106 CJEU, *Egenberger*, para. 77.

1107 CJEU, *Van Gend & Loos*; CJEU, *Internationale Handelsgesellschaft mbH*, para. 3 ff.; CJEU, *Mangold*, para. 77 ff.; CJEU, *Kücükdeveci*, para. 23; CJEU, *Cinéthèque SA*, para. 54 ff.; CJEU, Judgment of 19 April 2016, *Dansk Industri*, C-441/14, EU:C:2016:278, para. 35; CJEU, *Egenberger*, para. 79; CJEU, Judgment of 11 September 2018, *IR/JQ*, C-68/17, EU:C:2018:696, para. 68.

1108 CJEU, *Bauer and Willmeroth*, para. 89 ff.; CJEU, *MPG*, para. 74 ff.

1109 CJEU, *Bauer and Willmeroth*, para. 90; CJEU, *MPG*, para. 74 ff.

1110 CJEU, *MPG*, para. 73.

clear and specific and not subject to conditions¹¹¹¹. The determination of whether a sufficient degree of concretization exists is subject to a certain degree of arbitrariness on the part of the CJEU. Nevertheless, it has therefore already been established that the Working Time Directive 2003/88/EC can sufficiently trigger Art. 31 para. 2 CFR, and that its provisions can therefore, in principle, also result in a direct horizontal effect. Therefore, horizontal effect of CFR provisions are possible where secondary law and CFR coexist and are closely interrelated, with the secondary law right serving as the expression of the corresponding CFR right. While these directives may not formally have a horizontal direct effect in procedural terms, in substance, they clearly regulate the relationship between the private parties.

However, the invocation of fundamental rights in private legal relationships does not succeed in each and every case. This is partly due to Art. 51 para. 1 CFR, which states that the CFR is “applicable to the member states exclusively when they are implementing Union law”¹¹¹². Furthermore, some provisions of directives “cannot be regarded as giving concrete expression to a general principle of EU law”¹¹¹³. For instance, in the case *AMS*, the CJEU decided that the ‘right to information and consultation within the undertaking’ under Art. 27 CFR requires legislative concretization “to be fully effective, it must be given more specific expression in European Union or national law”¹¹¹⁴, i.e., it needs further concretization by the EU or the member states.

The horizontal effect is therefore first practically narrowed to the competencies of the EU legislator and secondly to the scope in which the legislator has issued secondary law. Furthermore, the provision of the CFR must be clear and unconditional, but it is often hard to say (not obvious) which secondary law provision reflects a CFR provision as it is often not explicitly stated in the secondary legislation, but frequently only emerges from the legislative history of the respective secondary legislation (e.g. advisory documents, legislative justifications). This makes it more difficult to predict CJEU court practice in this field, in particular due to the CJEU’s approach of not taking into account documents even if they were put on record in the Council when drafting the provision, unless they are reflected in the provision¹¹¹⁵ and refuses to consider the minutes of the Commission, the Council or Parliament that are not reflected in the legislation¹¹¹⁶. The case law on the issue is still limited. In some cases, the Opinions of the Advocates General have raised the possibility of a horizontal effect of CFR

1111 *Ibid.*, para. 74.

1112 Regarding the general principle of prohibited age discrimination, cf. CJEU, Judgment of 23 September 2008, *Bartsch*, C-427/06, ECLI:EU:C:2008:517; regarding the unequal treatment of fixed-term and permanent employees based on the nature of the employment relationship pursuant to Art. 20 and 21 CFR, cf. CJEU, Judgment of 22 January 2020, *Martín*, C-177/18, EU:C:2020:26, para. 56 ff.

1113 CJEU, *Smith*, para. 48.

1114 CJEU, *AMS*, para. 45.

1115 CJEU, *The Queen/Immigration Appeal Tribunal*, para. 18.

1116 CJEU, *Quelle*, para. 32.

provisions, but the judgments themselves have left the question unresolved¹¹¹⁷. The practical relevance of the horizontal effect of the CFR is therefore limited to cases where national law is not in line with EU law¹¹¹⁸ or where interpretation of national courts of EU matters is not in line with EU law¹¹¹⁹. Therefore, extending the CJEU's case law to other fundamental social rights, such as Art. 30 or Art. 31 para. 1 CFR remains questionable. In some areas, however, the case law of the CJEU and the increasing interpretation of the CFR¹¹²⁰ make it necessary to at least consider a possible direct horizontal effect when analyzing the relevant provisions of directives in the following, as any new EU directive has the potential to broadening the scope of application of the CFR leading to more of its provisions to be applied also to horizontal employment relationships – either directly, or indirectly by way of the CJEU interpreting directives beyond their textual limits in the light of CFR provisions.

4.3.2.2. EU directives' requirements for national law

This section explores the relevance of selected EU directives in determining the extent to which their personal scope of application encompasses individuals who, under Lithuanian law, would typically be classified as self-employed. The analysis aims to clarify how far EU secondary legislation, when interpreted systematically, may extend protective rights and social guarantees to this intermediary group situated between traditional employment and full self-employment. Just because fundamental rights must be interpreted broadly as such does not automatically mean that every directive based on those rights must also be interpreted equally broadly, particularly where the directive's purpose justifies a narrower personal scope of application. To begin with, it is essential to note that some directives are explicitly confined to conventional employment relationships.

One Directive that raises the question of whether it might extend to certain self-employed individuals is the Transparent and Predictable Working Conditions Directive (EU) 2019/1152. At first glance, such an interpretation may appear unlikely. The Proposal for a Reform of Directive 91/533/EEC – that formed the basis for this Directive – originally included a uniform definition of the term 'worker', explicitly rooted in the *Lawrie-Blum* formula¹¹²¹. However, this definition was ultimately not adopted,

1117 Regarding Art. 31 para. 2 CFR, cf. CJEU, *Dominguez*; furthermore, cf. Opinion of Advocate General Trstenjak delivered on 8 September 2011, *Dominguez*, C-282/10, EU:C:2011:559; CJEU, Judgment of 14 May 2019, *COOO*, C-55/18, EU:C:2019:402, para. 68 ff.

1118 CJEU, *Cresco*, para. 87.

1119 CJEU, *Popławski II*, para. 57.

1120 About the CJEU's reasoning regarding this systematic, cf. CJEU, Judgment of 25 November 2021, *Job-Medium GmbH*, C-233/20, EU:C:2021:960, para. 35; CJEU, *COOO*, para. 71; CJEU, Judgment of 14 March 2017, *G4S*, C-157/15, EU:C:2017:203, para. 38; CJEU, Judgment of 18 July 2013, *Alemo-Herron*, C-426/11, EU:C:2013:521, para. 36; CJEU, Judgment of 22 November 2011, *KHS AG*, C-214/10, EU:C:2011:761, para. 31, 37.

1121 Proposal for a Directive on Transparent and Predictable Working Conditions, chap. 1 art. 2 para. 1 lit. a.

and the CJEU has consistently refrained from relying on such preparatory documents unless they are reflected in the adopted provision¹¹²² when determining the CJEU's worker concept. It could be argued, albeit less convincingly, that the reference to the CJEU judgments associated with its personal scope of application in Recital 8 constitutes such a sufficient reflection. However, it would arguably be more appropriate to seek the definition within the adopted text of the directive itself. The purpose of Directive (EU) 2019/1152 is to enhance working conditions across the EU by fostering greater transparency and predictability in employment relationships, while simultaneously preserving flexibility within the labor market¹¹²³. It establishes the minimum rights that apply to all individuals regarded as workers within the EU who are employed under a contract or relationship as defined by national legislation, collective agreements, or customary practices, taking into account the CJEU's case law¹¹²⁴. As outlined, the European Commission initially proposed to define the personal scope of the Directive solely through the lens of EU law, invoking the concept of 'worker' as articulated in the case *Lawrie-Blum*. This would have marked the first instance in which EU legislation offered a concrete legal definition of the term 'worker'¹¹²⁵. However, the final version of the Directive adopts a hybrid model. This model relies on national definitions of 'worker' while mandating that these be interpreted consistently with the jurisprudence of the CJEU. In practice, this dual-layered framework suggests a two-step analysis: first, national criteria are applied to establish whether an individual qualifies as a worker; second, this classification must be reviewed in light of the criteria established by the CJEU to ensure that national law does not arbitrarily exclude certain working individuals from the Directive's protection¹¹²⁶. This approach effectively creates a blended concept – partially autonomous and partially national – where domestic legal definitions hold initial authority yet must remain aligned with CJEU case law. Nevertheless, there remains a possibility that the CJEU might ultimately rely on an autonomous definition of 'worker' in accordance with the *Lawrie-Blum* formula¹¹²⁷. Would this occur, individuals in quasi-employment relationships, such as employee-like self-employed persons, would remain outside the Directive's personal scope.

Another relevant directive worth considering is Minimum Wages Directive (EU) 2022/2041. It seeks to improve living and working conditions within the EU by ensuring the adequacy of minimum wages and reinforcing the role of collective bargaining

1122 CJEU, *The Queen/Immigration Appeal Tribunal*, para. 18.

1123 Directive (EU) 2019/1152, recital 1.

1124 *Ibid.*, recital 2.

1125 Nathalie Oberthür, "Aktuelle Tendenzen des EuGH und deren Auswirkungen auf das nationale Recht (Arbeitnehmerbegriff, Datenschutz und andere Fragen)," *RdA*, 2018, 283.

1126 Martin Henssler and Benjamin Pant, "Europäisierter Arbeitnehmerbegriff," *RdA*, 2019, 330.

1127 Andreja Schneider-Dörr, *Crowd Work und Plattformökonomie: Eine arbeitsrechtliche Fallstudie* (Baden-Baden: Nomos, 2021), 398; Christian Rolfs, "Transparente und vorhersehbare Arbeitsbedingungen in der EU," *Zeitschrift für Arbeitsrecht*, 2021, 289 ff.; Sebastian Kolbe, "Mehr als ein neues Nachweisrecht – Zur Umsetzung der Arbeitsbedingungenrichtlinie in das deutsche Recht," *EuZA*, 2023, 6 ff.

in wage determination. In terms of personal scope, the Directive applies to workers. Recital 4 of the Directive links it to the European Pillar of Social Rights, which underscores workers' right to fair pay that ensures a decent standard of living. It appears plausible to read the Directive in conjunction with Art. 4 RESC, which enshrines the right to fair remuneration. Such a connection could suggest a broader interpretation of the Directive's personal scope. Art. 4 RESC requires that remuneration must be fair not only in terms of ensuring the subsistence of the working individual but also that of their family. This indicates that the protection afforded by this provision is not limited to the individual interests of a person engaged but goes well beyond that. In this context, economically dependent self-employed individuals – those who derive the majority of their income from a single client or a small number of clients – could, under certain circumstances, fall within the ambit of Art. 4 RESC. This line of thought is compelling, not least because Directive (EU) 2022/2041 provides also a framework to improve workers' effective access to minimum wage protection, where such protection is provided by national law or collective agreements¹¹²⁸. Furthermore, the Directive establishes a framework for the adequacy of statutory minimum wages¹¹²⁹ and promotes collective bargaining for wage setting¹¹³⁰. However, the personal scope in Art. 2 of the Directive refers to national legislation, collective agreements, and practices, implying that the national definition of 'worker' is determinative. Yet, this must be done considering the case law of the CJEU. This aligns again with the rather new hybrid regulatory approach seen in recent EU employment law directives. Importantly, the Directive does not generally require member states to introduce minimum wages, whether statutory or contractual. Therefore, the definition of 'worker' in the Directive cannot be extended to include categories of individuals who have not previously been subject to minimum wage provisions under national law¹¹³¹. Otherwise, this would impose an obligation on member states to introduce a statutory minimum wage for this group what would not be purpose of Directive (EU) 2022/2041.

A third directive that warrants closer examination is the Posted Workers Directive 96/71/EC, which addresses some of the legal issues related to the posting of workers. One of the Directive's primary objectives is to prevent employers from lower-wage member states from gaining a competitive advantage in high-wage member states by incurring lower wage and ancillary labor costs. To mitigate this risk, the Directive mandates that a 'hard core' of labor protections from the host (or destination) member state be applied to posted workers during their assignment¹¹³². According to Art 1 para. 1, the Directive applies exclusively to undertakings established in a member state that post workers to another member state in the context of the freedom to provide

1128 Directive (EU) 2022/2041, art. 1 para. 1 lit. c.

1129 Ibid., art. 1 para. 1 lit. a.

1130 Ibid., art. 1 para. 1 lit. b.

1131 Regarding the similar issue of regulating platform work, cf. Rüdiger Krause, "Auf dem Weg zur unionsrechtlichen Regelung von Plattformtätigkeiten," *NZA*, 2022, 527.

1132 Directive 96/71/EC, art. 3.

services, as defined in Art. 1 para. 3. The definition of a posted worker is set out in Art. 2, while Art. 1 para. 2 specifies that an employment relationship must continue to exist for the whole duration of the posting¹¹³³. Crucially, the determination of whether an individual qualifies as a worker for the purposes of the Directive is governed by the law of the member state to which the worker is posted¹¹³⁴. Neither Germany nor Lithuania cover certain self-employed persons (such as ‘employee-like persons’) in this context and there is no necessity to include those into the personal scope of application in the national transposition¹¹³⁵. Therefore, in connection with the countries under review in this dissertation, also Directive 96/71/EC would not apply to certain self-employed individuals.

The Fixed-term Work Directive 1999/70/EC and the Part-time Work Directive 97/81/EC should also be included in the analysis, as they form essential components of the EU’s framework for regulating atypical forms of employment. The Fixed-term Work Directive 1999/70/EC implements the Framework Agreement on fixed-term work, which was concluded by the ETUC, UNICE, and CEEP, pursuant to Art. 155 para. 2 TFEU. Through the Directive, this agreement is given binding legal force across all member states. Art. 1 of the Directive identifies two primary objectives: to enhance the quality of fixed-term employment through the application of the principle of non-discrimination, and to establish a framework aimed at preventing the misuse of successive fixed-term employment contracts or relationships. Whether an employment relationship exists and whether a person is considered a worker, which is necessary for the framework agreement’s applicability, is determined by national law. However, if a person is not classified as a worker under national law, the CJEU overrides this national assessment to ensure the framework agreement’s full effectiveness¹¹³⁶. The CJEU explicitly acknowledged in the context of the case *O’Brien*¹¹³⁷, which is referenced in the context of the Fixed-Term Work Framework Agreement the judgment of *Sibilio*¹¹³⁸, the applicability of national law in the context of the Fixed-Term Work Framework Agreement¹¹³⁹. However, in the case of *Del Cerro Alonso*, the CJEU entirely departed from national law criteria due to the importance of the principles of equal treatment and non-discrimination as fundamental principles of EU law. The framework agreement is thus recognized as having general applicability to all workers providing paid

1133 Robert Rebhahn and Michaela Windisch-Graetz, “RL 96/71/EG Art. 1 Anwendungsbereich,” in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 51; Sebastian Krebber, “Die arbeitsrechtliche Bedeutung der Arbeitnehmerfreizügigkeit des Unionsrechts,” *EuZA*, 2019, 67.

1134 Directive 96/71/EC, art. 2 para. 2.

1135 AEntG, sec. 1.

1136 CJEU, Judgment of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, para. 29.

1137 CJEU, Judgment of 1 March 2012, *O’Brien*, C-393/10, EU:C:2012:110, para. 27 ff.

1138 CJEU, Judgment of 15 March 2012, *Sibilio*, C-157/11, EU:C:2012:148, para. 50.

1139 CJEU, *O’Brien*, para. 32.

services under fixed-term contracts¹¹⁴⁰. Ultimately, the CJEU bases its definition of a fixed-term worker on the autonomous EU law concept of a worker, developed under Article 45 TFEU. In the case *Governo della Repubblica italiana*, the CJEU confirmed that both the Framework Agreement and Directive 2003/88/EC must be considered when determining whether an individual qualifies as a worker. Thus, when assessing worker status for the Framework Agreement, reference is made to the autonomous definition of a worker established in the context of the relevant Directive¹¹⁴¹. Although member states have discretion¹¹⁴², they must exercise their discretion in a manner that preserves the agreement's practical effect. A member state cannot arbitrarily exclude certain categories of working individuals from its scope. Exclusion is only EU law-compliant if the employment relationship in question fundamentally differs from those under the national law of the member state¹¹⁴³. Similar conclusions can also be drawn in the case of the Part-time Work Directive 97/81/EC. The Directive primarily serves to implement the Framework Agreement on part-time work, which is annexed to the Directive¹¹⁴⁴. The Framework Agreement pursues several interrelated objectives, the most prominent being the elimination of discrimination against part-time workers in comparison to full-time workers and the promotion of part-time work undertaken on a voluntary basis¹¹⁴⁵. The Framework Agreement provides an autonomous definition of 'part-time work', independent of national classifications. However, when it comes to determining who qualifies as a 'worker' falling within the personal scope of the Directive, the Framework Agreement explicitly refers to the national definitions provided by the member states. Therefore, this national definition is decisive for Directive 97/81/EC's personal scope of application¹¹⁴⁶. Nonetheless, the CJEU has held again that this reference to national law does not grant member states unfettered discretion; they must not undermine the effective implementation of Directive 97/81/EC¹¹⁴⁷ and cannot arbitrarily exclude certain categories of working individuals from the protection intended by the Directive. Similar as for the Fixed-term Work Directive 1999/70/EC, exclusion from the Directive's scope is only permissible if the relevant employment relationship is fundamentally different from those typically considered employment relationships under national law. For both Directives, this is therefore not relevant for Lithuania under the current national framework. Both, the Directive 1999/70/EC's and Directive 97/81/EC's personal scope of application would not cover certain self-employed individuals with regard to Lithuania.

1140 CJEU, *Del Cerro Alonso*, para. 27 ff.

1141 CJEU, *UX*, para. 120.

1142 CJEU, *O'Brien*, para. 34.

1143 *Ibid.*, para. 42.

1144 Directive 97/81/EC, art. 1.

1145 *Ibid.*, clause 1.

1146 Cf. CJEU, Judgment of 12 October 2004, *Wippel*, C-313/02, EU:C:2004:607.

1147 Cf. CJEU, *O'Brien*; regarding Directive 1999/70/EC, cf. CJEU, *Del Cerro Alonso*; regarding Directive 2008/94/EG, cf. CJEU, Judgment of 5 May 2022, *Ministerstvo*, C-101/21, EU:C:2022:356.

The sixth directive to be examined is the Information and Consultation Directive 2002/14/EC. Its Art. 1 para. 1 sets out the purpose and aim of the Directive: to establish a general framework for ensuring employees' rights to information and consultation. Recitals 7-10 highlight three main objectives¹¹⁴⁸: To ensure the early involvement of workers in current and future company operations, thereby safeguarding their interest; To foster dialogue and cultivate a climate of mutual trust, which facilitates worker participation in corporate adaptation processes and contributes to improved competitiveness; To promote employment security. When considering it with Art. 27 CFR in mind, the question arises as to whether certain self-employed persons could fall within the personal scope of application, in particular those who, due to economic dependence, have a similar need for information and consultation as traditional employees. Although the term 'worker' under the Directive is defined according to national law, member states do not enjoy unlimited discretion in this regard. They cannot manipulate the Directive's personal scope through restrictive or overly specific national definitions. Instead, the 'general' EU law concept of 'worker' prevails in determining who falls within the Directive's scope¹¹⁴⁹. The CJEU confirmed this approach in the case *CGT*, holding that Art. 3 para. 1 of the Directive precludes national provisions that exclude specific categories of workers from being counted when determining the number of workers relevant for triggering information and consultation obligations, provided these individuals are otherwise protected under national employment law¹¹⁵⁰. As under Lithuanian employment law, only traditional employees are covered, the Directive's scope does not extend beyond them. In the case *AMS*, the CJEU built on this¹¹⁵¹ and confirmed that in disputes between private parties, a direct invocation of Directive 2002/14/EC is not possible¹¹⁵², and that also Art. 27 CFR does not render the national law provisions contrary to the Directive inapplicable¹¹⁵³ – i.e., no horizontal direct effect is triggered.

A seventh directive in which the potential inclusion of self-employed individuals must at least be considered is the *Collective Redundancies Directive 98/59/EC*. Recitals 2, 4, and 6 of the Directive indicate that its dual purpose is to strengthen the protection of workers in the event of mass redundancies and to facilitate the proper functioning of the single market¹¹⁵⁴. The Directive does not provide a definition of the term 'worker', nor does it refer explicitly to other EU legislative provisions or national interpretations. Adopted on the basis of Art. 153 TFEU, its initial aim was to harmonize

1148 Cf. Hermann Reichold, "Durchbruch zu einer europäischen Betriebsverfassung - Die Rahmen-Richtlinie 2002/14/EG zur Unterrichtung und Anhörung der Arbeitnehmer," *NZA*, 2003, 291.

1149 Monika Schlachter, "Die europäische Dimension betrieblicher Arbeitnehmerbeteiligung," *EuZA*, 2015, 152.

1150 CJEU, Judgment of 18 January 2007, *CGT*, C-385/05, EU:C:2007:37, para. 32 ff.

1151 CJEU, *AMS*, para. 24 ff.

1152 *Ibid.*, para. 36.

1153 *Ibid.*, para. 42 ff.

1154 CJEU, Judgment of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, para. 39.

the rules governing collective redundancies across member states. Relying on national definitions of worker would contradict this objective¹¹⁵⁵. The term worker in Directive 98/59/EC must therefore be defined autonomously¹¹⁵⁶. This raises the question of whether certain economically dependent self-employed individuals – particularly those who would be similarly affected by measures in connection with mass redundancies – could fall within the Directive’s personal scope. This is especially relevant in light of Art. 27 CFR and Art. 29 RESC, which emphasize workers’ rights to information and consultation in cases of collective dismissal. However, the CJEU has already provided a clear interpretation in this regard. Accordingly, the autonomous concept of a ‘worker’ under Directive 98/59/EC refers to an individual who, for a certain period of time, performs services for and under the direction of another person in return for remuneration¹¹⁵⁷. This definition mirrors the *Lawrie-Blum* formula and explicitly excludes genuinely self-employed individuals from the Directive’s personal scope. Therefore, solely economically dependent self-employed persons are not covered by the Directive.

Similar considerations also arise in relation to the Transfer of Undertakings Directive 2001/23/EC. This Directive pursues a dual objective: protecting workers in the event of a transfer of an undertaking or business and furthering the integration of the single market¹¹⁵⁸. While its initial aim was to prevent structural changes within the single market from adversely affecting the workers of the businesses concerned¹¹⁵⁹, the focus has shifted away from merely preventing competition distortions, although this concern remains relevant. According to Recital 3 of the Directive, safeguarding workers during a change in business ownership is essential¹¹⁶⁰. The continuity of employment relationships within an economic entity should therefore be ensured and workers be protected from dismissal¹¹⁶¹, even against the will of the transferee of the undertaking¹¹⁶², regardless of a change in ownership¹¹⁶³. The Directive therefore mandates that, upon transfer, the employment relationship continues with the transferee as the new employer on the same terms as originally agreed with the seller. This ensures,

1155 Cf. Opinion of Advocate General Mengozzi delivered on 12 September 2006, *CGT*, C-385/05, EU:C:2006:554, para. 78 ff.

1156 CJEU, *Balkaya*, para. 33.

1157 *Ibid.*, para. 34.

1158 CJEU, Judgment of 15 December 2005, *Güney-Görres*, C-232/04 and C-233/04, EU:C:2005:778, para. 40.

1159 CJEU, Judgment of 7 February 1985, *Abels*, C-135/83, EU:C:1985:55, para. 18.

1160 CJEU, Judgment of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559.

1161 CJEU, Judgment of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, para. 52, 59.

1162 CJEU, Judgment of 19 October 2017, *Securitas*, C-200/16, EU:C:2017:780, para. 30; CJEU, Judgment of 20 November 2003, *Abler*, C-340/01, EU:C:2003:629, para. 37.

1163 CJEU, Judgment of 7 August 2018, *Colino Sigüenza*, C-472/16, EU:C:2018:646, para. 29; CJEU, Judgment of 29 July 2010, *UGT-FSP*, C-151/09, EU:C:2010:452, para. 22; CJEU, Judgment of 18 March 1986, *Spijkers*, C-24/85, EU:C:1986:127, para. 11.

as far as possible, that the employment contract or relationship remains unchanged and that workers do not suffer a deterioration of their situation solely due to the transfer¹¹⁶⁴. Nonetheless, the transferee's interests must not be disregarded in the process¹¹⁶⁵. The provisions of the Directive must be interpreted in harmony with the fundamental rights guaranteed by the CFR, including Art. 16, which protects the freedom to conduct a business¹¹⁶⁶. In this light, one might again ask whether, e.g., certain economically dependent self-employed individuals – those who may be similarly affected by structural changes – could fall within the Directive's personal scope, particularly when viewed through the lens of Art. 27 CFR, which enshrines the right to information and consultation within the undertaking. Directive 2001/23/EC adopts a dual structure in defining its personal scope of application. On the one hand, it concerns the factual occurrence of a transfer of an undertaking, typically involving the transfer of an economic entity composed of assets, including the employment relationships. In this context, an autonomous EU law concept of 'worker' applies¹¹⁶⁷. On the other hand, Art. 2 para. 2 of the Directive provides that it shall not affect national laws regarding the definition of 'contract of employment' or 'employment relationship'¹¹⁶⁸. The existence of an employment contract or relationship is thus determined by national law¹¹⁶⁹. The Directive defines a 'employee' as any person who, "in one way or another"¹¹⁷⁰, is protected under the national employment law of the relevant member state¹¹⁷¹. The Directive does not affect national law regarding the definitions of employment contracts or relationships. However, member states are not permitted to exclude employment relationships from the Directive's scope based solely on factors such as the number of hours worked¹¹⁷². The legal effect of a transfer of an undertaking is that the employment relationship is preserved and continues with the transferee, i.e., the transfer of undertaking cannot lead to a dismissal of the employee. This raises the obvious question of whether Art. 30 CFR and the possibility of a horizontal direct effect should also be taken into consideration. Art. 30 CFR stipulates that 'every worker' has the right of protection in the event

1164 CJEU, Judgment of 24 June 2021, *Obras y Servicios Públicos and Acciona Agua*, C-550/19, EU:C:2021:514, para. 102; CJEU, Judgment of 26 March 2020, *ISS Facility Services*, C-344/18, EU:C:2020:239, para. 25.

1165 CJEU, *Obras y Servicios Públicos and Acciona Agua*, para. 103.

1166 CJEU, *Alemo-Herron*, para. 30 ff.

1167 Cf. Rolf Wank, "Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?," *EuZA*, 2008, 184-185.

1168 Cf. Directive 2001/23/EC.

1169 Directive 2001/23/EC, art. 2 para. 2; CJEU, Judgment of 13 June 2019, *Correia Moreira*, C-317/18, EU:C:2019:499, para. 40; CJEU, Judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, para. 39; CJEU, Judgment of 21 October 2010, *Albron Catering*, C-242/09, EU:C:2010:625, para. 23.

1170 CJEU, Judgment of 11 July 1985, *Foreningen af Arbejdsledere i Danmark v A/S Danmøls Inventar*, C-105/84, EU:C:1985:331, para. 27.

1171 Directive 2001/23/EC, art. 2 para. 1 lit. d.

1172 Directive 2001/23/EC, art. 2 para. 2.

of unjustified dismissal according to EU or national law¹¹⁷³. First of all, the scope of application of the CFR must be triggered which is not always the case. First, a national regulation must implement EU law, meaning there must be, e.g., a directive to trigger the application of EU law and a CFR provision. Since EU law does not entail comprehensive rules on dismissal protection, national dismissal protection laws generally do not implement EU law so that the application of the CFR cannot be triggered and there can be no subsequent direct effect (neither horizontal nor vertical). However, the application could be triggered if a national dismissal protection provision was caused by an EU directive's provision – this is the case for Art. 4 para. 1 of Directive 2001/23/EC, i.e., that a transfer of the undertaking shall not in itself constitute grounds for dismissal of the worker¹¹⁷⁴. For the direct effect of the CFR provision, it is required that, in the case at hand, the right to protection against dismissal is also sufficiently clear, precise, and unconditional. This is questionable in case of Art. 30 CFR although there is a clear event on which there is presumably an overall consensus beyond the directive that this event should not result in a dismissal – the transfer of an undertaking. Art. 30 CFR is addressed primarily to the institutions, bodies, offices, and agencies of the EU, as well as to the member states, when implementing EU law in accordance with Art. 51 para. 1 CFR¹¹⁷⁵. Since Art. 4 para. 1 of Directive 2001/23/EC could be seen as an implementation Art. 30 CFR, there are at least doubts whether it could serve as a standard for assessing the validity of national dismissal provisions¹¹⁷⁶. However, with regard to the personal scope of application, this question is of no relevance, as it is national law which determines who qualifies as an 'employee'¹¹⁷⁷, despite the fact that the CJEU held that individuals who remain protected under employment law – such as those on long-term unpaid leave – must still be considered an employee under the Directive¹¹⁷⁸. This interpretation was further developed in the case *Albron Catering*, where the CJEU emphasized that the term 'employment relationship' cannot be interpreted exclusively according to national law. Although Art. 2 para. 2 provides that the existence of an employment relationship is subject to national law¹¹⁷⁹ and Art. 3 para. 1 and Art. 2 para. 2 refer to the terms 'employment contract' and 'employment relationship' as "alternative and thus as an equivalent"¹¹⁸⁰, there is substantial support for the view that the definition of a worker as "any person who is protected under national employment

1173 CFR, art. 30.

1174 Cf. Directive 2001/23/EC.

1175 Claudia Schubert, "GRC Art. 30 Schutz bei ungerechtfertigter Entlassung," in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 1–2a; Picker and Rathmann, "Europäisierung des Kündigungsschutzes? - Zur Kompetenz der EU und Relevanz der RL 2019/1152/EU für das Kündigungsrecht," 64.

1176 Hüpers and Reese, "Art. 30," para. 37.

1177 Directive 2001/23/EC, art. 2 para. 1 lit. d.

1178 Cf. CJEU, Judgment of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574.

1179 Directive 2001/23/EC, art. 2 para. 2.

1180 CJEU, *Albron Catering*, para. 24.

law in the relevant member state” includes not only those with ‘full’ protection under national law but also those who enjoy ‘partial’ protection. The CJEU has consistently held that the Directive’s protection applies to all workers who receive any level of protection under national law, even if limited, which cannot be reduced or withdrawn solely because of a transfer of undertaking¹¹⁸¹. If partial protection is sufficient to fall within the Directive’s scope, this may open the door to including certain groups of self-employed individuals, provided they are recognized as partially protected under national law. German law recognizes some groups as partially in need of employment law protection, such as employee-like persons, including domestic workers. However, this would only have an impact on Germany, but no impact on the legal situation in Lithuania. Lithuanian employment law does not recognize intermediate groups of working individuals. Therefore, such self-employed individuals cannot be considered as falling within the personal scope of Directive.

The analysis of the directives examined thus far reveals a divided picture. On the one hand, there are indications – particularly when read in conjunction with fundamental rights provisions – that certain self-employed individuals could, in theory, fall within the personal scope of application of some directives. However, the CJEU has largely rejected such expansive readings, maintaining a narrower interpretation grounded in established case law. On the other hand, inclusion is both possible and required in situations where national law already affords specific protections to particular groups of self-employed or employee-like individuals. Yet this dimension has no bearing in the Lithuanian context, which does not recognize such intermediate groups of working individuals. This raises an important question: whether this doctrinal approach – limiting inclusion only to workers in the traditional reading – will persist when applied to directives addressing the principle of equality, a foundational principle of EU law.

A first directive within this body of equality-related legislation is the Equal Treatment in Employment and Occupation Directive 2000/78/EC. Its Art. 1 sets out its principal objective: to establish a general framework for combating discrimination based on religion or belief, disability, age, or sexual orientation, in the context of employment and occupation, thereby ensuring the principle of equal treatment across the member states¹¹⁸². The framework set out in Directive 2000/78/EC must be interpreted in conjunction with Art. 21 para. 1 CFR which enshrines the fundamental right to non-discrimination¹¹⁸³. The CJEU has explicitly grounded its interpretation of Art 21 para. 1 CFR in the substantive content of Directive 2000/78/EC¹¹⁸⁴. This link-

1181 CJEU, Judgment of 19 May 1992, *Redmond Stichting*, C-29/91, EU:C:1992:220, para. 18; CJEU, *Foreningen af Arbejdsledere i Danmark v A/S Danmøls Inventar*, para. 27.

1182 Cf. CJEU, Judgment of 15 January 2019, *E.B.*, C-258/17, EU:C:2019:17, para. 40.

1183 CJEU, Judgment of 13 January 2022, *MIUR*, C-282/19, EU:C:2022:3, para. 60; CJEU, Judgment of 26 January 2021, *Szpital Kliniczny*, C-16/19, EU:C:2021:64, para. 33.

1184 CJEU, *Mangold*, para. 74 ff.; CJEU, *Kücükdeveci*, para. 50; CJEU, Judgment of 13 September 2011, *Prigge*, C-447/09, EU:C:2011:573, para. 38; CJEU, *Dansk Industri*, para. 22.

age enables the CJEU not only to apply the Directive's anti-discrimination provisions in horizontal relationships between private parties¹¹⁸⁵ but also to invoke the Directive, together with Art. 21 para. 1 CFR, in cases where the temporal applicability of the Directive has not yet formally begun¹¹⁸⁶. In this context, 'employment' in Art. 3 para. 1 lit. a of the Directive is used synonymously with the status of being a worker. In the absence of a reference to the national concept of worker, an autonomous EU interpretation must be applied. Art. 3 para. 1 lit. a extends the scope of the Directive to self-employment as well. Even prior to the adoption of Directive 2000/78/EC, the CJEU had already applied anti-discrimination rules relating to gender¹¹⁸⁷ or age limits regardless of whether the activity is employed or self-employed¹¹⁸⁸. Furthermore, the Directive applies in cases where a self-employed individual is denied civil contract renewals due to their sexual orientation¹¹⁸⁹, reinforcing its broad scope and protective reach beyond traditional employment relationships.

A similar approach applies to the Racial Equality Directive 2000/43/EC. As stated in its Art. 1, Directive 2000/43/EC seeks to establish a general framework at the EU level to combat discrimination based on race or ethnic origin, with the aim of implementing the principle of equal treatment across all member states¹¹⁹⁰. The material scope of the Directive, as outlined in Art. 3 para. 1 lit. a-d, covers all stages of employment and occupation, including membership of and involvement in workers' or employers' organizations. The CJEU's case law indicates that Directive 2000/43/EC should be interpreted broadly, referring to Recital 12, which emphasizes that specific measures to combat discrimination based on race or ethnic origin should encompass the aspects listed in Art. 3 para.1 to ensure the development of democratic and tolerant societies that are inclusive of all individuals, regardless of their racial or ethnic background¹¹⁹¹. Member States are not permitted to narrow the scope of the Directive through restrictive national implementation, as doing so would undermine its effectiveness¹¹⁹². Although Directive 2000/43/EC sets only minimum standards, national transposing measures must not introduce additional conditions that would unjustifiably limit the Directive's applicability. Directive 2000/43/EC covers "all persons in both public and private sectors, including public authorities". Art. 3 para. 1 lit. a of

1185 Sebastian Krebber, "Die Unionsrechts- und Kompetenzakzessorietät des unionsrechtlichen Grundrechtsschutzes im Bereich des Arbeitsrechts: Grundsatz und Ausnahmen," *EuZA*, 2016, 12.

1186 Cf. Chapter 4.3.2. of this dissertation; also BAG, Urt. v. 15.2.2012 - 7 AZR 946/07, *AP TzBfG* § 14, para. 17 ff.

1187 Cf. CJEU, Judgment of 6 April 2000, *Jørgensen*, C-226/98, EU:C:2000:191.

1188 CJEU, Judgment of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, para. 32 ff.

1189 CJEU, Judgment of 12 January 2023, *TP*, C-356/21, EU:C:2023:9, para. 33 ff.

1190 Directive 2000/43/EC, art. 1.

1191 *Ibid.*, recital 12; cf. CJEU, Judgment of 15 November 2018, *Maniero*, C-457/17, EU:C:2018:912, para. 35.

1192 CJEU, Judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, para. 43; CJEU, Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para. 42, 56.

the Directive clarifies that this applies to both workers and self-employed individuals. Importantly, the Directive protects not only individuals who are directly subject to discrimination on the grounds of their race or ethnic origin, but also those who, though not themselves members of the racial or ethnic group in question, are treated less favorably or otherwise disadvantaged due to their association with such groups¹¹⁹³.

Similarly, the Equal Treatment Directive 2006/54/EC aims to uphold the principle of equal opportunities and equal treatment between men and women in matters of employment and working conditions, as established in its Art. 1 para. 1. This principle is further specified through the Directive's anti-discrimination provisions, particularly in Art. 4, 5, and 14. According to Art. 6 of the Directive, Title II chap. 2 applies to the entire working population, including the self-employed, employees whose work is interrupted due to illness, maternity, accident, or involuntary unemployment, job seekers, as well as retired or incapacitated employees and their eligible dependents. Since the personal scope is broadly defined as the 'working population', the application of Art. 5 and following primarily depends on whether individuals in similar situations receive benefits from an occupational social security system as defined in Art. 2 para. 1 lit. e and f. However, Art. 4, 14 and following seem to not apply to the self-employed, but only to traditional employment relationships. Art. 157 para. 1 and 2 TFEU similarly seem to apply only to employment relationships with regard to occupational social security systems. Nonetheless, they do not exclude the possibility that occupational pension schemes may extend to self-employed individuals in certain contexts¹¹⁹⁴. In Germany, the BAG has addressed the issue of the Directives personal scope of application by arguing that, due to the lack of a uniform EU definition of 'worker', the personal scope of such provisions could, in some instances, include individuals classified as employee-like under national law, i.e., self-employed persons outside an employment relationship under personal dependence¹¹⁹⁵. Nevertheless, in doing so, it focused on the right to issue instructions and referred to the CJEU's case law¹¹⁹⁶. It is therefore questionable to what extent the BAG genuinely intended to include merely economically dependent employee-like persons within the general personal scope of the Directive, as they are not working in a relationship under personal dependence. Notwithstanding these uncertainties, at least Art. 6 of the Directive extends the scope of Art. 5 ff. clearly to the entire working population. Therefore, the prohibition of discrimination in occupational pension schemes applies not only to employees but also to the self-employed. This means that directors and board members of a legal entity can also be entitled to protection¹¹⁹⁷, even in cases where they are not classified as workers under EU law in other instances. Art. 6 explicitly states that, for occupational pension

1193 CJEU, *CHEZ Razpredelenie Bulgaria*, para. 52 ff., 56.

1194 CJEU, Judgment of 25 May 2000, *Podesta*, C-50/99, EU:C:2000:288, para. 35.

1195 BAG, Urt. v. 25.6.2020 - 8 AZR 145/19, para. 39 ff., 63,68, 75.

1196 *Ibid.*, para. 70, 72.

1197 Sebastian Krebber, "AEUV Art. 157 (ex-Art. 141 EGV) [Gleichstellung von Mann und Frau im Erwerbsleben]," in *EUV/AEUV*, by Christian Calliess et al. (Munich: C.H. Beck, 2022), para. 27.

schemes, the provisions of Title II chap. 2 of Directive 2006/54/EC apply to “the working population, including self-employed persons”, thereby addressing a gap in Directive 79/7/EEC¹¹⁹⁸. It is not clear from the wording whether also the anti-discrimination prohibition in Art. 14 para. 1 extends to the self-employed as well as employees. The CJEU generally locates the protection of self-employed individuals – if they do not fall under the broad EU definition of a worker – more within the Self-Employed Gender Equality Directive 2010/41/EU¹¹⁹⁹, even though Art. 14 para. 1 lit. a also refers to the self-employed. Legal clarity can only be provided by the CJEU. For the time being, a further directive which must be considered in this context, is the Self-Employed Gender Equality Directive 2010/41/EU. It aims to strengthen the effective application of the principle of equal treatment between men and women who are self-employed. This focus stems from the recognition that, compared to workers or employees, this group has historically benefited only marginally from gender equality protections under EU law¹²⁰⁰. The Directive seeks to achieve this goal through several key mechanisms: Granting self-employed women access to maternity leave¹²⁰¹; Recognizing the contributions of assisting spouses or life partners in family businesses by allowing them to receive social protection equivalent to that of self-employed individuals¹²⁰²; Ensuring that national equality bodies are competent to address complaints and cases involving discrimination against these groups¹²⁰³. Art. 2 defines the personal scope of application¹²⁰⁴, explicitly identifying two distinct categories of beneficiaries: ‘self-employed individuals’ and ‘assisting spouses or partners.’ The legal treatment of these two groups under EU law diverges. While self-employed individuals may fall within the scope of other EU instruments that promote gender equality in specific domains, Directive 2010/41/EU is the principal legislative measure ensuring equal treatment for assisting spouses and partners¹²⁰⁵. In distinction to the term worker, the directive defines self-employment as the pursuit of economic activity on one’s own account¹²⁰⁶. This defini-

1198 Karl-Jürgen Bieback and Bettina Hummer, “Vorbemerkungen,” in *Europäisches Sozialrecht*, ed. Maximilian Fuchs, Constanze Janda, and Karl-Jürgen Bieback (Baden-Baden: Nomos, 2022), para. 2.

1199 CJEU, *Danosca*, para. 70.

1200 Proposal for a Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity and Repealing Directive 86/613/EEC, COM(2008) 636 Final, *EUR-Lex*, 2, accessed April 13, 2025, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0636:FIN:en:PDF>.

1201 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity and Repealing Council Directive 86/613/EEC, *EUR-Lex*, art. 8, accessed April 13, 2025, <https://eur-lex.europa.eu/eli/dir/2010/41/oj/eng>.

1202 *Ibid.*, art. 7.

1203 *Ibid.*, art. 11; “COM(2008) 636 Final,” 5 ff.

1204 Cf. “COM(2008) 636 Final,” 8.

1205 *Ibid.*, 3.

1206 Directive 2010/41/EU, art. 1 para. 2.

tion explicitly encompasses individuals who are economically active but who do not meet the criteria for worker status under the EU concept of ‘worker’, as established by the *Lawrie-Blum* formula. It can thus be concluded that the scope of application of the Equal Treatment Directive 2006/54/EC appears to be primarily limited to ‘workers’ in the traditional sense of those engaged in employment relationships. As a result, certain self-employed individuals do not necessarily fall within its personal scope, but into the scope of Directive 2010/41/EU.

Attention must also be given to the Work-Life Balance Directive (EU) 2019/1158, which aims to promote gender equality in labor market participation and treatment at work. Recitals 2 and 3 of the Directive explicitly reference Art. 23 and 33 CFR. Directive 2019/1158 introduces a set of individual rights that member states are required to implement through national legislation¹²⁰⁷. These rights include paternity leave¹²⁰⁸, parental leave¹²⁰⁹, and carer’s leave¹²¹⁰. Member states are required to provide flexible work arrangements for such workers who are parents or carers, detailing the necessary instruments for implementing these provisions¹²¹¹. The Directive applies to all workers who have employment contracts or other employment relationships, including contracts relating to the employment or the employment relationships of part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency, as previously provided for by Directive 2010/18/EU. Taking into account the case-law of the CJEU regarding the criteria for determining the status of a worker, it is for member states to define employment contracts and employment relationships¹²¹². Once again, this reflects a hybrid definition of the personal scope of application. The Directive initially covers all workers in the private-law sense, regardless of whether they are employed on a permanent or fixed-term basis, full-time or part-time, or as regular or temporary workers. Additionally, it includes individuals who, without a formal employment contract, are in a ‘working relationship’ and whose dependent employment raises similar compatibility issues as for employees with formal contracts, such as apprentices, civil servants¹²¹³, and judges¹²¹⁴. In contrast, volunteers and unpaid interns fall outside the Directive’s scope. Their activities are not regarded as economically driven and thus do not fall within the ambit of the labor market in the legal sense. The same applies under Art 33 para. 2 CFR, which guarantees ‘everyone’ the right to right to protection from dismissal for a reason

1207 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU, *EUR-Lex*, art. 1 para. 2, accessed April 13, 2025, <https://eur-lex.europa.eu/eli/dir/2019/1158/oj/eng>.

1208 *Ibid.*, art. 4.

1209 *Ibid.*, art. 5.

1210 *Ibid.*, art. 6.

1211 *Ibid.*, para. 9.

1212 *Ibid.*, recital 17.

1213 CJEU, *Chatzi*, para. 28 ff.

1214 CJEU, Judgment of 16 July 2015, *Maistrellis*, C-222/14, EU:C:2015:473, para. 24, 29 ff.

connected with maternity and the right to paid maternity leave and to parental leave, solely to reconcile family life and ‘professional life’¹²¹⁵. However, it could be argued that unpaid internships could also be considered part of ‘professional life’ if they serve to prepare for or to advance in a profession. Despite the fact that the scope of protection includes ‘everyone’, the protection against dismissal in Art 33 para. 2 CFR and under Art. 12 does likely not intend to apply to any kind of civil contract, since the term ‘dismissal’ presupposes an existing employment relationship in the traditional sense or at least a termination occurring within a stable structure or definable entity¹²¹⁶.

Another relatively recent directive in the field of equal treatment is the Pay Transparency Directive (EU) 2023/970. Its primary objective is to strengthen the enforcement of the principle of equal pay for equal work or work of equal value between men and women. The principle of equal pay as enshrined in EU law under Article 157 TFEU, mandates equal pay for equal or equivalent work¹²¹⁷. The principle requires that all elements of remuneration and employment conditions be free from gender-based discrimination. This prohibition also covers all collective agreements and private contracts, as affirmed by the CJEU¹²¹⁸. Art. 2 defines the scope of the Directive. It specifies the terms ‘employer’ and ‘worker’ and also stipulates that ‘applicants’ are covered by a certain section of the Directive. The term ‘worker’ covers all who have an employment contract or are in an employment relationship in accordance with the legislation, collective agreements and/or practice applicable in the respective member state, taking into account the case law of the CJEU. The hybrid regulation technique is therefore applied again. However, explicitly included are part-time employees, fixed-term employees and persons with an employment contract or employment relationship with a temporary employment agency as well as employees in management positions¹²¹⁹. If they fulfil the relevant criteria, domestic workers, workers employed on call, intermittently, on the basis of vouchers and on online platforms, workers in sheltered employment relationships as well as trainees and apprentices also fall within the scope of this directive¹²²⁰. In particular, the special mention of platform workers suggests

1215 Markus Sprenger, “RL (EU) 2019/1158 Art. 2 Anwendungsbereich,” in *Kommentar zum europäischen Arbeitsrecht*, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 4.

1216 Cf. CJEU, *Danosa*.

1217 Cf. CJEU, *Tesco Stores*, para. 33.

1218 *Ibid.*, para. 21; CJEU, Judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, para. 67; CJEU, Judgment of 9 September 1999, *Krüger*, C-281/97, EU:C:1999:396, para. 20; CJEU, Judgment of 7 February 1991, *Nimz*, C-184/89, EU:C:1991:50, para. 11; CJEU, Judgment of 27 June 1990, *Kowalska*, C-33/89, EU:C:1990:265, para. 12; CJEU, *Defrenne*, para. 39; regarding collective agreements, cf. CJEU, *Allonby*, para. 45; CJEU, Judgment of 17 September 2002, *Lawrence*, C-320/00, EU:C:2002:498, para. 17.

1219 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value between Men and Women through Pay Transparency and Enforcement Mechanisms, *EUR-Lex*, para. 18, accessed April 13, 2025, <https://eur-lex.europa.eu/eli/dir/2023/970/oj/eng>.

1220 *Ibid.*

that economically dependent self-employed persons could also be included. Directive (EU) 2023/970 was not adopted into a legal vacuum. In connection with the personal scope of application of the German EntgTransG, which had already introduced similar transparency obligations¹²²¹ as those set out in Directive (EU) 2023/970, the BAG ruled that the personal scope of application in this context must not be interpreted solely according to national law. Instead, it must be aligned with the definition of ‘worker’ in Directive 2006/54/EC which asks for remuneration-related equal treatment of male and female workers performing “the same work or work of equal value”¹²²². The BAG clarified that there is no single definition of ‘worker’ under EU law. According to the equal pay provisions of Directive 2006/54/EC, the term must be defined based on objective criteria that characterize the employment relationship in terms of the rights and obligations of the parties involved. The key feature of an employment relationship is that a person performs services for another under their direction in exchange for remuneration¹²²³. However, in individual cases, an employee-like person under national law could also be considered an employee under the German transposition law as it could be considered worker under the underlying Directive 2006/54/EC¹²²⁴. In the case in question, the BAG pointed out that the claimant provided services under the direction of the defendant, fitting the definition of ‘worker’ under the equal pay provisions of Directive 2006/54/EC¹²²⁵, thereby satisfying the requirement of personal dependence. Nonetheless, this interpretation appears to set the threshold for personal dependence particularly low – even lower than what is generally required under German law for employee status and certainly lower than the threshold established under Lithuanian law. According to the BAG, the meaning of the term ‘worker’ of Directive 2006/54/EC depends on the specific context of its application, and in individual cases, it may also include employee-like persons who are not considered employees¹²²⁶. However, final clarity on this question – whether Germany’s BAG is misguided in its particularly broad interpretation here, can only be provided by the CJEU.

In summary, with regard to the equal treatment framework within EU law, there is a discernible and increasing tendency toward the inclusion of certain self-employed individuals within the scope of protection. This trend appears justified in light of the foundational role that the principle of equal treatment plays in the EU’s legal order. Given its status as a core principle of EU law, equal treatment entails a normative imperative to ensure broad coverage and to leave no one behind. This inclusive orientation is particularly significant because equal treatment provisions can have horizontal direct effect. This means that provisions of directives covering equal treatment may in some cases be invoked directly in legal relationships between private parties, such

1221 EntgTranspG, sec. 11 ff.

1222 BAG, Urt. v. 25.6.2020 - 8 AZR 145/19, para. 39 ff., 63, 68.

1223 Ibid., para. 70, 72.

1224 Ibid., para. 39, 75.

1225 Ibid., para. 76.

1226 Ibid., para. 44.

as between economically dependent self-employed individuals and their contracting work providers. In the context of the Pay Transparency Directive (EU) 2023/970, this could have far-reaching consequences. If the position of the BAG is upheld, it would imply that certain economically dependent self-employed persons may already be entitled to transparency rights – such as access to information about remuneration paid to comparative employees – despite not being in a conventional employment relationship themselves. This interpretation would thus considerably expand the Directive’s impact and reinforce its role in addressing structural gender-based pay disparities beyond the confines of traditional employment.

In the next step, it must furthermore be examined to what extent this broad interpretative approach is also reflected in secondary legislation concerning occupational health and safety, which finds its fundamental right basis in Art. 31 CFR. Legal basis for the EU’s power to adopt measures in health and safety at work is governed by Article 153 TFEU¹²²⁷. With the objective of introducing measures to improve the safety and health protection of workers at work¹²²⁸, the Framework Directive on Safety and Health at Work 89/391/EEC forms the basis for further directives that were subsequently adopted and impose indirectly obligations on employers to implement protective measures for their workers. It applies to all sectors of activity, whether public or private, including industry, agriculture, commerce, administration, services, education, culture, and leisure¹²²⁹. A key issue concerns the personal scope of the Framework Directive – specifically, who qualifies as a worker entitled to protection under its provisions. Art. 3 lit. a states that it applies to “any person employed by an employer, including trainees and apprentices but excluding domestic servants”¹²³⁰. This inclusion of trainees and apprentices indicates a broad approach, as does the inclusion of public sector employees, even those subject to special national service regulations¹²³¹. Only domestic servants are explicitly excluded. This also means that this exception provided must be interpreted narrowly¹²³². However, the definition remains incomplete. It is not entirely clear what is meant by ‘employed by an employer’, nor how broadly this term is intended to be understood. Crucially, the Directive does not refer to national definitions of ‘worker’, meaning that an autonomous EU interpretation must be developed. Interpretive difficulties are compounded by the inconsistent translation of the Directive into various EU languages. The English version uses the word ‘worker’ (i.e. not the UK term ‘employee’), while the German version uses ‘Arbeitnehmer’ (employee), and the Lithuanian version uses ‘darbuotojas’ (employee). Given the principle of language equality in EU law, all language versions have equal legal value and must be considered

1227 TFEU, art. 153.

1228 Cf. Directive 89/391/EEC, art. 1 para. 1.

1229 Ibid., art. 2 para. 1.

1230 Ibid.

1231 Cf. Ibid.

1232 Cf. CJEU, *Fenoll*, para. 19 ff.; CJEU, Judgment of 12 January 2006, *Commission/Spain*, C-132/04, EU:C:2006:18, para. 22.

together¹²³³. However, the substantive meaning of ‘worker’ should be consistent across all member states. Therefore, rather than relying solely on linguistic formulations, interpretation should focus on the national transpositions of the Directive and how member states understand and apply its scope. In Lithuania, the Framework Directive is transposed mainly through the LR DSSI. Its personal scope is defined by reference to the concept of ‘employee’ in the LR DK, which is based on the existence of an employment contract and further extends to an exhaustive list of public servants and unpaid personnel such as interns. This means that the core definition of ‘employee’ from the LR DK remains unaffected, but the personal scope of the law is extended. Accordingly, Lithuanian law seems to assume that the core concept of worker in the Framework Directive corresponds to the ‘general’ EU concept. In Germany, the transposition is found in the ArbSchG¹²³⁴. The ArbSchG does not use the term ‘Arbeitnehmer’ (employee) found in the German version of the Directive but instead refers to ‘Beschäftigter’ (engaged person)¹²³⁵, a broader term. The term of ‘Beschäftigter’ in this context includes besides, i.a., ‘Arbeitnehmer’ (employees) also ‘arbeitnehmerähnliche Personen’ (employee-like persons) within the meaning of Sec. 5 para. 1 ArbGG, excluding only domestic servants¹²³⁶. German legal scholarship interprets the Directive’s use of the term ‘worker’ in Art. 3 of the Framework Directive broadly. In line with EU law-conform interpretation, the ArbSchG is understood to apply to employee-like persons, meaning they are to be considered ‘workers’ under the Framework Directive¹²³⁷. However, it is argued that this does not apply to the Working Time Directive 2003/88/EC¹²³⁸, as an individual directive, as employee-like persons are in this regard not subject to the same risks as employees due to their limited time commitment¹²³⁹. This view was shared by the CJEU in the case *Yodel*¹²⁴⁰ which held that independent contractors working for a platform were not workers under the Directive. In German occupational health and safety law, however, the concept of employee-like persons diverges from the traditional notion. The usual criterion of economic dependence is considered inadequate in this context. Instead, the key factor is the social protection need, which arises from the person’s integration into a hazardous work environment. What matters is not the status¹²⁴¹ of the working relationship but the real risks arising from the

1233 CJEU, Judgment of 3 March 1977, *North Kerry Milk Products*, C-80-76, EU:C:1977:39, para. 11 ff.

1234 Cf. ArbSchG.

1235 Cf. *Ibid.*, sec. 2 para. 2.

1236 *Ibid.*

1237 Schulze-Doll, “ArbSchG § 2 Begriffsbestimmungen,” para. 19; Pottschmidt, *Arbeitnehmerähnliche Personen in Europa*, 212 ff., 231.

1238 Cf. Directive 2003/88/EC.

1239 Wank, “Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?,” 186.

1240 Cf. CJEU, *Yodel*.

1241 Schulze-Doll, “ArbSchG § 2 Begriffsbestimmungen,” para. 19.
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actual work performed¹²⁴². The need for protection of employee-like persons in occupational health and safety is therefore derived solely from the comparability of the activities and the risks resulting from it¹²⁴³. This extends to individuals working under service or result-based contracts, such as those in construction, manufacturing, or courier services, if they operate within the organizational structure of another entity¹²⁴⁴. This interpretation could also apply to crowdworkers, including those working via platforms, if they are not working in an employment relationship under personal dependence¹²⁴⁵, but work predominantly for one platform operator or crowdsourcer¹²⁴⁶. This would mean that the ArbSchG would also apply to them and would force the platform operator or crowdsourcer to take appropriate occupational health and safety measures. A similar interpretation of the Framework Directive's personal scope of application can be seen in the UK. Despite the 'Brexit', the Framework Directive remained applicable through the European Union (Withdrawal Agreement) Act 2020 until the end of the transition period on 31 December 2020¹²⁴⁷. In the case *IWUGB v SSWP*¹²⁴⁸, the High Court addressed the interpretation of 'worker' under Art. 3 of the Framework Directive. The Framework Directive is implemented in UK law through the HSWA 1974¹²⁴⁹ and associated regulations. The question arose as to whether the Framework Directive was properly transposed into national law if the scope of application in Sec. 53 HSWA 1974 only included 'employees' or 'limb (a) workers', but not the further so-called 'limb (b) worker' as existing in Sec. 230 para. 3 ERA 1996. In the case *IWUGB v SSWP*, the High Court referencing the CJEU's case *Allonby*, Advocate General *Kokott's* opinion in *O'Brien* and Advocate General *Mengozzi's* Opinion in *Fennell*, emphasized that there is no single, uniform definition of worker in EU law, but that "it varies according to the area in which the definition is to be applied"¹²⁵⁰. Moreover, it found no indication that the use of 'worker' in the Framework Directive was intended to mirror the concept as it is applied in the context of freedom of

1242 Pottschmidt, *Arbeitnehmerähnliche Personen in Europa*, 226 ff.; Kohte, "ArbSchG § 2 Begriffsbestimmungen," para. 83 ff.

1243 Schulze-Doll, "ArbSchG § 2 Begriffsbestimmungen," para. 19.

1244 Examples, cf. Kohte, "ArbSchG § 2 Begriffsbestimmungen," para. 86–95.

1245 Cf. BAG, Urt. v. 21.5.2019 – 9 AZR 295/18.

1246 Kohte, "ArbSchG § 2 Begriffsbestimmungen," para. 100.

1247 Cf. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, art. 126, accessed April 13, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W/TXT%2802%29>.

1248 Cf. *R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050.

1249 Cf. Health and Safety at Work Etc. Act 1974, c. 37, accessed April 13, 2025, <https://www.legislation.gov.uk/ukpga/1974/37>.

1250 *R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050, para. 82 (a).

movement¹²⁵¹. In examining the autonomy of the EU law concept of ‘worker’, the High Court arrived at a view that diverged slightly from that found in German legal scholarship. It acknowledged the existence of a generally recognized autonomous EU law definition of ‘worker’, but suggested that the meaning of the term in Art. 3 of the Framework Directive might differ from this general concept¹²⁵². In contrast, much of the German literature rejects the notion of a single ‘general’ EU definition of ‘worker’, emphasizing instead the contextual and directive-specific nature of the term¹²⁵³. The High Court further clarified that it would be impermissible for an expansive interpretation of ‘worker’ within the Framework Directive to lead to a corresponding extension of the concept under Art. 45 TFEU, which governs freedom of movement for workers. In this regard, the Court referenced *Uber BV v Aslam*, reaffirming that “the authors of the Treaty clearly did not intend that the term ‘worker’ should include ‘independent providers of services who are not in a relationship of subordination with the person who receives the services’”¹²⁵⁴. Nevertheless, the High Court strongly emphasized that the term ‘worker’ under Art. 3 of the Framework Directive must be understood as having a single, uniform meaning across all member states¹²⁵⁵. Divergent national interpretations would lead to unequal levels of safety and health protection, undermining the Directive’s harmonizing objective and incentivizing regulatory competition at the expense of occupational health standards¹²⁵⁶. In this sense, the term ‘worker’ in Art. 3 of the Framework Directive must also be an autonomous EU law definition¹²⁵⁷.

In support of this view, the High Court cited multiple CJEU judgments that applied an autonomous definition of ‘worker’ across varying legal contexts, with particular emphasis on the case *Ruhrlandklinik*, which it described as “a particularly striking example of the use of purposive interpretation to apply the autonomous definition in circumstances” beyond traditional employment frameworks¹²⁵⁸. According to the High Court, also the objectives of the Framework Directive “suggest a scope fixed by reference to a single EU-wide meaning”¹²⁵⁹.

Although it also considered Art. 31 CFR, which guarantees the right to working conditions that respect health, safety, and dignity, it characterized this provision as

1251 *Ibid.*, para. 82 (b).

1252 *Ibid.*, para. 82 (g).

1253 Cf. Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff,” 32; Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 190.

1254 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 72.

1255 *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050, para. 82 (h).

1256 *Ibid.*, para. 13.

1257 *Ibid.*, para. 82 (l).

1258 *Ibid.*, para. 82 (m).

1259 *Ibid.*, para. 82 (i).

primarily an “interpretive aid”¹²⁶⁰, as it could not override the explicit exclusion of domestic servants under Art. 3 of the Framework Directive¹²⁶¹. Nevertheless, the fact that the Framework Directive confers to the right to “working conditions which respect their health, safety and dignity” on “every worker”,¹²⁶² supports an interpretation of Art. 3 of the Framework Directive as broad as possible. It therefore does not only “include” employees, but also limb (b) workers¹²⁶³, i.e., self-employed individuals working outside the patterns of traditional employment. Although Directive 89/391/EEC initially gives the impression that it merely sets out principles requiring further elaboration by the member states or the EU, and thus might not be considered to have direct effect because it is neither unconditional nor sufficiently precise, there is one provision that, in relation to the topic of this dissertation, appears to be sufficiently unconditional and precise: Art. 6 para. 1 of Directive 89/391/EEC¹²⁶⁴. This provision requires explicitly employers (which would likewise require a broad interpretation) to ensure the safety and health of workers in all aspects related to work. Accordingly, this obligation – which also extends in general to directives based on the Framework Directive 89/391/EEC – could potentially produce direct effect at least in vertical relationships, meaning that ‘state’ work providers would already be bound by it towards their freelance workers in Lithuania – since Lithuania, at least according to the interpretation by Germany and the UK, would not have sufficiently implemented the directive. Whether this obligation could also have a direct horizontal effect considering Art. 31 para. 1 CFR however remains unresolved for the time being. Such a broad interpretation is not contradicted by the existence of Directive 91/383/EEC concerning the safety and health of workers with fixed-term or temporary contracts. This Directive was specifically designed to ensure equal treatment in occupational safety and health between workers engaged under fixed-term or temporary agency contracts and those in standard, permanent employment relationships¹²⁶⁵. To achieve comprehensive protection, Art. 2 para. 3 of Directive 91/383/EEC clarifies that it does not replace but rather complements the Framework Directive 89/391/EEC, which continues to apply in full to the employment situations addressed by Directive 91/383/EEC. The Directive applies exclusively to employment relationships established by fixed-term contracts and to temporary agency work involving a contractual relationship between the agency, acting as the employer, and the worker¹²⁶⁶. The objective of the Directive is therefore to close protection gaps that arise specifically due to the nature of fixed-term or temporary agency work. It cannot be inferred from the fact that these areas

1260 *Ibid.*, para. 82 (n).

1261 *Ibid.*

1262 *Ibid.*

1263 *Ibid.*, para. 143.

1264 Directive 90/270/EEC, art. 6 para. 1.

1265 Directive 89/391/EEC, art. 2.

1266 *Ibid.*, art. 1 para. 1.

are subject to a separate directive that other forms of work or broader definitions of ‘worker’ fall outside the scope of the Framework Directive.

Similar application scopes may therefore also arise in other directives that relate to the protection of health and safety in the broadest sense. One example is the Pregnant Workers Directive 92/85/EEC. Its aim is to implement measures to improve the safety and health protection of pregnant workers, those who have recently given birth, and breastfeeding workers in the workplace¹²⁶⁷. This is also reflected in its recitals which state that these workers should be considered a group with special risks and that measures must be taken to ensure their safety and health. However, according to the CJEU, the term ‘worker’ in Directive 92/85/EEC must be interpreted with reference to the case law on freedom of movement¹²⁶⁸. Yet, this decision is of more limited significance as individuals who are not covered by the Directive due to a lack of EU worker status, may fall under Directive 2010/41/EU as self-employed persons, which also provides for maternity benefits in the form of maternity leave in Art. 8¹²⁶⁹.

A similarly narrow interpretation was adopted by the CJEU regarding the Working Time Directive 2003/88/EC. According to its Art. 1 para. 3, it generally applies to a broad scope of all private or public sectors, as defined in Art. 2 para. 1 of the Framework Directive 89/391/EEC¹²⁷⁰. Before determining whether a specific activity falls within the scope of Directive 2003/88/EC, it must first be established that the activity falls under the personal scope of the Framework Directive¹²⁷¹. The scope of the Framework Directive should be broadly interpreted due to its aim of improving workplace safety and health, as well as the wording that should cover all sectors. It highlights a broad application, as it applies to all private and public sectors defined in Art. 2 of the Framework Directive, except for a few explicitly listed special areas¹²⁷². An interpretation aligned with Art. 31 CFR – which guarantees the right to working conditions that respect health, safety, and dignity – could justify an even broader understanding of ‘worker’ also under 2003/88/EC where working time restrictions affect these fundamental interests. This may particularly include economically dependent persons, who – due to their reliance on a single work provider – may be subject to similar pressures and exposed to the same types of hazards as traditional employees.

1267 Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently given Birth or Are Breastfeeding, *EUR-Lex*, art. 1 para. 1, accessed April 13, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01992L0085-20190726>.

1268 Judgment of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536, para. 24 ff.; cf. CJEU, *Lawrie-Blum*.

1269 Directive 2010/41/EU, art. 8.

1270 CJEU, *May*, para. 19; CJEU, *Union Syndicale Solidaires Isère*, para. 22; CJEU, Order of 14 July 2005, *Personalrat Feuerwehr Hamburg*, C-52/04, EU:C:2005:467, para. 42.

1271 CJEU, *Sindicatul Familia Constanța*, para. 50 ff.; CJEU, *Personalrat Feuerwehr Hamburg*, para. 38; CJEU, Judgment of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, para. 30 ff.

1272 CJEU, *Sindicatul Familia Constanța*, para. 52 ff.; CJEU, *Union Syndicale Solidaires Isère*, para. 21; CJEU, Judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, para. 45.

However, the CJEU decided already that the term worker under Directive 2003/88/EC has to be interpreted in line with the *Lawrie-Blum* formula¹²⁷³, as confirmed in the case *Yodel*. It states that a person employed under a service agreement specifying they are an independent contractor may, under certain very strict conditions, not be classified as a ‘worker’ under Directive 2003/88/EC. The CJEU held that individuals operating under a service contract identifying them as independent contractors may not qualify as workers under the Directive if they meet certain criteria. These include: the ability to use subcontractors or substitutes; freedom to accept or reject tasks; control over the number of hours worked; the right to offer services to third parties, including competitors; and the capacity to set their own working hours based on personal preferences rather than the work provider’s operational needs. Most crucially, the individual must act independently and must not be in a subordinate relationship with the alleged employer. The CJEU indicates that the crucial criterion for being considered a worker under the Working Time Directive is the existence of a classic subordinate relationship¹²⁷⁴. Therefore, an application to certain self-employed persons would not be the case. This is in line with the interpretation by German scholars which assumes the same concept of worker applies in general to all directives related to the Framework Directive 89/391/EEC, i.e. including certain self-employed working individuals, except to Directive 2003/88/EC, as, e.g., employee-like persons are seen as not in need of the same protections as employees due to their limited time commitment¹²⁷⁵.

Similar to the developments in the field of equality law, a clear trend can be observed within the domain of occupational health and safety towards the inclusion of certain self-employed individuals. This tendency is particularly informed by the overarching principle enshrined in Art. 31 CFR, which guarantees the right to fair and just working conditions. Although the CJEU has, in some instances, rejected such inclusion – most notably in relation to the Working Time Directive 2003/88/EC – these judgments can, in part, be justified on teleological grounds. They reflect the specific purposes of the directives in question, rather than a blanket exclusion of all self-employed persons from the broader scope of occupational health and safety protection. This leaves open the normative and doctrinal question of whether certain categories of self-employed individuals – particularly those exposed to similar risks as employees – must be systematically considered within the protective ambit of EU occupational health and safety legislation. Equally unresolved is the legal impact of deriving such inclusion from fundamental rights, particularly Art. 31 CFR. A key issue in this context

1273 “Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council Concerning Certain Aspects of the Organisation of Working Time C/2017/2601,” *EUR-Lex*, chap. III A 1, accessed April 13, 2025, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52017XC0524%2801%29>.

1274 CJEU, *Yodel*, para. 43; CJEU, Judgment of 17 March 2021, *Academia de Studii Economice Din București*, C-585/19, EU:C:2021:210, para. 58.

1275 Wank, “Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?,” 186.

concerns the potential horizontal applicability of Art. 31 CFR, similar to the CJEU's approach to Art. 21 CFR on non-discrimination. While the CJEU has affirmed the direct horizontal effect of Art 31 para. 2 CFR regarding the right to limits on maximum working hours, rest periods, and paid annual leave – an area where the CJEU has rejected the inclusion of self-employed individuals – the broader applicability of Art. 31 para. 1 CFR, which guarantees working conditions which respect their health, safety and dignity, remains debatable. This uncertainty stems in part from concerns about the provision's level of precision and whether it constitutes a sufficiently defined standard to support direct enforcement between private parties. Art 31 para. 1 CFR merely clarifies that workers possess this right, but – unlike with Art. 31 para. 2 CFR – it is far less clear who bears the obligation to ensure its fulfillment, whether it is the employer or the state. Given the CJEU's unpredictability in these matters, one should, however, not be surprised if it eventually recognizes the horizontal effect for Art. 31 para. 1 CFR as well.

A potential acceleration regarding these issues may, however, arise through two recent areas of secondary legislation that clearly blur the traditional boundaries between employment and self-employment from the top to the bottom. These are, on the one hand, the Whistleblower Protection Directive (EU) 2019/1937 and, on the other, the Platform Work Directive (EU) 2024/2831.

The aim of Whistleblower Protection Directive (EU) 2019/1937 as outlined in its Art. 1, is to strengthen the enforcement of EU law and policy in specific areas by encouraging the reporting of breaches. Whistleblowers can play a pivotal role in achieving this objective, yet their willingness to come forward is often hindered by barriers such as the fear of retaliation. Due to their integration into operational processes, employees often first notice threats or damages to the public interest in their professional environment. When they report or disclose these issues, they are considered whistleblowers under Art. 5 para. 7 of the Directive and may in practice face retaliation¹²⁷⁶, such as denial of promotion¹²⁷⁷, intimidation¹²⁷⁸, or dismissal¹²⁷⁹. Therefore, the personal scope of Directive (EU) 2019/1937 primarily covers employees, to ensure a high level of protection for whistleblowers¹²⁸⁰. The decisive criterion for determining 'worker' status in this context aligns with the existence of an employment relationship, consistent with the interpretation under Art. 45 para. 1 TFEU and Art. 4 para. 1 lit. a of the Directive. However, while providing their services, self-employed individuals may, due to the nature of their services, find themselves in comparable positions to employees. Their proximity to operational processes allows them to detect and report risks

1276 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, *EUR-Lex*, art. 5 para. 11, accessed March 21, 2025, <https://eur-lex.europa.eu/eli/dir/2019/1937/2024-12-30>.

1277 *Ibid.*, art. 19 para. 2 lit. b.

1278 *Ibid.*, art. 19 para. 2 lit. g.

1279 *Ibid.*, art. 19 para. 2 lit. a.

1280 *Ibid.*, art. 4 para. 1 lit. a.

to the public interest¹²⁸¹. If they report or disclose such information, they are equally covered as whistleblowers within the meaning of Art. 5 no. 7 and as such often suffer reprisals in practice¹²⁸², e.g. in the form of ‘blacklisting’¹²⁸³, premature termination of the service contract¹²⁸⁴ or damage to reputation¹²⁸⁵. Therefore, the personal scope of application of Directive (EU) 2019/1937 to achieve a high level of protection pursuant to Art. 4 I lit. b also includes self-employed persons within the meaning of Art. 49 TFEU. Self-employed individuals under Art. 49 TFEU and Art. 4 para. 1 lit. b of the Directive are all natural persons who provide services to others without an employment relationship and receive remuneration in return. In this regard, the definition of ‘worker’ plays a secondary role for the purposes of protection under the Whistleblower Protection Directive (EU) 2019/1937. However, it becomes decisive in relation to the thresholds that trigger certain obligations for legal entities engaging working individuals – specifically, the duty under Art. 8 of the Directive to establish internal reporting channels. For private sector legal entities, this obligation arises once the number of workers reaches 50 or more. One possible interpretation is that this threshold refers exclusively to traditional employees, as defined by the *Lawrie-Blum* formula, who work under the direction and supervision of an employer in return for remuneration. However, a broader interpretation may be more appropriate in light of the purpose and spirit of the Directive. Including freelance workers within this headcount could be justified, particularly when these individuals maintain a strong functional connection to the company – greater than that of ordinary contractual partners. A narrow reading, limited to traditional employees, would lead to outcomes that conflict with the regulatory purpose. For instance, a legal entity employing only one employee but engaging 49 freelance workers would fall outside the obligation to establish internal reporting channels. Such an interpretation would undermine the preventive and protective goals of the Directive, which seeks to foster internal whistleblowing cultures and safeguard persons closely tied to the work provider’s operations.

Where the legislative boundaries vanish completely, is found in the Platform Work Directive (EU) 2024/2831. It is beyond doubt that this directive is intended to apply to certain individuals who would traditionally be classified as self-employed. The legislative process leading to its adoption was highly controversial. The initial proposal introduced a novel methodological approach: a hybrid definition of the term ‘worker’ with a legal presumption. This entailed a reference to the national concept of ‘worker’ or ‘employee’, combined with an autonomous EU concept, and the assumption of an ‘employment relationship’ if a set number of legally defined criteria were met¹²⁸⁶. The

1281 Ibid., recital 39.

1282 Ibid., art. 5 no. 11.

1283 Ibid., art. 19 lit. l.

1284 Ibid., art. 19 lit. m.

1285 Ibid., art. 19 lit. k, recital 39.

1286 Proposal for a Directive on Improving Working Conditions in Platform Work, chap. I art. 2 para. 1 no. 4, art. 4, recital 20.

proposal clearly attempted to function as a jack-of-all-trades. It aimed not only to define the personal scope of application in a broad and functional way but also to integrate the methodological suggestions of Recommendation No. 198 of the ILO, which is explicitly cited in Recital 21 of the Proposal¹²⁸⁷.

The scope of protection was intended to include the contractual relationship between a digital labor platform that controls the performance of work and a person performing platform work through that platform. In the context of the Proposal, ‘platform work’ was defined as any work organized through a digital labor platform and performed in the EU by an individual based on a contractual relationship with the platform, regardless of whether a contractual relationship existed between the individual and the service recipient. The focus, therefore, was on control as a form of personal dependence or organizational subordination. Whether control over the performance of work existed was to be determined by a type of checklist. The proposal outlined five criteria. If at least two were met, control over the performance of work was presumed.

The first criterion examined whether the platform exercised significant influence over remuneration, either by directly setting wage levels or by imposing upper limits on earnings¹²⁸⁸. The second criterion assessed whether the platform imposed binding rules on the working individual’s appearance, conduct toward service recipients, or specific methods for performing tasks¹²⁸⁹. A third criterion involved supervision of the performance of work or evaluating its quality through the platform, including via electronic surveillance¹²⁹⁰. The fourth criterion referred to restrictions on the working individual’s freedom or autonomy in organizing their tasks, including the use of disciplinary measures. This encompassed constraints on working hours, the ability to refuse tasks, or engage subcontractors or substitutes¹²⁹¹. The fifth criterion assessed whether the platform prevented the working individual from establishing their own client base or working for other clients¹²⁹².

It is apparent that these criteria drew inspiration from UK case law on the ‘limb (b) worker’ status, particularly the decision of the UKSC in the case *Uber BV v Aslam*¹²⁹³. The control criteria under discussion by the Proposal – especially concerning remuneration, availability, behavioral rules, and performance supervision – reflect core elements of *Uber BV v Aslam*. The UKSC emphasized Uber’s substantial control over its drivers, notably through fare setting, algorithm-driven performance monitoring, and restrictions on ride acceptance. These aspects appear directly mirrored in the Proposal’s criteria. At the same time, comparisons with the CJEU’s reasoning in the case

1287 Ibid., recital 21.

1288 Ibid., art. 4 para. 2 lit. a.

1289 Ibid., art. 4 para. 2 lit. b.

1290 Ibid., art. 4 para. 2 lit. c.

1291 Ibid., art. 4 para. 2 lit. d.

1292 Ibid., art. 4 para. 2 lit. e.

1293 Cf. *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5.

Yodel seem pertinent, particularly regarding whether it influenced the formulation of the criteria. The first key criterion for classifying someone as a worker under the Proposal is whether the platform sets or limits remuneration. In the case *Uber BV v Aslam*, the UKSC held that drivers had no bargaining power over their pay, as Uber unilaterally set uniform rates, which drivers could not adjust¹²⁹⁴. Also in *Yodel*, the CJEU highlighted that couriers could potentially negotiate their compensation, indicating a higher degree of entrepreneurial freedom¹²⁹⁵. Another criterion is whether the platform imposes strict rules regarding work methods, client interaction, or appearance. In the case *Uber BV v Aslam*, drivers were subject to disciplinary measures based on customer ratings and required to follow detailed behavioral standards¹²⁹⁶, justifying their classification as limb (b) workers. By contrast, the CJEU in *Yodel* focused on the working individual's freedom to determine their own work methods, concluding that no control existed¹²⁹⁷. Thus, *Uber BV v Aslam* clearly adopted the criterion from the Proposal, while *Yodel* did not. Regarding performance monitoring, the *Uber BV v Aslam* emphasized the use of GPS tracking and algorithmic evaluation, which dictated job assignments and performance ratings¹²⁹⁸. This amounted to a form of indirect hierarchy through digital oversight. In *Yodel*, such electronic monitoring was absent, as job allocation was conducted manually¹²⁹⁹.

The fourth criterion, concerning autonomy over working hours and the ability to accept or reject jobs, was also adopted in *Uber BV v Aslam*, where the UKSC found that although drivers could flexibly log into the app, they were penalized via algorithmic sanctions for rejecting rides¹³⁰⁰. This indicated that flexibility was illusory and constrained by structural limitations. Conversely, in *Yodel*, the CJEU stressed the workers' broad freedom in setting work hours and declining jobs, supporting a self-employed status¹³⁰¹.

The fifth criterion addresses the restriction on working for other clients. Uber drivers were not permitted to accept other assignments during an active ride, but there was no absolute exclusivity clause¹³⁰². In contrast, *Yodel* expressly allowed couriers to work for multiple companies, reinforcing their autonomy¹³⁰³. This demonstrates the relevance of the criterion in both rulings.

Both *Yodel* and *Uber BV v Aslam* revolve around whether platform workers should

1294 *Ibid.*, para. 93.

1295 CJEU, *Yodel*, para. 32.

1296 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 96.

1297 CJEU, *Yodel*, para. 41.

1298 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 97.

1299 CJEU, *Yodel*, para. 37.

1300 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 98.

1301 CJEU, *Yodel*, para. 39.

1302 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, para. 99.

1303 CJEU, *Yodel*, para. 40.

be classified as genuinely self-employed or employed. In both cases, the degree of platform control was scrutinized. The UKSC in *Uber BV v Aslam* found that while drivers had formal flexibility, the algorithm exercised indirect control (e.g., through ride acceptance quotas). In *Yodel*, the CJEU held that a working individual cannot be considered a worker if they truly control their working hours and job acceptance. In *Uber BV v Aslam*, the algorithmic control was central, including sanctions for rejecting rides. In *Yodel*, the focus was on work organization rather than technological oversight. Surprisingly, the Proposal's control criteria appear more aligned with *Uber BV v Aslam* than *Yodel*. While the *Yodel* judgment emphasized flexibility as a sign of independence, the Proposal prioritized mostly the features highlighted in *Uber BV v Aslam*.

This raises several concerns. On one hand, referencing legal experiences from other jurisdictions that seem to offer solutions is commendable. On the other hand, it is curious that such reliance was placed on a jurisdiction – namely the UK – that was no longer part of the EU at the time of the Proposal's publication. Rather than drawing from the experiences of continental European legal systems, the reasoning of a UK decision was transplanted out of context, raising questions about compatibility with legal frameworks such as those in Germany or Lithuania. Central to this issue is the Proposal's methodology. Its scope of protection includes the aforementioned presumption that an employment relationship must be assumed if two of the five criteria are met. The choice of precisely two criteria appears arbitrary and difficult to reconcile with the long-standing principle of the 'primacy of facts'. Ironically, the decision *Uber BV v Aslam* symbolizes the evolution of this very principle in UK case law. It must also be noted that *Uber BV v Aslam* was not concerned with defining a classic employment relationship but merely with whether drivers qualified as 'limb (b) workers' – a specific intermediate status in UK law granting only core employment rights. A binary legal system, like Lithuania's, would struggle to accommodate such a classification, particularly due to its narrow definition of subordination in employment law. The Proposal's emphasis on punitive control mechanisms rather than positive behavioral nudging and incentives – as developed in parallel by German case law – suggests it was something of a rushed endeavor, neglecting concurrent developments in several member states.

It is thus unsurprising that the adopted version of the Directive is far vaguer regarding the scope of its personal scope of application. It follows the tradition of Recommendation 198, as referenced in Recital 27, which also began with the aim of creating comprehensive legal definitions, only to ultimately leave such decisions to member states due to the diverse legal systems and traditions involved. The methodology of the adopted Directive can again best be described as a hybrid definition of 'worker' complemented by a legal presumption – i.e., reference to the national concept of 'worker' or 'employee', combined with principles established by the CJEU. An employment relationship is presumed if specific conditions are met. The central focus thus remains on a legal presumption. However, through the explicit reference to CJEU principles, the 'primacy of facts' principle is now given significantly greater weight than in the original Proposal. The presumption still rests on facts indicating direction and control, but

now expressly takes into account national law, collective agreements, and prevailing practices within member states, along with the case law of the CJEU. This, combined with the requirement that member states establish a framework of supporting measures to ensure effective implementation and compliance with the legal presumption, shows that the final Directive deliberately leaves room for interpretation and relies on the diverse experiences and traditions of the actual EU member states¹³⁰⁴.

Nevertheless, questions also arise here regarding compatibility with national law, particularly in the case of Lithuania, which operates under a binary system. It is evident that the Directive aims for a significantly softer concept of control than a purely formal organizational subordination derived from the contractual relationship between the parties, as was still required by the CJEU in the case *Yodel*¹³⁰⁵. In this regard, the scope of protection under the Directive – despite the absence of strict criteria – would deviate considerably from the traditional *Lawrie-Blum* understanding. As a result, it would render the personal scope of application under Art. 32 LR DK incompatible with the Directive. The Lithuanian system, with its narrow definition of subordination, has not been designed to accommodate soft and indirect forms of control. This inevitably leads to follow-up issues similar to those encountered in the context of the potential EU worker concepts discussed in Chapter 3.5. of this dissertation. Either the reinterpretation of subordination would result in an inflation of the personal scope of application of the entire employment law or divergent interpretations of the concept could emerge for different aspects of employment law – both contrary to the definition of subordination currently enshrined in Art. 32 para. 2 LR DK. A pragmatic solution would be the establishment of a separate legal framework specifically for platform work. However, such a move would depart from Lithuania’s longstanding tradition of codifying employment law within a single, unified code. In this context, it is also noteworthy that the adopted version of the Directive clarifies that “this legal presumption shall not apply to proceedings which concern tax, criminal or social security matters. However, Member States may apply the legal presumption in such proceedings as a matter of national law”¹³⁰⁶. In Germany, where employment, tax, and social security laws already have varying definitions of their personal scope of application, following or not following this exception is relatively unproblematic. In contrast, in Lithuania – where the scopes of application for employment, tax, and social security law have been closely aligned – the question arises whether the Directive’s definitions should be extended to tax and social security law as well. Alternatively, by choosing not to apply the presumption in these areas, Lithuania would need for the first time establish clearly distinct personal scopes of application across legal domains. This would represent a departure from the previously strict binary structure and the ‘all-or-nothing’ approach that has characterized the Lithuanian legal system. However, the Directive, which must be transposed by 2 December 2026, does not cover all freelance workers,

1304 Cf. Directive (EU) 2024/2831, recital 6.

1305 Cf. CJEU, *Yodel*, para. 45.

1306 Directive (EU) 2024/2831, art. 5 para. 3.

but only those who work via digital labor platforms in the narrower sense, i.e., the platform offers certain predefined (digital) services and the working individual provides the service to a service recipient (e.g., a consumer) under the conditions (automated monitoring systems or automated decision-making system) set by the platform. Accordingly, this raises concern that this may create a new two-tier system within the category of freelance workers. Yet, the directive includes mostly platform-specific provisions – such as ensuring data protection and increased transparency, including the disclosure of algorithms¹³⁰⁷, aimed at making the forms of subtle control outlined in Chapter 3.4. of this dissertation more visible. Although the Directive extends certain typical employment law protections to this new type of working individuals, these protections remain limited to the specificities of platform work and largely relate to the digital dimension of such activities. For instance, health and safety regulations primarily address risks associated with data collection and processing¹³⁰⁸, as do provisions concerning information and consultation¹³⁰⁹ and the provision of information to platform workers¹³¹⁰. Similarly, the right to protection against dismissal¹³¹¹ refers solely to protection against adverse consequences in the event of exercising rights under the Directive. Accordingly, the measures set out in the Directive would increase mostly the detectability of false employment relationships; however, in the absence of an adjustment or a revised understanding of the personal scope of other employment law provisions, they would not extend the rights of platform workers outside the digital context.

One of the few provisions that move beyond the digital sphere is Art. 25 of the Directive on collective bargaining, which requires that Member States take appropriate measures to promote the role of social partners and encourage the exercise of the right to collective bargaining in platform work¹³¹². This implies that platform workers should be afforded rights comparable to those available to employees, including at the level of the (platform) work provider. At a minimum, any limitation of these rights would need to be supported by well-founded justification.

Ultimately, the example of the Platform Work Directive (EU) 2024/2831 most strikingly illustrates that directives can cover highly diverse regulatory areas, and that their personal scope of application must correspond to these regulatory objectives – rarely aligned with the structures and mechanisms of national law. Certain aims of directives address specific aspects of labor that may play no role – or only a limited one – in otherwise almost similar working relationships. As such, the objectives underlying the provisions of the Directive (EU) 2024/2831 are difficult to transfer to other contexts – not even to other freelance workers – unless they operate in a similarly structured

1307 *Ibid.*, art. 9.

1308 *Ibid.*, art. 12.

1309 *Ibid.*, art. 13.

1310 *Ibid.*, art. 14.

1311 *Ibid.*, art. 23.

1312 *Ibid.*, art. 25.

digital environment. Similar difficulties in transferring problems affect other directives as well, making it necessary to conduct a case-by-case analysis of their personal scope of application. This raises the question of whether a uniform national scope of application can adequately accommodate such diversity.

4.4. Requirements by the Constitution of the Republic of Lithuania

Since the principle of constitutional supremacy prevails within the Lithuanian legal system – both in the application of the LR DK and in the development of new legal norms as well as in addressing gaps in the regulation of labor relations – it is essential to assess the legal framework established by the Lithuanian Constitution. The content of a working individual’s rights is shaped not only by constitutional provisions explicitly and directly related to employment law (i.e., provisions expressly concerning employment rights and obligations) but also by constitutional provisions that, although formulated ‘*expressis verbis*’, have only an indirect connection to employment law¹³¹³. However, the Lithuanian Constitution has the particularity that certain labor-related fundamental rights are formulated in comparatively great detail¹³¹⁴. Of these, the following can be regarded as guidelines and a framework for how labor must be regulated in relation to the individual employment level in order to be in conformity with the Constitution:

- Right to adequate, safe and healthy working conditions¹³¹⁵;
- Right to adequate pay for work¹³¹⁶;
- Right to rest and leisure as well as to annual paid holidays¹³¹⁷.

Furthermore, the Constitution also contains several collective rights:

- Right to establish and join trade unions¹³¹⁸;
- Right to strike¹³¹⁹.

Furthermore, it sets general guidelines for social protection by the state:

- Right to social security in the event of unemployment¹³²⁰;
- Right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by law¹³²¹.

1313 Rytis Krasauskas, “Kai kurie Konstitucijos ir Darbo kodekso sąveikos aspektai,” *Jurisprudencija* 22, no. 1 (2015): 27.

1314 Cf. Agnė Razgūniėnė, “Darbo sutarties instituto ypatumai Baltijos valstybėse,” *Jurisprudencija* 74, no. 66 (2005): 47.

1315 Lietuvos Respublikos Konstitucija, art. 48 para. 1.

1316 Ibid.

1317 Ibid., art. 49 para. 1.

1318 Ibid., art. 50.

1319 Ibid., art. 51.

1320 Ibid., art. 48 para. 1.

1321 Ibid., art. 52.

Under the Constitution, restrictions on such constitutional rights and freedoms may only be imposed if they are established by law and necessary in a democratic society to protect the rights and freedoms of others, the values enshrined in the Constitution, as well as constitutionally significant objectives. Furthermore, the restrictions cannot impair the essence of the rights and freedoms and the constitutional principle of proportionality must be observed¹³²².

Despite the considerable amount of labor-related references in the Constitution, the Lithuanian Constitutional Court LRKT has so far been sparse in addressing what constitutes an employment relationship in the sense of the Constitution. However, when it did, it merely referred to the term used in the LR DK 2002. In a decision from 2015, the LRKT mentioned this in passing and based its conclusions solely on the then-current definition of an employment contract in Art. 93 LR DK 2002:

“According to this legal regulation, an employment relationship is characterized, among other things, by the employee’s subordination to the employer, which manifests itself in the fact that the employee, working under an employment contract, is controlled by the employer, is obliged to comply with the workplace rules, including requirements related to working hours, work organization, work discipline, and the manner of performing work”¹³²³.

While it was acceptable to refer to the statutory definition in the question that was presented, this approach would not be methodologically appropriate in cases specifically concerning constitutional definitions – as it cannot be a simple law that defines the access to constitutional rights. Thus, a fundamental definition of an ‘employee’ under constitutional law, as partially inferred in the scholarly literature¹³²⁴, does not appear to be clearly established in the LRKT’s prior reasoning. It is therefore necessary to assess the personal scope of applications of these constitutional provisions more closely.

4.4.1. Right to adequate, safe and healthy working conditions (Art. 48 para. 1)

The right to adequate, safe and healthy working conditions and the right to adequate remuneration for work¹³²⁵ applies to everyone according to the wording of the Constitution. However, it nevertheless raises the question whether a distinction would have to be made between employees and individuals who perform work on a freelance basis. The right can initially be enshrined in the Universal Declaration of Human Rights of 1948 and in the International Covenant on Economic, Social and Cultural

1322 Rytis Krasauskas, “Nekonkuravimo susitarimai darbo teisėje. Ar darbuotojas ir darbdavys lygiaverčiai konkurentai?,” *Jurisprudencija* 8, no. 110 (2008): 44–45.

1323 LRKT, 2015 m. lapkričio 4 d. nutarimas ‘Dėl profesinės karo tarnybos karių teisės dirbti kitą darbą ribojimo’ Nr. KT29-N18/2015, para. 11.1.

1324 Cf. Davulis, “Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką,” 48-49.

1325 Lietuvos Respublikos Konstitucija, art. 48 para. 1.

Rights¹³²⁶. However, the essential points of reference can be derived from Art. 31 CFR, which is why Art. 48 para. 1 must also be interpreted in the context of the CFR – which however limits this right to just ‘every worker’. Furthermore, reference may also be made to Art. 3 para. 1 RESC¹³²⁷ – which, however, is likewise limited to the ‘worker’-related context. The wording of the Constitution is therefore broader and more inclusive, but it also leaves open the question of who must be ultimately responsible for creating which exact conditions. The Constitution itself does not provide an answer, but the fact that Art. 48 para. 1 applies to ‘everyone’ means that everyone has a right to adequate, safe and healthy working conditions. This should therefore also apply to self-employed persons and they must be supported in this if they are unable to provide these for themselves for objective reasons. The aim of occupational health and safety is to prevent accidents and injuries in connection with the work. Their main cause lies in the work process, in particular by reducing the causes of risk associated with the working environment¹³²⁸. It must therefore be ensured that the person who can objectively guarantee adequate, safe and healthy working conditions is the one who does so. If this is only the work provider, e.g. because they are the only one who can fully assess the risks because of an information asymmetry, they would need to be obliged to do so, regardless of their own employment law status and the status of the working individual. Accordingly, the scope of Art. 48 para. 1 must be interpreted broadly and could also include freelance workers.

4.4.2. Right to adequate pay for work (Art. 48 para. 1)

The right to adequate pay for work also applies to ‘everyone’ and has several functions. On the one hand, it implies that equal pay must be paid for equal work – differentiation based on gender would be inadmissible and would be seen as discrimination. On the other hand, differentiation based on working conditions, the employee’s profession, qualifications, the position held, the intensity, tension, complexity of the work performed, the social significance of the activity or the type of work would be permissible¹³²⁹.

In addition, minimum wage provisions can be linked to this. On the one hand, this means that only work, carried out in compliance with the requirements set out in Art. 48 para. 1 and permitted by the LR DK and other employment laws, can be considered unpaid work¹³³⁰. On the other hand, a concrete minimum wage guarantee can also be linked to this¹³³¹. There is no doubt that these minimum wage rights are initially linked

1326 Dambrauskienė, “48 str.,” 428.

1327 RESC, art. 3 para. 1.

1328 Dambrauskienė, “48 str.,” 429.

1329 *Ibid.*, 433.

1330 *Ibid.*, 431, 437.

1331 *Ibid.*, 431.

to traditional employees, but the question arises as to whether certain freelance workers must also be subsumed under this. With regard to the question of adequate pay, it can be argued that the resulting principle of equal pay is not only based on equal pay regardless of gender, but also covers situations in which, e.g., freelance workers working 'side-by-side' with traditional employees for the same work provider and perform the same activities under slightly different organization (without subordination). In this case, the pay of the regular employees could form the benchmark of what would be an adequate pay for the same work – especially when freelance workers bear additional risks that traditional employees do not face.

Since freelance workers are in most instances self-employed, it can be argued that their remuneration is not formed on the labor market, but on the free service market. However, market failures can appear, making self-employed persons unable to negotiate adequate pay due to a lack of entrepreneurial strength or due to an excessive supply of labor on the market, but this pay represents the essential economic basis of the working individual's livelihood. Art. 48 para. 1 needs to be read in connection with Art. 4 RESC which requires fair remuneration that not only secures the livelihood of the individuals concerned but also of their families¹³³². Subsequently, at least economically dependent solo self-employed persons who derive their income primarily from one or a few work providers could, under certain conditions, fall under Art. 4 RESC and possibly also under Art. 48 para. 1 of the Constitution. If an individual has only their labor to offer and lacks specialized skills that would secure a strong negotiating position in any relevant market, they may require certain protections regardless of the formal structure of the work arrangement. Art. 48 para. 1 could therefore also give rise to a duty on the part of the state to protect these individuals due to market failure and their economic dependence. However, protection against market failure does not necessarily have to be provided through employment law, but the state must create compensatory measures, e.g. through competition law.

4.4.3. Right to rest and leisure as well as to annual paid holidays (Art.49 para. 1)

Art. 49 para. 1 states that 'every working person' shall have the right to rest and leisure, as well as to annual paid leave. This right is defined as a necessary prerequisite for restoring the functions of the human body and leading a fulfilling life and thus also relates to ensuring the effective implementation of the right to decent working conditions¹³³³. It is questionable whether at least certain self-employed persons could be covered as well. Derived from history, it probably refers more to working individuals as understood by the LTSR DĮK¹³³⁴ according to which the working [person] ('dirban-

1332 Cf. RESC, art. 4.

1333 Vytautas Nekrašas, "49 straipsnis," in *Lietuvos Respublikos Konstitucijos komentaras. 1 dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 440.

1334 LTSR DĮK, art. 18.

tysis') was on the one hand the worker ('darbininkas') and the on the other hand the servant ('tarnautojas'). The wording of Art 49 para. 1 would therefore initially refer to traditional employees and civil servants, so that the employment contract or a similar legal basis is probably the connecting factor for this right¹³³⁵. The extent to which freelance workers must also be included in this area of protection is unclear. However, if Art. 49 para. 1 is understood as serving to ensure the effective implementation of the right to safe and healthy working conditions, it allows for an interpretation in the sense of Art. 31 para. 1 and para. 2 CFR, whereby certain self-employed persons could also be included in the scope of application if this right is interpreted teleologically¹³³⁶.

4.4.4. Right to establish and join trade unions (Art. 50)

Art. 50 describes and further develops the right to freely join associations, political parties, etc., guaranteed to citizens in Art. 35 of the Constitution¹³³⁷. The LRKT considers it as one of the prerequisites for the constitutional goal of an open, just and harmonious civil society¹³³⁸ and one of the guarantees of civic and political functioning¹³³⁹. The establishment of and participation in trade unions can be regarded as one of the most fundamental and important rights of working individuals¹³⁴⁰.

Davulis and *Nekrošius* describe the aim of trade unions as the protection of explicit employees¹³⁴¹. This is not initially relevant to the formation of and joining a trade union, but it becomes important in the activities of trade unions. They see unionization as a means of preserving the equality of the parties to the employment law relationship and the balance of power, as the employer has greater economic potential and the ability to dispose of the labor supply¹³⁴². The constitutional status of trade unions therefore also demonstrates the state's own interest in maintaining a harmoniously functioning system of collective representation in labor relations in which one of the parties is particularly vulnerable¹³⁴³.

The right to establish and join trade unions under Art. 50 of the Constitution is related to Art. 11 ECHR as well ILO Convention No. 87 on freedom of association and ILO Convention No. 98 on the right to organize and collective bargaining¹³⁴⁴. Further-

1335 Cf. Dambrauskienė, "48 str.," 426.

1336 In this regard, cf. Chapter 4.3.1.2 of this dissertation.

1337 *Davulis* and *Nekrošius*, "50 str.," 449–50.

1338 LRKT, 2003 m. rugsėjo 30 d. nutarimas 'Dėl valstybinių profesinių sąjungų valdyto turto'.

1339 LRKT, 2004 m. liepos 1 d. nutarimas 'Dėl Seimo narių kūrybinės veiklos'.

1340 Rytis Krasauskas, "Kolektyvinės darbo teisės subjektai," in *Kolektyvinė darbo teisė: vadovėlis*, ed. Rytis Krasauskas (Vilnius: Mykolo Romerio Universitetas, 2013), 259.

1341 *Ibid.*

1342 *Ibid.*

1343 *Ibid.*

1344 *Ibid.*, 449–51.

more, it is related to the right to organize under Art. 5 RESC and the right to bargain collectively under Art. 6 RESC, as well as the freedom of assembly under Art. 12 CFR and the right of collective bargaining and action under Art. 28 CFR. Art. 50 of the Constitution must therefore be interpreted accordingly. Thus, the right to establish and join trade unions under the Constitution, in principle, cannot be restricted except where such restrictions are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others¹³⁴⁵. Additionally, restrictions may be imposed on members of the armed forces, the police, or the state administration¹³⁴⁶. Freelance workers, however, would generally not fall within these exclusion categories.

4.4.5. Right to strike (Art. 51)

The right to strike, as a method of resolving collective labor disputes¹³⁴⁷ and as a legal measure of last resort¹³⁴⁸ in collective action to safeguard workers' rights¹³⁴⁹, has constitutional status in Art. 51. It is an integral component of the freedom of association¹³⁵⁰. However, this right is not unlimited and is channeled by law. Firstly, the right to strike only applies to 'employees' according to the personal scope of application of Art. 51. By calling a strike, in the eyes of the LRKT, a trade union – as an independent 'employees' organization – is carrying out not only the will of the union's members but also the other 'employees' in the company¹³⁵¹. Yet, it must be asked to what extent certain freelance workers must nevertheless get access to it. The right to strike logically presupposes the obligation to work of the individual in the moment of the strike. A strike in the sense of employment law can therefore only take place if a specific obligation to work exists. Regarding freelance workers, this question would therefore only be relevant if they are in a continuing obligation (e.g. under a framework agreement). The right to strike is explicitly recognized as a measure of collective action in Art. 28 CFR. Accordingly, Art. 51 must be interpreted in light of it. The international literature partly advocates for including certain employee-like individuals (independent workers)

1345 ECHR, art. 11 para. 2.

1346 Ibid.

1347 Dambrauskienė, "51 str.," 462.

1348 Cf. Tomas Bagdanskis, "Kolektyviniai darbo ginčai," in *Kolektyvinė darbo teisė: vadovėlis*, ed. Rytis Krasauskas (Vilnius: Mykolo Romerio Universitetas, 2013), 479.

1349 Cf. Petras Plumpa, "43 straipsnis," in *Lietuvos Respublikos Konstitucijos komentaras. 1 dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 471.

1350 Krasauskas, "Kolektyvinės darbo teisės normų ištakos," 20.

1351 LRKT, 1999 m. sausio 14 d. nutarimas 'Dėl profesinių sąjungų'.

within the personal scope of protection¹³⁵². The CFA has determined that ILO Convention No. 87 on freedom of association and ILO Convention No. 98 on the right to organize and collective bargaining should include self-employed individuals¹³⁵³. Additionally, the ECSR extended the personal scope of the right to collective bargaining under Art. 6 para. 2 RESC to economically dependent self-employed individuals¹³⁵⁴. A coherent interpretation of international law could therefore necessitate also a broad interpretation of Art. 11 ECHR when it comes to its personal scope of application. Although Art. 11 ECHR does not explicitly include the right to strike¹³⁵⁵, Art. 28 CFR goes beyond this interpretation of Art. 11 ECHR by affirmatively guaranteeing the right to strike¹³⁵⁶ – but must be understood as sharing the same personal scope of application as Art. 11 ECHR. Therefore, Art. 28 CFR and, consequently, a corresponding interpretation of Art. 50 and 51 of the constitution would grant the right to strike also to certain freelance workers. Whether it could effectively be executed to often missing obligations to work in freelance relationships, is, however, a separate question.

4.4.6. Right to receive pensions, social assistance and social security in the event of unemployment (Art. 52 and 48 para. 1)

Art. 52 provides to create an effective social security system to ensure a humane and social market economy¹³⁵⁷. The right to social security in the event of unemployment is repeated both in Art. 48 para 1 and in Art. 52. Overall, it is addressed to the state and provides no clear information as to whether it refers only to employees with regard to labor-related social security or also includes certain self-employed persons in its scope of protection.

The provisions essentially correspond to the standards of human rights to social protection laid down in the Universal Declaration of Human Rights (Art. 22, 23 and 25)¹³⁵⁸, the RESC (Art. 12, 13, 14 and 23) and Art. 34 CFR and must be interpreted accordingly – the scope of protection must also be interpreted accordingly and may well include certain freelance workers in individual cases.

1352 Zwinger and Brameshuber, “Collectively Agreed (Minimum) Labour Conditions as Protection Boosters,” 107 ff.; Heuschmid, “§ 11 Der Arbeitskampf im EU-Recht,” para. 34; Hüpers and Reese, “Art. 28,” para. 29.

1353 ILO, *Freedom of Association*, 387 ff.; Countouris and De Stefano, “New Trade Union Strategies for New Forms of Employment,” 50 ff.; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1354 ECSR, *Irish Congress of Trade Unions v. Ireland*, para. 37; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1355 Cf. ECtHR, *Schmidt and Dahlström v. Sweden*.

1356 Cf. CFR, art. 28.

1357 Cf. Gina Marija Pajuodienė, “52 straipsnis,” in *Lietuvos Respublikos Konstitucijos komentaras. 1 dalis*, ed. Karolis Jovaišas (Vilnius: Teisės Institutas, 2000), 472.

1358 Cf. *Ibid.*

4.4.7. Interim Conclusion

The Lithuanian Constitution offers a detailed framework for labor rights, some of which can potentially extend to freelance workers if interpreted consistently with the ECHR, the RESC and different ILO instruments. Key rights include the right to adequate, safe, and healthy working conditions (Art. 48), which could broadly apply to all working individuals, including freelance workers, especially when objective reasons prevent them from ensuring these conditions themselves. Similarly, the right to adequate pay (Art. 48) could be interpreted to cover freelance workers when they lack economic power to negotiate fair wages due to market failures, potentially necessitating state intervention.

While the Constitution primarily frames the right to rest, leisure, and paid leave (Art. 49) for traditional employees, there is also a case for interpreting this protection to include certain freelance workers if it is understood as serving to ensure the effective implementation of the right to safe and healthy working conditions. Also regarding the right to establish and join trade unions (Art. 50) as well as the right to strike (Art. 51) in coherence with Art. 28 CFR, coverage of freelance workers would be required. Lastly, social security protections (Art. 52) extend broadly to all individuals, with no clear distinction between employees and the self-employed, implying that certain freelance workers may also be included.

Overall, it can be said that the Constitution, in its original conception, likely adhered to a traditional distinction between employees and self-employed individuals, grounded in the socio-economic context and experiences prevailing at the time of its drafting. However, additional fundamental rights instruments have since emerged – most notably the CFR – making it no longer appropriate to interpret the Constitution in isolation. Instead, these developments must be taken into account, and a coherent interpretation should be pursued in alignment with the ECHR, RESC, and the CFR. While the Constitution might focus in its pure wording on traditional employees and employment relationships, evolving legal interpretations and international law may support the inclusion of certain freelance workers in the scope of these protections. In summary, Lithuanian constitutional law provides a solid foundation for safeguarding labor rights and social protection, but evolving labor realities suggest that further legal clarifications might be necessary to fully ensure the rights and social guarantees of all working individuals that require such protection, including certain self-employed freelance workers. In any case, the LRKT has the final say.

5. APPLICABILITY OF EMPLOYMENT LAW TO FREELANCE WORKERS IN GERMANY, THE UK AND LITHUANIA

After clarifying the requirements set by international, EU, and constitutional law, the next step is to examine the different conclusions drawn from these requirements in the national laws of Lithuania, Germany, and the UK, and to what extent Germany and the UK may have made regulations that might even go beyond the established framework. This chapter examines specific areas of employment law across the three jurisdictions in which traditional employment rights are extended to certain self-employed individuals. It does not address areas where protective rights already apply universally to all self-employed persons.

A key difference can be noted at the outset. Lithuanian employment law is strongly oriented towards EU guidelines and aims to implement them consistently. Therefore, it appears that in Lithuania, the concept of ‘employment contract’ in Art. 32 LR DK is essentially aligned with the supposed ‘general’ concept of worker according to the CJEU based on the *Lawrie-Blum* formula and sufficiently reflects it¹³⁵⁹. Although the concept of ‘employee’ in Germany also largely corresponds to the *Lawrie-Blum* formula, awareness of possible deviations exists and a different approach is taken. In Germany, whenever a regulatory matter falls under an autonomous CJEU definition, the EU concept is basically directly applied for interpretation, while in other cases, the national concept prevails¹³⁶⁰. In the UK, a similar approach was followed until ‘Brexit’, but since ‘Brexit’, there is now the possibility for independent definitions and potential divergences from CJEU definitions.

5.1. Applicability of individual employment law

In principle, only employees are subject to individual employment law regulations in Germany. However, also due to the fact that employment law is not codified in Germany, some laws extend the scope of application punctually to persons who are in principle genuinely self-employed – the previously outlined employee-like persons (‘arbeitnehmerähnliche Personen’) who are clearly not to be qualified as employees in legal terms, so that employment law does not apply to them in principle¹³⁶¹. As employee-like persons in Germany, limb (b) workers in the UK – in comparison to employees or limb (a) workers – are covered by “only a limited set of core rights”¹³⁶². In contrast, individual employment law in Lithuania is generally only applicable to persons who work under an employment contract. Although individual laws, such as

1359 Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13; Davulis, *LR DK komentaras*, n. 208.

1360 Cf. BAG, Beschl. v. 8.2.2022 - 9 AZB 40/21, *NJW*, 2022, para. 16, 20.

1361 Hohmeister, “BUrlG § 2 Geltungsbereich,” para. 14.

1362 Freedland and Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” 27.

the LR DSSĮ, extend the scope of protection to legal relationships that are equivalent to employment relationships and to persons who perform unpaid work¹³⁶³, the definition of the core concept of an organizational subordinated employee from the LR DK remains unaffected, but the personal scope of the individual law is extended. Such equivalent relationships are listed exhaustively in Art. 4 para. 3 LR UĮ. These are, e.g., civil service relations, professional military service relations or legal relations arising from the work of state politicians, i.e. workers in the public sector¹³⁶⁴. Some laws that extend to persons performing certain unpaid work refer to the exhaustive list in Art. 9 LR UĮ, e.g. persons doing an internship after concluding an internship contract, performing activities beneficial to society or performing work as a means of occupational therapy. However, self-employed persons are not covered by this. Instead, as both the LR DK and the LR DSSĮ, which transpose numerous EU directives with a EU ‘worker’ concept as their personal scope of application¹³⁶⁵, rely on the same basic and narrow ‘employee’ concept, this approach appears to assume that there is a single ‘general’ EU concept of ‘worker’¹³⁶⁶ based on the *Lawrie-Blum* formula.

Against this backdrop, the following analysis will focus on Germany and the UK, examining the extent to which certain individual employment rights have been extended to self-employed individuals. This includes considering how, despite differences in the scope of legal concepts, protections may apply to ‘employee-like persons’ in Germany and/or ‘limb (b) workers’ in the UK.

In Germany, only employees are subject to minimum wage requirements¹³⁶⁷. Decisive is the employment contract definition in section 611a BGB which is based solely on personal dependence due to being bound by instructions and working in a determined way. It is remarkable that, in the UK, limb (b) workers are also covered by the same minimum wage laws that apply to employees¹³⁶⁸. This applies also in cases where the work is deliverable oriented, i.e., so-called ‘output work’¹³⁶⁹. For calculating the minimum wage, the hours actually worked are taken into account for minimum wage calculation¹³⁷⁰. This means that a high degree of fragmentation in working time enables a greater number of freelance or self-employed individuals to benefit from minimum wage guarantees.

Limb (b) workers are furthermore protected from any unlawful deduction of

1363 LR DSSĮ, art. 2 para. 9.

1364 Cf. Directive 89/391/EEC, art. 1, 2 para. 1.

1365 Cf. LR DK, annex; LR DSSĮ, annex.

1366 Cf. Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.” 13; Davulis, *LR DK komentaras*, n. 208.

1367 MiLoG, sec. 1 para. 1.

1368 NMWA 1998, sec. 1, 54.

1369 NMWR 2015, reg. 36.

1370 Ibid., reg. 37.

wages¹³⁷¹ which includes any sums payable in connection with the employment¹³⁷². In Germany, employee-like persons do not have a specific protection against unlawful wage deductions in the same way as employees. However, they can rely on certain contractual and legal provisions, such as unconscionability¹³⁷³ and good faith¹³⁷⁴. If deductions are unreasonable or abusive, these general civil law provisions may apply, as it would similarly be possible for self-employed persons in Lithuania.

Since 2020, limb (b) workers are also protected from detriment in certain health and safety cases if they take appropriate action related to health and safety such as leaving or refusing to return to a workplace, taking steps to protect themselves or others or raising health and safety concerns with their work provider¹³⁷⁵. The inclusion of limb (b) workers into occupational health and safety regulations was a consequence of the judgment of the High Court in the case *IWUGB v SSWP and Others*¹³⁷⁶, which considered the inclusion of limb (b) workers to be necessary for the full transposition of Directive 89/391/EEC due to a broad interpretation of the EU's 'worker' concept in its Art. 3¹³⁷⁷. Similar considerations exist in Germany. Employee-like persons are covered by the health and safety regulations as employees¹³⁷⁸. However, the term 'employee-like person' in this context is understood more broadly, as the link to economic dependence, as pursued in other contexts, is not seen as appropriate with regard to the protective purpose of occupational health and safety law. Instead, employee-likeness is derived from the hazardous nature of the work and the risks associated with it. The need to include such a wide circle of working individuals in the personal scope of application can be as well derived from a broad interpretation of Art. 3 of Directive 89/391/EEC.

Limb (b) workers in the UK are furthermore protected from any detriment as a result of whistleblowing¹³⁷⁹. While not having access to the whistleblowing automatic unfair dismissal claim¹³⁸⁰ with possible reinstatement¹³⁸¹, they can, however, claim for

1371 ERA 1996, sec. 13.

1372 *Ibid.*, sec. 27.

1373 BGB, 138.

1374 *Ibid.*, 242.

1375 ERA 1996, sec. 44.

1376 *Cf. R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions and another* [2020] EWHC 3050.

1377 UK Parliament, "Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021," accessed March 22, 2025, [https://hansard.parliament.uk/lords/2021-04-27/debates/98C1D97D-3C34-4250-9658-241FC7457326/EmploymentRightsAct1996\(ProtectionFromDetrimentInHealthAndSafetyCases\)\(Amendment\)Order2021](https://hansard.parliament.uk/lords/2021-04-27/debates/98C1D97D-3C34-4250-9658-241FC7457326/EmploymentRightsAct1996(ProtectionFromDetrimentInHealthAndSafetyCases)(Amendment)Order2021).

1378 ArbSchG, § 2 para. 2 no. 3.

1379 ERA 1996, sec. 47B para. 1.

1380 *Cf. Ibid.*, sec. 103A.

1381 *Cf. Ibid.*, sec. 113.

compensation¹³⁸². It must be noted that these regulations were no longer implemented based on Directive (EU) 2019/1937, as it was not transposed due to the UK's exit from the EU. However, Directive (EU) 2019/1937 is a key foundation for the whistleblower regulations in both Lithuania and Germany. The respective German HinSchG proceeds in a similar way, as the German regulations in occupational health and safety. Its personal scope of application includes 'Beschäftigte' who are legally defined to encompass not only traditional employees but also individuals classified as employee-like persons due to their economic dependence¹³⁸³. It is argued by some scholars that the term 'employee' in this definition should be based on the worker concept in accordance with Art. 45 TFEU¹³⁸⁴. Another view is that the employee must be defined according to national law and that instead the umbrella term 'Beschäftigter' transposes the EU worker concept, even if it does not actually include employee-like persons¹³⁸⁵. For the concept of an employee-like person, recourse is taken to the understanding from the TVG and the BUrUG, i.e., covers economically dependent persons – in contrast to the interpretations in the field of occupational health and safety. The obligations under the law arise not only for employers, but also for a so-called 'employment provider' ('Beschäftigungsgeber')¹³⁸⁶ – a terminology that was newly introduced by and for the whistleblowing regulations of the HinSchG. It is to be understood broader than an employer as the party to a traditional employment relationship¹³⁸⁷. The thresholds for the obligation to set up internal reporting channels, as requested by Art. 8 of Directive (EU) 2019/1937, do therefore not only include employees but also employee-like persons¹³⁸⁸. The purpose of this broad definition is to extend the terminology to all individuals who may potentially become aware of a violation in a professional context. This approach aims to align with the personal scope of application of Art. 4 of Directive (EU) 2019/1937. However, this implementation is considered partially inadequate¹³⁸⁹. The rationale behind this approach was the German legislator's view that the EU concept of worker is significantly broader than its national counterpart,

1382 Ibid., sec. 49 para. 6.

1383 HinSchG, sec. 3 para. 8.

1384 Greiner, "HinSchG § 3 Begriffsbestimmungen," in *ErfK*, by Rudi Müller-Glöße et al. (Munich: C.H. Beck, 2025), para. 6.

1385 Philipp Ceesay, "HinSchG § 3 Begriffsbestimmungen," in *Hinweisgeberschutzgesetz*, by Eike Bicker et al., ed. Jan Lieder and Philipp Ceesay (Munich: C.H. Beck, 2025), para. 44 ff.

1386 HinSchG, sec. 3 para. 9.

1387 Cf. Marcel Marques and Marie Blesius, "Hinweisgeberschutz – Gesetzliche Anforderungen und mögliche Chancen für die Zukunft," *Zeitschrift das Recht der Non Profit Organisationen*, 2023, 240.

1388 HinSchG, sec. 12 para. 1.

1389 Entwurf eines Gesetzes für einen besseren Schutz hinweisgebender Personen sowie zur Umsetzung der Richtlinie zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden, BT-Drucksache 20/3442 (Deutscher Bundestag, September 19, 2022), 66, <https://dserv.bundestag.de/btd/20/034/2003442.pdf>; Ceesay, "HinSchG § 3 Begriffsbestimmungen," para. 49 – "without an awareness of the precise scope of the requirements of EU law."

necessitating a broad general clause¹³⁹⁰. However, it remains unclear whether the inclusion of all employee-like persons was intended solely to implement the personal scope of the Directive (EU) 2019/1937 or was motivated by independent considerations. It is more likely that the inclusion of employee-like persons in this concept refers to someone ‘working in the private or public sector who acquired information on breaches in a work-related context’ rather than a worker in the sense of Art. 4 para. 1 lit. a of the Directive. The view that the definition of employee-like person in this context aligns with its interpretation under TVG and BUrlG and therefore includes economically dependent persons would nevertheless be reasonable, as it primarily affects the thresholds for the requirement of setting up whistleblowing channels rather than the rights of the whistleblower as such¹³⁹¹. The inclusion of employee-like persons into the threshold calculation makes sense, as otherwise, the threshold would not apply to a work provider who employs only one employee, but 49 employee-like freelance workers which would evidently contradict the purpose of Art. 8 of Directive (EU) 2019/1937 – particularly in cases involving the reporting of violations related to occupational health and safety, which also affect employee-like persons in the same way. Based on this, the personal scope of application could even potentially extend to the broader understanding of employee-like persons according to the ArbSchG and in line with the German interpretation of the personal scope of application of Directive 89/391/EEC.

Since 2019, in the UK, not only employees, but also limb (b) workers have the right to be given itemized payslips indicating the gross pay, the deductions made, the net pay and the hours worked¹³⁹². In contrast, in Germany, according to Sec. 108 GewO¹³⁹³, only employees are entitled to receive payroll statements, but not employee-like persons¹³⁹⁴. A similar, more employee-like treatment of freelance workers can also be observed in other areas of UK law. In Germany, Directive (EU) 2019/1152 on transparent and predictable working conditions was implemented exclusively for employees¹³⁹⁵.

1390 BT-Drucksache 20/3442, 56.

1391 It must be noted that in Lithuania also self-employed whistleblowers are protected, however, the threshold for the necessary setting-up of internal whistleblowing channels only takes into account the number of traditional employees.

1392 ERA 1996, sec. 8.

1393 Gewerbeordnung [Trade Regulation Act] in the version published on 22 February 1999 (BGBl. I, p. 202), last amended by Art. 9 of the Act of 27 December 2024 (BGBl. 2024 I No. 438), sec. 108.

1394 Frank Maschmann, “GewO § 108 Abrechnung des Arbeitsentgelts,” in *Beck-Online. GROSSKOMMENTAR*, ed. Beate Gsell et al. (Munich: C.H. Beck, 2024), para. 8.

1395 Gesetz zur Umsetzung der Richtlinie (EU) 2019/1152 des Europäischen Parlaments und des Rates vom 20. Juni 2019 über transparente und vorhersehbare Arbeitsbedingungen in der Europäischen Union im Bereich des Zivilrechts und zur Übertragung von Aufgaben an die Sozialversicherung für Landwirtschaft, Forsten und Gartenbau, *Bundesgesetzblatt Online*, accessed March 18, 2025, [247](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&start=//*/%5b@attr_id=%27bgbl122s1174.pdf%27%5d; Sebastian Kolbe, “RL (EU) 2019/1152 Art. 1 Zweck, Gegenstand und Anwendungsbereich,” in <i>Kommentar zum europäischen Arbeitsrecht</i>, by Martin Franzen et al. (Munich: C.H. Beck, 2024), para. 7.</p></div><div data-bbox=)

In the UK, however, since 2020, also limb (b) workers are entitled to receive a written statement of employment particulars on or before their first day of work, i.e., the names of the employer and worker, the date employment begins, the scale or rate of pay and the frequency of payment, the hours of work and whether they are variable, the details of holiday entitlement, including paid leave and the duration of the employment, if it is temporary or fixed-term¹³⁹⁶. In the end, the status of limb (b) workers entails a significantly higher degree of documentation than that required for employee-like persons under German law. Therefore, the engagement of employee-like persons is characterized by a markedly higher degree of informality.

Furthermore, also German leave regulations according to the BUrlG apply to employee-like persons, which, i.a., entitles every employee to paid holiday in each calendar year¹³⁹⁷. Sec. 2 BUrlG however defines employees also as persons who are to be regarded as similar to employees due to their economic ‘non-independence’, i.e. employee-like persons¹³⁹⁸. The economic dependence of this group creates a special need for protection similar to employees¹³⁹⁹, which justifies equal treatment, e.g. also partial leave¹⁴⁰⁰. In individual cases, a broad interpretation of the concept of employee-like persons under the BUrlG is regularly necessary¹⁴⁰¹. Similar as employee-like persons in Germany, limb (b) workers have the right to paid annual leave¹⁴⁰². As in Germany, this emphasizes the legislator’s view that limb (b) workers are vulnerable in the same way as employees in terms of their recovery which can be derived from the working individual’s need for a healthy work environment.

In the UK, limb (b) workers are subject to equal treatment¹⁴⁰³. Also in Germany, the rules for preventing or eliminating discrimination based on race or ethnic origin, gender, religion or belief, disability, age, or sexual identity apply to employee-like persons¹⁴⁰⁴, following the definitions according to TVG and BUrlG¹⁴⁰⁵. On the one hand, every such discrimination is a violation of contractual obligations¹⁴⁰⁶. On the other hand, the employer of an employee-like person is obliged to take appropriate

1396 ERA 1996, sec. 1.

1397 BUrlG, sec. 1.

1398 Ibid., sec. 2.

1399 ArbGG, sec. 5 para. 1 sentence 2.

1400 Hohmeister, “BUrlG § 2 Geltungsbereich,” para. 14.

1401 Dirk Neumann, “BUrlG § 2 Geltungsbereich,” in *Bundesurlaubsgesetz*, ed. Dirk Neumann and Martin Fenski (Munich: C.H. Beck, 2011), para. 67.

1402 The Working Time Regulations 1998, reg. 2.

1403 Equality Act 2010, c. 15, sec. 83, accessed March 22, 2025, <https://www.legislation.gov.uk/ukpga/2010/15>.

1404 AGG, sec. 6 para. 1 no. 3.

1405 Peter Schrader and Jens Schubert, “AGG § 6 Persönlicher Anwendungsbereich,” in *Allgemeines Gleichbehandlungsgesetz: mit Entgelttransparenzgesetz, Berliner LADG: Handkommentar*, by Wolfgang Däubler and Thorsten Beck (Baden-Baden: Nomos, 2022), para. 42 ff.

1406 AGG, sec. 7.

measures to prevent such discrimination¹⁴⁰⁷. If discrimination appears, the employer is obliged to compensate damages¹⁴⁰⁸. Furthermore, developed by case law, another aspect of equal treatment has been extended to employee-like persons in connection with the EntgTranspG. ‘Beschäftigte’ can request information from the work provider on the average monthly gross pay and individual pay components of comparable employees in order to check compliance with the equal pay principle¹⁴⁰⁹. The purpose of the law is to enforce the principle of equal pay for women and men performing the same or equivalent work. According to Sec. 2 para. 1 EntgTranspG, the law applies to all ‘Beschäftigte’ as defined in Sec. 5 para. 2 EntgTranspG. This includes employees¹⁴¹⁰. Employee-like persons (except home workers and those equated with them) are not mentioned by the law. A similar right to information is also formulated in Directive (EU) 2023/970, which must however be transposed into national law only by 7 June 2026¹⁴¹¹. The personal scope of application of the Directive is also limited to workers who have an employment contract or employment relationship within the meaning of the legislation, collective agreements and/or practice applicable in the individual member states, but taking into account the case law of the CJEU¹⁴¹². However, in contrast to this, the BAG has ruled that the personal scope of the EntgTranspG in this context must not be interpreted solely according to national legal understanding but rather in a manner consistent with EU law, in alignment with the definition of ‘worker’ under Directive 2006/54/EC¹⁴¹³ on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. As a result, in individual cases, according to the BAG, employee-like persons may also fall within the personal scope of the law¹⁴¹⁴, despite not explicitly mentioned, with the result that they are entitled as employees to request information from the work provider regarding comparable work and remuneration. However, it remains unclear whether the term employee-like person in this context refers exclusively to economically dependent individuals or if it encompasses a broader group and whether

1407 Ibid., sec. 12.

1408 Ibid., sec. 15.

1409 EntgTranspG, sec. 2 para. 1, 5 para. 2.

1410 Cf. EntgTranspG, sec. 10.

1411 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, *EUR-Lex*, art. 34, accessed April 13, 2025, <https://eur-lex.europa.eu/eli/dir/2023/970/oj/eng>.

1412 Directive (EU) 2023/970, art. 2 para. 2.

1413 Cf. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, *EUR-Lex*, accessed April 18, 2025, <https://eur-lex.europa.eu/eli/dir/2006/54/oj/eng>.

1414 Stephan Altenburg, “Arbeitsentgelt,” in *Arbeitsrecht: Individualarbeitsrecht, Kollektives Arbeitsrecht, Prozessrecht: alphabetische Gesamtdarstellung*, by Martina Ahrendt, ed. Isabella Grobys and Andrea Panzer-Heemeier (Baden-Baden: Nomos, 2025), para. 31.

this interpretation could also be applied to the definition of the personal scope of application of Directive (EU) 2023/970.

Also in response to the case law of the CJEU¹⁴¹⁵, women who are classified as employee-like person due to their economic dependence are generally covered by the maternity protection provisions of the German MuSchG, including economically dependent women who are not integrated into the work organization of the work provider¹⁴¹⁶. Certain rights are explicitly excluded for employee-like women which relate to certain statutory benefits provided by the employer in case of certain disabilities to work in connection with the pregnancy¹⁴¹⁷. However, full protection applies with regard to special dismissal protection. Employee-like women cannot be dismissed during pregnancy, up to four months after a miscarriage occurring after the twelfth week of pregnancy, and until the end of their statutory protection period following childbirth but at a minimum, until four months after giving labor¹⁴¹⁸. Consequently, also a service contract or a contract to produce a work cannot be subject to termination for such individuals¹⁴¹⁹.

The analysis clearly demonstrates that both Germany and the UK respond to the need for protection of individuals who, while not classified as employees in the strict sense, are nevertheless economically or otherwise vulnerable. This is achieved through the existence of extended protected groups – employee-like persons in Germany and limb (b) workers in the UK. These intermediate groups benefit, to varying extents, from selected employment law protections, derived partly from broader interpretations of EU legislation and partly from independent national considerations. This differentiated protection logic is not primarily based on formal contractual relationships, but rather on the actual economic dependence or vulnerability situation of individuals. It reflects a functional concept of employment that focuses more on the effective implementation of minimum social standards in atypical employment relationships.

In contrast, Lithuania currently follows a more formalistic approach: individual employment law protections generally apply only to individuals with an employment contract. Although certain specialized laws – such as the LR DSSĮ and the LR UĮ – extend protections in specific cases to individuals without a classic employment contract (such as unpaid interns or public servants), Lithuania lacks an open, intermediate status or catch-all provision similar to Germany or the UK that systematically includes certain self-employed individuals within the scope of application. For legal provisions not derived from EU law, this situation has no direct consequences for Lithuania, as

1415 Katharina Dahm, “MuSchG § 1 Anwendungsbereich, Ziel des Mutterschutzes,” in *BeckOK Arbeitsrecht*, ed. Christian Rolfs et al. (Munich: C.H. Beck, 2024), para. 28; with reference to: CJEU, “Danosa.”

1416 Daniel Benkert, “Neuregelung des Mutterschutzes,” *NJW-Spezial*, 2017, 562.

1417 MuSchG, sec. 18, 19 para. 2.

1418 *Ibid.*, sec. 17.

1419 Dahm, “MuSchG § 1 Anwendungsbereich, Ziel des Mutterschutzes,” para. 30; Frank Bayreuther, “Das neue Mutterschutzrecht im Überblick,” *NZA*, 2017, 1149; Benkert, “Neuregelung des Mutterschutzes,” 562.

national lawmakers retain discretion. However, where EU law is concerned, issues arise because Germany and, to some extent, the UK interpret autonomous EU concepts more broadly than Lithuania – even though uniform interpretation across member states is required. If these broader interpretations prevail, it would imply that numerous Lithuanian regulations are not fully aligned with EU law, particularly because they exclude certain freelance workers. This issue is especially apparent in the area of occupational health and safety. Both Germany and the UK, based on their interpretation of the personal scope of Directive 89/391/EEC, include certain self-employed individuals within the protective framework, treating them similarly to employees. Lithuania, by contrast, only extends such protections to specific groups like public sector employees and interns. Should this broader interpretation be confirmed, Lithuania would already be required to ensure comparable protections for freelance workers – at minimum, for those engaged by ‘state’ companies under the CJEU’s broad definition, thus operating within vertical relationships. Whether freelance workers in purely horizontal relationships must also be covered remains disputed, depending largely on whether Art. 31 para. 1 CFR is recognized as having horizontal effect. In any case, legislative action by the Lithuanian legislator would be necessary.

Similarly, the question arises whether certain freelance workers in Lithuania should also be entitled to vacation rights vis-à-vis their work providers. The CJEU has already confirmed that Art. 31 para. 2 CFR can have horizontal effect. However, in the case *Yodel*, the CJEU adopted a rather narrow interpretation of the personal scope of the Working Time Directive 2003/88/EC, suggesting that freelance workers generally fall outside its protection. Consequently, the broader application of these rules in UK and German law appears to reflect national initiatives rather than EU requirements and thus does not impose obligations on Lithuania.

The same reasoning applies to the UK’s decision to extend minimum wage protections to limb (b) workers, as well as Germany’s inclusion of employee-like persons in whistleblower thresholds regarding obligations to setup internal reporting channels for employers. While it would be reasonable – considering the objectives of the Whistleblower Directive (EU) 2019/1937 – to include certain self-employed individuals, the EU legislator likely did not intend it.

The most significant divergence arises in the context of gender equality and non-discrimination. Germany’s particularly broad interpretation could have substantial consequences. Equal pay for equal work, as also enshrined in Art. 23 CFR, is a fundamental principle of EU law and could, under certain circumstances, even produce horizontal effect¹⁴²⁰. Of particular interest is the right of an employee-like freelance worker under German law to request information about pay conditions at their work provider. The secondary law counterpart to this provision is first found in Art. 21 para. 4 of Directive 2006/54/EC, which merely states that employers ‘shall be encouraged’ to provide such information, without creating an enforceable right. One could argue

1420 Cf. CJEU, Judgment of 8 April 1976, *Defrenne II*, C-43-75, EU:C:1976:56; CJEU, Judgment of 15 June 1978, *Defrenne III*, 149/77, EU:C:1978:130.

– albeit tenuously – that the Lithuanian rules placing the burden of proof on the employer in wage discrimination cases¹⁴²¹ might imply a broader understanding of the employment relationship. Furthermore, with the necessary transposition of Directive (EU) 2023/970, which establishes in Art. 7 an equivalent to the German right to information, this question could arise – despite the Directive’s seemingly narrower personal scope of application – since the broad German interpretation is derived directly from EU law.

The German legislator’s approach in this case seems fundamentally sound. The principle of non-discrimination under EU law demands equal conditions for equal work, regardless of the formal structure of the employment relationship or associated employment statuses. It is thus appropriate to focus on the substance of the work and the underlying dynamics rather than formalistic categories. This area represents the greatest potential risk for Lithuanian employment law concepts, even though the German interpretation does not automatically mandate changes to current Lithuanian law.

Questionable is the German extension of protection against dismissal to employee-like women working under service contracts or contracts to produce a work. Certain associations can be drawn with Art. 33 CFR. However, as Art. 33 CFR refers explicitly to ‘dismissal’, an extension to the termination of civil law contacts likely remains a national choice by Germany rather than a direct requirement of EU law – even if the CJEU interpreted ‘dismissal’ broadly in the case *Danosa*¹⁴²². However, there is at least potential for such extension. In summary, two areas of individual employment law can be identified where, according to German and/or UK interpretations of EU law, Lithuania may not fully comply with its EU obligations if it fails to extend protection to certain self-employed individuals:

- occupational health and safety;
- non-discrimination.

In the case of non-discrimination, a failure to comply would be particularly serious, as certain freelance workers could already today be entitled to specific employment rights against their private-law work providers due to the potential horizontal effect of the respective provisions. A similar argument could be made regarding the right to the limitation of maximum working hours, daily and weekly rest periods, and annual paid leave under Art. 31 para. 2 CFR. However, the CJEU’s judgment in the case *Yodel* has already limited these possibilities – at least for the time being.

5.2. Applicability of collective employment law

5.2.1. The right to establish and form trade unions

In Germany, the formation of and participation in trade unions is protected by the

¹⁴²¹ LR MVLGI, *e-TAR*, art. 3, accessed April 18, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.746227138BCB/alhvQvNwGw>; LR DK, art. 26 para. 5.

¹⁴²² Cf. CJEU, *Danosa*.

constitution. The right to form associations for the protection and promotion of working and economic conditions is guaranteed for everyone and for all professions. Agreements that restrict or seek to hinder this right are null and void, and measures aimed at this are unlawful¹⁴²³. Therefore, self-employed persons can also become members of and form trade unions and have the union represent their interests.

In the UK, there are protections against discrimination related to trade union membership or activities, including for limb (b) workers¹⁴²⁴. Whereas unfair dismissal in connection with trade union activities is in general just prohibited when it comes to employees¹⁴²⁵, an employer is also prohibited from treating limb (b) workers detrimentally due to their trade union membership or involvement in union activities. This means it is illegal to refuse to recruit a person or subject them to unfair treatment because of their union activities¹⁴²⁶.

In Lithuania, all natural persons with legal capacity to work are free to form and join trade unions at state, sectoral or territorial level and to participate in their activities. But only employees of the company or its structural unit may be members of trade unions organized at the level of the company or its structural unit¹⁴²⁷. Members of trade unions who are legally employed under employment contracts or on other legal grounds in the territory of the Republic of Lithuania shall have all the rights and obligations of members of a trade union as laid down in the statutes of trade unions¹⁴²⁸. The wording 'on other grounds' suggests that the possibility was created for self-employed to at least join trade unions on at state, branch or territorial level and enjoy the same rights¹⁴²⁹. However, only employees of a company or its structural unit are still allowed to be members of the associated company union and to form such unions – self-employed freelance workers are not. It is questionable whether the definition 'on other grounds' is to be understood broadly and also includes economically dependent self-employed persons or whether only persons are included who are in a legal relationship that is governed by a legal act. The LR GPMĮ can help with interpretation: An employment relationship or its equivalent is:

“a relationship in which work is carried out on the basis of an employment contract, as well as any other activity carried out on the basis of a legal relationship which, in substance (by agreeing on remuneration conditions, the location and functions of the workplace, the discipline of the workplace, etc.), corresponds to the relationship

1423 GG, art. 9.

1424 TULRCA 1992, sec. 296, 146.

1425 Ibid., sec. 152.

1426 Ibid., sec. 146.

1427 LR PSĮ, *e-TAR*, art. 1, accessed March 22, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.ABF3AEE57087/asr>.

1428 Ibid., art. 2.

1429 'Kurjerių asociacija', which is part of the trade union 'Gegužės 1-osios profesinės sąjungos (GIPS)', represents the interests of couriers from companies such as 'Wolt' or 'Bolt food'.

between the employer and the employee created by an employment contract.”¹⁴³⁰

Even though this still indicates that economically dependent self-employed persons might also be included, the state tax inspectorate VMI interprets this definition much more narrowly. Accordingly, such relations are those which are not established on the basis of an employment contract, but by other legal acts regulating relations, but are analogous to employment relations, i.e. fulfil the essential conditions characteristic of an employment contract¹⁴³¹. As an example, the legal relations of the civil service¹⁴³² and the legal relations of the professional military service¹⁴³³ are mentioned¹⁴³⁴. The scope of the group of persons is thus exhaustively defined¹⁴³⁵.

If the term, on trade unions, is interpreted so narrowly that only legally defined legal relations are covered, freelance workers cannot become full members of trade unions. They would have all the rights and obligations of trade union members set out in the trade union’s statutes, but not the right to vote on decisions concerning the announcement of a strike, the conclusion and implementation of collective agreements as well as other matters which may affect employees or, for other reasons established by law, the rights and obligations of working individuals¹⁴³⁶. This means that although freelance workers have passive trade union membership rights, they do not have the opportunity to actively shape the trade union and its activities. Doubts arise concerning such an exclusion of certain groups – particularly freelance workers – from trade union activities when viewed against the backdrop of higher-ranking legal norms. While freelance workers may formally enjoy passive trade union rights, their inability to actively assert these rights would clearly contravene Art. 11 ECHR, which explicitly recognizes collective bargaining as one of the essential elements of the right to form and join trade unions for the protection of a worker’s interests¹⁴³⁷. If, however, membership in a trade union does not entail the possibility of engaging in collective bargaining, such membership is rendered largely symbolic or even meaningless. The ECSR accordingly extended the scope of Art. 6 para. 2 RESC – the right to bargain

1430 LR GPMĮ, art. 2 para. 31.

1431 VMI, “KM0292 11/22/18.”

1432 LR VTĮ, e-TAR, accessed April 13, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.D3ED3792F52B/asr>.

1433 Lietuvos Respublikos krašto apsaugos sistemos organizavimo ir karo tarnybos įstatymas, e-TAR, accessed April 13, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.15C705E93776/asr>.

1434 VMI, “KM0292 11/22/18.”

1435 Cf. Rytis Krasauskas, “Pagrindiniai pokyčiai skatinant kolektyvines derybas,” in *Besikeičiantys darbo santykiai ir jų reguliavimas Lietuvoje*, by Ingrida Mačernytė-Panomariovienė et al. (Vilnius: Mykolo Romerio universitetas, 2023), 319.

1436 LR PSĮ, art. 2.

1437 ECtHR, *Demir and Baykara v. Turkey*, para. 145–154; It should be noted, however, that Art.11 ECHR does not include the right to strike. When applicants argued that the right to establish and join a trade union encompasses also a right to strike, their claim was denied, cf. ECtHR, *Schmidt and Dahlström v. Sweden*; Likewise, the right to consultation and a union’s right to recognition for collective bargaining were not considered fundamental aspects of Art. 11 ECHR, cf. ECtHR, Judgment of 27 October 1975, *National Union of Belgium Police v Belgium* (No. 4464/70).

collectively – to self-employed individuals in need of social protection¹⁴³⁸ who are *de facto* dependent on one or more contracting parties. This interpretation casts further doubt on the compatibility of Lithuanian legal provisions with supranational and constitutional guarantees. The question of which specific freelance workers should be entitled to this right – be it freelance workers “in a situation comparable to that of workers”¹⁴³⁹, those working side-by-side with employees for the same counterparty, platform workers, or economically dependent solo self-employed persons – remains subject to ongoing debate. Nevertheless, the complete exclusion of such individuals from active trade union rights would undoubtedly infringe upon their fundamental rights¹⁴⁴⁰. In light of the prevailing broad interpretations of Art. 11 ECHR¹⁴⁴¹, Art. 6 para. 2 RESC¹⁴⁴², and a rights-consistent reading of Art. 28 CFR, alongside the ILO Conventions No. 87 and No. 98¹⁴⁴³ and Art. 50 and 51 of the Lithuanian Constitution – as discussed throughout this dissertation – at least such a blanket restriction is not legally justifiable. This also applies to the right to strike, despite not being a fundamental aspect of Art. 11 ECHR¹⁴⁴⁴, because if Art. 28 CFR is understood to include certain self-employed individuals, the same scope must logically extend to the right to take collective action, including striking. This interpretation also informs the understanding of Art. 51 of the Lithuanian Constitution. Accordingly, certain freelance workers would, under higher-ranking law, be entitled to the same rights related to trade union membership and collective action as traditional employees – even though the exact boundaries of this group remain unsettled. It is clear, however, that not all self-employed persons are covered.

5.2.2. The right to collective bargaining

A collective bargaining power granted by national law to trade unions or associations of economically dependent self-employed persons may conflict with the general prohibition of practices which may negatively affect competition in the EU under Art. 101 para. 1 TFEU¹⁴⁴⁵. Accordingly, all agreements between undertakings, decisions by

1438 ECSR, *Irish Congress of Trade Unions v. Ireland*, para. 37; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1439 European Commission, “Commission Guidelines on the Application of EU Competition Law,” para. 20.

1440 Cf. *ibid.*, 26 ff., 28 ff., 32 ff.

1441 Cf. ECtHR, *Sindicatul ‘Păstorul Cel Bun’ v. Romania*; ECtHR, *Demir and Baykara v. Turkey*.

1442 Cf. ECSR, *Irish Congress of Trade Unions v. Ireland*, para. 37; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1443 Cf. ILO, *Freedom of Association*, para. 387 ff.; Countouris and De Stefano, “New Trade Union Strategies for New Forms of Employment,” 50 ff.; Kountouris, “The Concept of ‘Worker’ in European Labour Law,” 221 ff.

1444 Cf. ECtHR, *Schmidt and Dahlström v. Sweden*.

1445 TFEU, art. 101 para. 1.

associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the single market are prohibited¹⁴⁴⁶. Collective agreements for the protection of economically dependent self-employed persons in most cases fulfil the facts of the prohibition of competition restrictions in Art. 101 para. 1 TFEU¹⁴⁴⁷.

For this to be the case, the working individuals would not have to be qualified as workers or employees, but as undertakings within the meaning of Art. 101 para. 1 TFEU. Employees, unlike economically dependent self-employed persons, do not fall under the definition of an undertaking under EU competition law. In making this distinction, the CJEU refers to the criterion of personal dependence of the concept of worker under the free movement of workers¹⁴⁴⁸. In the case of solely economically dependent self-employed persons, however, the criterion of personal dependence by being bound by instructions does not exist¹⁴⁴⁹. Yet, in the case of economic dependence on their employer, they could be qualified as undertakings in the sense of EU competition law and would consequently be addressees of Art. 101 para. 1 TFEU. The addressees of Art. 101 para. 1 TFEU are not only undertakings but also associations of undertakings¹⁴⁵⁰. The legal form of these associations is irrelevant for the qualification as an association of undertakings¹⁴⁵¹. Trade unions would also be considered an association of undertakings if they collectively represent the interests of self-employed persons and possibly even conclude collective agreements for them¹⁴⁵². Art. 101 para. 1 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the restriction of competition. Collective agreements do not fit easily into this definition, as they are agreements that include both sides of a market for labor or services.

The question is therefore whether the exception¹⁴⁵³ that exists according to the case law of the CJEU for collective agreements for the protection of workers or employees also applies to collective agreements for the benefit of certain solo self-employed persons. In this regard, the CJEU ruled that collective agreements concerning self-employed persons are only exempt if “the service providers” are “false self-employed”

1446 Ibid.

1447 Cf. Achim Seifert, *Kollektivverträge für wirtschaftlich abhängige Selbständige und unionsrechtliches Kartellverbot*, HSI-Schriftenreihe, Band 42 (Frankfurt am Main: Bund-Verlag, 2022).

1448 CJEU, *Coöperatieve Vereniging ‘Suiker Unie’ UA*, para. 538, 540; CJEU, *Becu*, para. 26; CJEU, *Confederación Española de Empresarios de Estaciones de Servicio*, para. 45.

1449 CJEU, *FNV Kunsten*, para. 27.

1450 CJEU, Judgment of 12 September 2000, *Pavlov*, C-180/98, EU:C:2000:428, para. 86; CJEU, Judgment of 19 February 2002, *Wouters*, C-309/09, EU:C:2002:98, para. 56.

1451 Cf., i.a., CJEU, Judgment of 30 January 1985, *BNIC*, C-123/83, EU:C:1985:33, para. 19.

1452 Cf. CJEU, *FNV Kunsten*, para. 28.

1453 CJEU, *Albany*, para. 60.

persons, i.e. are “in a situation comparable to that of those workers”¹⁴⁵⁴. It raises the question whether this has introduced an intermediate category for economically dependent self-employed persons¹⁴⁵⁵ as it is partially understood in German literature and the CJEU has made a rather unfortunate conflation of employee-like and false self-employment, or whether the CJEU intended to only cover false self-employed persons who have been wrongly classified (by national law) as self-employed and are actually workers instead. The latter interpretation is more likely, and the idea that the CJEU could have developed a concept similar to the employee-like person under German law seems rather too German-centric. The CJEU’s reasoning can be explained by the fact that the concept of false self-employment in EU law does not align perfectly with national law. A person can be considered false self-employed under EU law and simultaneously genuinely self-employed under national law, and *vice versa*, depending on whether the EU or national concept is applied more broadly. The existence of intermediary concepts such as employee-like persons only further amplifies this effect, as such a concept does not yet exist in EU law and the CJEU faces the dilemma of categorizing such individuals, despite their *de facto* existence, either as workers or as self-employed persons¹⁴⁵⁶.

In Germany, the collective bargaining regulations, governed by the TVG, do not apply *per se* to self-employed persons, but it does apply explicitly to employee-like persons¹⁴⁵⁷. As early as 1974, the legislator extended the autonomy of collective bargaining to employee-like persons¹⁴⁵⁸ and created an exception to the prohibition of agreements restricting competition for these actually self-employed persons¹⁴⁵⁹. This means that German collective bargaining law also applies to persons who are economically dependent and in need of social protection comparable to an employee (employee-like persons)¹⁴⁶⁰. This right by employee-like persons for collective bargaining applies to

1454 CJEU, *FNV Kunsten*, para. 42.

1455 Affirmative, cf. Eva Kocher, “GRC Art. 28 Recht auf Kollektivverhandlungen und Kollektivmaßnahmen,” in *Frankfurter Kommentar zu EUV, GRC und AEUV*, by Matthias Pechstein, Carsten Nowak, and Ulrich Häde (Tübingen: Mohr Siebeck, 2017), para. 15; Wank, “Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff” 37; Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” 195 ff.; ECSR, *Irish Congress of Trade Unions v. Ireland*, para. 115 – “Art. 101 TFEU <...> allows for the exemption of certain categories of self-employed workers”; rather dismissive, cf. Jochen Mohr and Paul Mey, “Kollektivverträge über die Tätigkeitsbedingungen von Solo-Selbständigen nach den neuen Leitlinien der Kommission,” *Neue Zeitschrift für Kartellrecht*, 2022, 670 ff.

1456 Cf. Wank, “Beschäftigungsverhältnisse außerhalb des Arbeitsrechts im Unionsrecht,” 129–32.

1457 TVG, sec. 12a para. 1.

1458 Gesetz zur Änderung des Heimarbeitsgesetzes und anderer arbeitsrechtlicher Vorschriften (Heimatarbeitsänderungsgesetz), *Bundesgesetzblatt Online*, art. II sec. 1, accessed April 13, 2025, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl174s2879.pdf.

1459 *Ibid.*

1460 *Ibid.*

national, territorial as well as collective agreements at employer level¹⁴⁶¹. Atypical employment relationships are even considered to be in particular need of regulation by collective agreements¹⁴⁶². There are practical examples of collective agreements that apply specifically to certain freelance workers ('freie Mitarbeiter') in Germany¹⁴⁶³. Such persons who provide artistic, literary or journalistic services, as well as persons who are directly involved in the provision, in particular the technical design, of such services, are even covered by collective agreements under more favorable conditions. Even though the extension of collective agreement provisions to employee-like persons has existed in theory for about 50 years now, its practical significance has so far largely been limited to the area of freelance work in German public service broadcasting¹⁴⁶⁴. However, it is quite conceivable that this will change in the course of the digitalization of the world of work, e.g., for freelance workers who are not considered employees, but provide services digitally or for platforms if they work predominantly (i.e. in principle more than 50%) for another person on the basis of a civil contract, provide the services owed personally and essentially without the cooperation of own staff or if they receive from that person on average more than half of the remuneration to which they are entitled for their gainful employment as a whole. Against this background, the instrument of the employee-like person in Germany is up for debate in the form of the question of whether it still does justice to its protective purpose, whether it needs to be readjusted or whether new instruments are needed to enable workers in the transitional area between dependent and self-employed work to better collectively negotiate their working conditions and income¹⁴⁶⁵. This is particularly relevant in light of the prohibition in Art. 101 TFEU¹⁴⁶⁶. The CJEU ruled that collective agreements between employers and trade unions, which solely regulate working conditions, do exceptionally not fall under Art. 101 TFEU¹⁴⁶⁷. This could be understood as a potential way to exempt certain solo self-employed individuals from Art. 101 TFEU. Similar considerations are reflected in the guidelines of the European Commission from 2022 which provide to exclude certain self-employed persons if they are "in a situation comparable

1461 Katja Nebe, "TVG §1 Inhalt und Form des Tarifvertrages," in *Tarifvertragsgesetz: mit Arbeitnehmer-Entsendegesetz*, by Wolfgang Däubler et al. (Baden-Baden: Nomos, 2016), para. 251.

1462 Ibid.

1463 E.g., collective agreement at employer level for freelance journalists at daily newspapers who are similar to employees, cf. "Tarifvertrag für Freie Mitarbeiterinnen des Mitteldeutschen Rundfunks," accessed April 13, 2025, <https://rundfunk.verdi.de/++file++5645c43f7713b8087600041a/download/Tarifvertrag%20f%C3%BCr%20freie%20Mitarbeiter.pdf>.

1464 Birgit Reinecke and Stephanie Rachor, "TVG §12a Arbeitnehmerähnliche Personen," in *Tarifvertragsgesetz: mit Arbeitnehmer-Entsendegesetz*, by Wolfgang Däubler et al. (Baden-Baden: Nomos, 2016), para. 9.

1465 Cf. BMAS, "Arbeit weiterdenken – Weißbuch Arbeiten 4.0," Bundesministerium für Arbeit und Soziales, 174, accessed April 13, 2025, https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/a883-weissbuch.pdf?__blob=publicationFile&v=2.

1466 TFEU, art. 101 para. 1.

1467 CJEU, *Albany*, para. 59–64.

to that of workers¹⁴⁶⁸, from this prohibition, ensuring their fundamental rights are not restricted¹⁴⁶⁹. Alongside economically dependent individuals, who bear some similarity to the German legal framework, the guidelines go much further by exempting not only economically dependent solo self-employed persons, but also solo self-employed persons working ‘side-by-side’ with employees for the same counterparty, as well as platform workers¹⁴⁷⁰. To date, the issue remains unresolved whether agreements concluded by freelance workers would similarly be exempt if they exclusively negotiate their working conditions. The guidelines proposed by the EU serve as an indicator that this would be the case; however, the final decision ultimately rests with the CJEU. But even if the CJEU were not to follow this view, a differentiated analysis at various levels would be necessary. Such agreements would still need to have the potential to disrupt competition to be prohibited according to Art. 101 TFEU. In the case of freelance workers, however, particularly those working for a large platform that itself holds possibly a dominant market position, agreements between freelance workers could, in fact, serve to establish competition vis-à-vis the platform in the first place.

Also in the UK, limb (b) workers generally possess similar collective rights to those of employees¹⁴⁷¹. However, for a union to engage in collective bargaining on behalf of limb (b) workers, it must be recognized by the employer, either voluntarily or through a statutory process¹⁴⁷². Limb (b) workers’ ability to engage in collective bargaining depends on whether their employer recognizes a union for such purposes. If a trade union seeks to represent limb (b) workers, it must reach a voluntary agreement with the employer for collective bargaining. There is no statutory requirement for employers to recognize unions for limb (b) workers unless specific recognition agreements are established. Under the TULRCA 1992, trade unions can seek statutory recognition if they have the support of a significant portion of the workforce, including limb (b) workers¹⁴⁷³.

In Lithuania, trade unions represent their members (they can also be representatives of the employees’ collective) by concluding collective and other agreements with the employer¹⁴⁷⁴. They have the right to negotiate and conclude collective bargaining agreements with employers, their organizations or associations¹⁴⁷⁵. Only trade unions may represent their members, the employees, in collective bargaining, depending on

1468 European Commission, “Commission Guidelines on the Application of EU Competition Law,” para. 20.

1469 Cf. *ibid.*, 26 ff., 28 ff., 32 ff.

1470 Cf. *ibid.*

1471 Alessio Bertolini and Ruth Dukes, “Trade Unions and Platform Workers in the UK: Worker Representation in the Shadow of the Law,” *ILJ* 50, no. 4 (November 27, 2021): 666, doi:10.1093/indlaw/dwab022.

1472 TULRCA 1992, schedule A1.

1473 Cf. TULRCA 1992, schedule A1.

1474 LR PSĮ, art. 11.

1475 *Ibid.*, art. 12.

the level of collective bargaining¹⁴⁷⁶: at the employer level¹⁴⁷⁷, at the level of the branch (production, service, professional)¹⁴⁷⁸, at territorial level¹⁴⁷⁹ and at the national level¹⁴⁸⁰. For certain self-employed persons, collective bargaining agreements could only theoretically be negotiated at territorial and national level¹⁴⁸¹, but not on employer or branch level. The literature takes the view that the associations of self-employed persons, if they are considered as such under Lithuanian law, have no right to collective bargaining and the right to call collective action¹⁴⁸². Beyond the fact that such a restriction appears arbitrary and lacks clear legal justification, the absence of active trade union rights for freelance workers renders the right to union membership largely illusory. A trade union can only provide meaningful and democratic worker representation if its members are able to participate actively in its functions. Without this, freelance workers become ‘collective beggars’¹⁴⁸³ in a double sense: on the one hand, they lack direct access to negotiations with their contracting entities, and on the other, they are dependent on trade unions to negotiate terms on their behalf – terms over which they would have only limited influence. As outlined in the previous chapter, such a blanket restriction on (active) trade union rights is incompatible with higher-ranking legal norms, including international human rights standards and EU fundamental rights.

5.2.3. Representation by works councils

If an employer employs five employees, employees in Germany have the right to elect a works council¹⁴⁸⁴. The concept of ‘employee’ under the relevant BetrVG is based on the general definition found in employment law. However, it is narrower in some respects – for instance, close relatives of the employer and most executive employees are excluded. At the same time, the definition is broader in other respects – e.g., civil servants and soldiers are considered employees within the meaning of the BetrVG¹⁴⁸⁵.

The works council has not only consultation rights but also far-reaching co-determination rights¹⁴⁸⁶. In Germany, self-employed persons, such as freelance workers, are not subject to the care of the works council, they themselves are not employees and thus not entitled to form one. It is even more the statutory task of existing works

1476 LR DK, art. 188 para. 1.

1477 Ibid., art. 188 para. 2 and 3.

1478 Ibid., art. 192 para. 4, art. 179 para. 3.

1479 Ibid.

1480 Ibid., art. 192 para. 2, art. 179 para. 3.

1481 LR PSĮ, art. 11.

1482 Cf. Davulis, “Savarankiška dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką,” 72.

1483 Cf. Ewing and Hendy, “The Dramatic Implications of Demir and Baykara,” 180.

1484 BetrVG, sec. 1 para. 1.

1485 Cf. BAG, Beschl. v. 5.12.2012 - 7 ABR 48/11, para. 17.

1486 BetrVG, sec. 87.

councils to protect their ‘own’ employees from activities that were originally done by these employees or could be done by them and being instead outsourced to self-employed persons¹⁴⁸⁷. If the employer has integrated self-employed persons into the company so that they, together with the employees already employed there, realize the work-related purpose of the company by working according to instructions, this may constitute a so-called ‘recruitment’ (‘Einstellung’). The works council can then demand that the job positions be advertised for regular employees instead of assigning the work to self-employed persons¹⁴⁸⁸. Therefore, one of the basic problems is not only the question of whether freelance workers can form and participate in works councils, it is even the task of works councils to act against freelance workers.

In the UK, there is no statutory framework for works councils as seen in other European countries. Instead, trade unions serve as the primary mechanism for consultation and representation in the workplace. Despite the absence of a formal system for works councils, UK legislation does mandate the consultation of employees on specific matters. For instance, employers are required to consult with employee representatives when proposing to make a certain amount of employees redundant within a certain period¹⁴⁸⁹. However, it is important to note that these consultation obligations are limited to employees as defined under TULRCA 1992¹⁴⁹⁰, which only refers to individuals with a traditional contract of employment (limb (a) workers). This means that limb (b) workers are not covered by these statutory consultation requirements.

In Lithuania, the election of the works council must even be initiated by the employer if the number of employees of the employer is at least 20¹⁴⁹¹. The works council essentially only has consultation rights¹⁴⁹² and, e.g., participation rights in establishing the criteria for social selection in the event of dismissal¹⁴⁹³. If self-employed persons are not employees, they cannot establish a works council. It is also questionable whether an existing works council at the employer would need to represent the interests of the persons engaged by the employer on a self-employment basis. However, this question must be answered in the negative, since according to the LR DK, the works council only represents the employer’s employees, whereas the self-employed persons do not fulfil this definition. On the contrary, as in Germany, it would even be obliged to protect these employees against these ‘third-party’ self-employed freelance workers.

1487 Ibid., sec. 80 para. 2, sec. 99.

1488 Ibid., sec. 93; BAG, *Beschl. v. 27.07.1993 - 1 ABR 7/93, NZA, 1994, 92–94.*

1489 TULRCA 1992, sec. 188 para. 2.

1490 Ibid., sec. 296 and 297.

1491 LR DK, art. 169 para. 1.

1492 Ibid., art. 174.

1493 Ibid., art. 207.

6. APPLICABILITY OF COMPREHENSIVE SOCIAL SECURITY LAW FOR FREELANCE WORKER

As in employment law, the question of the legal classification of the employment relationship also plays a central role in social security law.

Supranational legal frameworks provide only limited concrete requirements regarding the specific design of national social security systems and offer, at best, a qualified obligation to include certain categories of working individuals within their scope. When it comes to social security in the ILO context, there are several instruments. Mention must be made to the Social Security (Minimum Standards) Convention No. 102 which laid the foundation for ILO's social security regulation¹⁴⁹⁴. Furthermore, ILO's Social Protection Floors Recommendation No. 202, as one of the more recent instruments, offers a robust and action-oriented framework designed to support states in addressing the persistent gaps in social protection systems¹⁴⁹⁵. In the field of social security, ILO instruments are generally categorized into two main types of standards: 'harmonization' standards, which aim to establish common minimum levels of protection across countries, and 'coordination' standards, which are designed to facilitate the portability and continuity of social security rights, particularly in the context of cross-border employment and migration¹⁴⁹⁶.

Accordingly, the regulatory impact of ILO instruments on countries such as the Germany, the UK and Lithuania – with their well-developed welfare systems – is relatively limited. This is particularly true when it comes to the inclusion of certain categories of working individuals who fall outside the scope of traditional employment relationships. In this regard, ILO instruments generally provide only minimal guidance. Only a few instruments specifically address these non-standard forms of work or extend protections to such groups. However, certain ILO conventions explicitly require member states to give particular attention to individuals or groups who are either not covered or insufficiently protected by existing social security systems – especially those who have traditionally faced structural disadvantages, such as agricultural workers¹⁴⁹⁷ and those employed in the informal economy¹⁴⁹⁸, a category that often includes freelance workers. Extending social protection to informal workers is identified by the ILO as a key objective, reflecting the broader commitment to

1494 Cf. Social Security (Minimum Standards) Convention No. 102, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312247:NO.

1495 Cf. Social Protection Floors Recommendation No. 202, accessed March 17, 2025, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524.

1496 "Right to Social Security" (New York and Geneva: ILO, 2025), 13, <https://www.ohchr.org/sites/default/files/2025-02/OHCHR-ILO-Fact-Sheet-39-Right-to-Social-Security.pdf>.

1497 Cf. Convention No. 11.

1498 Cf. Recommendation No. 204.

achieving inclusive and comprehensive coverage¹⁴⁹⁹.

A similar picture emerges when examining European instruments. The European Code of Social Security of 1964¹⁵⁰⁰, which can in part be seen as a regional counterpart to the ILO's Convention No. 102, primarily focuses on the establishment of minimum standards rather than expansive guarantees. Likewise, EU secondary law in the field of social security serves – apart from ensuring non-discriminatory access and the safeguarding of acquired entitlements – predominantly a coordinating function, rather than creating substantive rights. This is particularly evident in instruments such as Regulation (EC) No. 883/2004, which governs the coordination of national social security systems within the EU to ensure continuity of coverage and the portability of entitlements in cross-border situations¹⁵⁰¹. Social rights are even largely absent from the ECHR. With only a few exceptions, the ECHR does explicitly not protect socio-economic entitlements. One notable exception is Art. 1 of Protocol No. 1 to the ECHR, under which certain social benefits may qualify as possessions and thus fall within the scope of property rights¹⁵⁰².

Significantly more explicit references to social rights can be found in the RESC. Art. 12 RESC expressly guarantees the right to social security, although it refrains from prescribing concrete entitlements or defining the scope of that right in detail. A more developed articulation of this principle appears in Art. 34 para. 1 CFR. While Art. 34 para. 1 CFR refers to the provision of benefits in cases such as illness, old age, or loss of employment, the precise scope and content of these entitlements remain undefined, requiring explicit elaboration through national legislation. Although Art. 34 para. 1 CFR does not merely serve a symbolic or declaratory function¹⁵⁰³, it is generally understood to embody a principle rather than a directly enforceable right. As such, it only achieves its full legal effect upon implementation through legislative or regulatory measures. Until then, it does not confer justiciable individual rights in itself¹⁵⁰⁴. Accordingly, in contrast to employment law, states retain significantly greater discretion in shaping their national social security systems. The influence of higher-ranking legal norms on the concrete design and scope of these systems has, thus far, remained relatively limited.

1499 “General Comment No. 19, The Right to Social Security (Art. 9), 39th Session” (Geneva: UN Committee on Economic, Social and Cultural Rights, 2007), para. 34, <https://digitallibrary.un.org/record/618890?ln=en&v=pdf>.

1500 Cf. European Code of Social Security (Revised), accessed March 21, 2025, <https://rm.coe.int/168007b3d6.European+Code+of+Social+Security>

1501 Cf. Regulation (EC) No 883/2004.

1502 Cf. ECtHR, Judgment of 12 April 2006, *Stec and Others v. The United Kingdom* (Nos. 65731/01 and 65900/01).

1503 Thorsten Kingreen, “EU-GRCharta Art. 34 Soziale Sicherheit und soziale Unterstützung,” in *EUV/AEUV*, by Christian Calliess et al. (Munich: C.H. Beck, 2022), para. 1.

1504 Hans D. Jarass, “EU-Grundrechte-Charta Art. 34 Soziale Sicherheit und soziale Unterstützung,” in *Charta der Grundrechte der Europäischen Union*, by Hans D. Jarass (Munich: C.H. Beck, 2021), para. 3.

A further question that arises is whether social security law simply acts as a consequence of employment law or takes into account further considerations – i.e. whether it applies based on the same personal or a divergent scope of application. The question of extending social security law to individuals beyond traditional employees gained renewed attention in 2019 with the Council Recommendation on Access to Social Protection for Workers and the Self-Employed¹⁵⁰⁵. This recommendation urged member states to ensure access to adequate social protection and establish minimum standards not only for employees but also for self-employed individuals. Specifically, it advocated for making social security protections mandatory for all workers, regardless of whether they work in an employment relationship or not and extending coverage to the self-employed – at least on a voluntary opt-in basis, and where appropriate, on a mandatory basis for all professionally active individuals. The Recommendation places particular emphasis on ensuring continuous protection during transitions between employment and self-employment, or *vice versa*¹⁵⁰⁶. According to the Recommendation, the key objective would be to align social protection with the specific purpose of each branch of social insurance and to ensure that adequate coverage – at least on a voluntary basis – is provided to those who need it, regardless of the structure of the type of their work relationship¹⁵⁰⁷. A distinction is made between formal coverage – meaning that legislation or collective agreements entitle a specific group of working individuals to participate in a social protection scheme – and effective coverage, which ensures that these working individuals actually receive the promised benefits. In practice, formal coverage does not always translate into effective protection, as legislative requirements such as time thresholds (qualifying periods or waiting periods) or income thresholds may exclude certain working individuals whose work patterns do not allow them to meet these conditions. Qualifying periods require individuals to have completed a certain period of insurance, contribution payments, work, or residence before becoming eligible for benefits. A specific type of qualifying period is the minimum working period, which mandates a certain number of years of work to gain entitlement. Waiting periods, on the other hand, apply after eligibility has been established – meaning that even once a person qualifies for a benefit, they must wait a set period before payments would begin. Additionally, income thresholds may determine both initial access to social protection schemes and the entitlement to specific benefits, requiring a minimum amount of earnings or contributions before a working individual can claim support¹⁵⁰⁸.

Self-employed individuals, even when formally covered, typically encounter restrictions regarding recognized insurance periods compared to employees due to less continuous work patterns. A key issue is whether periods without professional

1505 Cf. “Council Recommendation of 8 November 2019 on Access to Social Protection for Workers and the Self-Employed (2019/C 387/01)”

1506 Cf. *ibid.*, points 1, 8.

1507 *Ibid.*, point 11.

1508 Cf. *ibid.*, points 7-11.

income, contributions, or active work – such as those due to sickness, unemployment, disability, parental leave, times between assignments or longer career breaks – would still count as insured periods. If a self-employed person lacks protection for these risks, they cannot claim assimilated periods, making it more difficult to meet the minimum qualifying record or to accumulate sufficient insurance periods for a decent level of benefits. Applying rules originally designed for employees to the self-employed without modification can create challenges. While the goals of these rules remain the same, their strict application may not align with the realities of non-standard work¹⁵⁰⁹. Unlike employment law, social security systems usually operate on a pay-as-you-go basis and must ensure both financial sustainability and fairness for the community of contributors. Given that many freelance workers have irregular work patterns or reduced working hours, eligibility criteria based on full-time work per day or week, which are aligned with the idea of the SER, may need to be adjusted.

Having explored the importance and practical challenges of distinguishing between self-employment and employment status (as well as persons working somewhere between) within the context of employment law, it is equally crucial to examine how such a distinction is drawn in the realm of social security law. The following discussion will analyze how Germany, the UK, and Lithuania define and differentiate between self-employed and employed status within their social security systems and whether their systems have already implemented tools that enable them to address these challenges.

6.1. Germany

Although the criteria used in Germany to determine employment status in social security and employment law have many overlaps, the concepts are not necessarily interchangeably. This is evident from the fact that both areas of law contain different definitions in the respective statutes. Additionally, different branches of the judiciary are responsible for each area, which can lead to varying interpretations of similar terms. For instance, the concept of an employee-like person under employment law plays no role in social insurance law¹⁵¹⁰, but there exist so-called ‘employee-like self-employed persons’ in certain branches of insurance. The social security status of the person working is mainly linked to the term ‘Beschäftigter’¹⁵¹¹. Insurance in all branches of social security applies to all employees who work for remuneration¹⁵¹². The work of a ‘Beschäftigter’ is defined as ‘non-self-employed work, in particular in an

1509 Schoukens and Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers*, 64 ff.

1510 Christoph Herrmann, “Arbeitnehmerähnliche Person,” in *Arbeitsrecht: Individualarbeitsrecht, Kollektives Arbeitsrecht, Prozessrecht: alphabetische Gesamtdarstellung*, by Martina Ahrendt, ed. Isabella Grobys and Andrea Panzer-Heemeier (Baden-Baden: Nomos, 2025), para. 22.

1511 Cf. SGB IV, sec. 7 para. 1.

1512 Ibid., sec. 2 para. 2 no. 1.

employment relationship¹⁵¹³. This already makes it clear that the term ‘Beschäftigter’ is to be defined more broadly as the term ‘employee’ from employment law, as it only mentions the employment relationship as an example. This example is linked to the definition of an employment contract from Section 611a BGB,¹⁵¹⁴ which also means that the definition of ‘Beschäftigter’, apart from the example, does not use the employment law’s definition to define the social security boundaries. However, there are still significant overlaps. At the heart of both definitions is the obligation to perform work subject to instructions, which is often interpreted in the same way by the labor and social courts¹⁵¹⁵. Like in employment law, the responsible BSG bases its interpretation on the criterion of personal dependence. Personal dependence can be assumed if the working individual is integrated into a company and the work is determined due to the employer’s right to issue instructions¹⁵¹⁶. German social security law explicitly states indications for the existence of employment. For instance, it mentions working in accordance with instructions and integration into the work organization of the person giving the instructions¹⁵¹⁷. The right to issue instructions may vary depending on the specific activity and may be refined in the case of higher-level services for “functionally appropriate participation in the work process”¹⁵¹⁸. Indications of employment are, as in employment law, above all the external determination of the place of work, the working hours and the type of work, as well as the connection of the activity to the work provider’s organization¹⁵¹⁹. However, this is not automatically given. In cases where the purpose of the respective area of law requires other criteria, the courts might come to different conclusions¹⁵²⁰.

Self-employment, on the other hand, primarily comprises the assumption of entrepreneurial risk, the existence of one’s own business premises as well as one’s own operating resources, the ability to dispose of one’s own labor and the essentially free organization of activities and working hours¹⁵²¹. Entrepreneurial risk regularly exists when own capital is used without a compelling prospect of success in the danger of losing it completely or substantially in the event of the economic failure of the business

1513 Ibid., sec. 7 para. 1.

1514 “Antwort der Bundesregierung” (Deutscher Bundestag, April 18, 2017), 16, <https://dserver.bundestag.de/btd/18/119/1811982.pdf>.

1515 BSG, Urt. v. 14.3.2018 – B 12 R 3/17 R, *BeckRS 7706* (2018); BAG, Urt. v. 17.10.2017 - 9 AZR 792/16, *BeckRS 140191* (2017).

1516 BSG, Urt. v. 14.3.2018 – B 12 R 3/17 R, para. 21.

1517 SGB IV, sec. 7 para. 1 sentence 2.

1518 BSG, Urt. v. 31.3.2017 - B 12 R 7/15 R, *Neue Zeitschrift für Sozialrecht*, 2017, para. 21.

1519 Cf. BSG, Urt. v. 29.6.2021 - B 12 R 8/19 R, *AP SGB IV § 7 Nr. 7*: para. 11; BSG, Urt. v. 23.2.2021 - B 12 R 15/19 R, *Neue Zeitschrift für Sozialrecht*, 2022, 346–51; BSG, Urt. v. 07.06.2019 - B 12 R 6/18 R, *Deutsches Steuerrecht*, 2019, para. 13; BSG, Urt. v. 18.11.2015 - B 12 KR 16/13 R, *Neue Juristische Online Zeitschrift*, 2016, 666–72.

1520 Preis, “BGB § 611a Arbeitsvertrag,” para. 15.

1521 BSG, Urt. v. 28.09.2011 - B 12 R 17/09 R, *BeckRS 67108* (2012): para. 16.

or without a compelling prospect of only generating losses with it. However, entrepreneurial risk serves only as an indicator of self-employment if this risk is also associated with greater freedom in the organization and determination of the scope of the use of one's own labor. A distinction is made between entrepreneurial risk and a so-called workplace risk which is inherently tied to employment¹⁵²². The distinction ultimately depends on which characteristics predominate or characterize the work¹⁵²³. As with employment law, the existence of employment is to be assessed on the basis of the principle 'primacy of facts' and based on an overall assessment of all circumstances of the individual case that exist in reality¹⁵²⁴. If characteristics of both statuses come together, an overall assessment must be made to determine in which area the focus of the activity lies, which characteristics predominate and characterize the overall picture of the circumstances¹⁵²⁵. In some cases, the case law of the BSG also considers fundamental rights of those affected, such as the freedom of art for artists¹⁵²⁶ and the special features of the respective professional groups. This means that the benchmark may differ depending on the activity being carried out and how it is potentially impacted by specific fundamental rights. Furthermore, the intention of the parties and the contractual provisions have at least a certain indicative effect, which must be considered as part of the overall assessment¹⁵²⁷. Yet, the legal consequences, i.e. the existence of an employment relationship with the resulting social security obligation, are not subject to the will of the parties¹⁵²⁸. Only in borderline cases, where the activity could equally be seen as either an employment relationship or as self-employment, can the mutual intention of the contracting parties have a decisive significance¹⁵²⁹. If the intention regarding this is not ascertainable, an assessment will be made to determine which of the two types (employment or self-employment) has characterized the working

1522 LSG Baden-Württemberg, Urt. v. 27.04.2016 – L 5 R 1753/15, *BeckRS* 68798 (2016) with additional references from the case law of the BSG.

1523 Cf. BSG, Urt. v. 19.10.2021 - B 12 R 10/20 R, *BeckRS* 39897 (2021): para. 21; BSG, Urt. v. 07.06.2019 - B 12 R 6/18 R, para. 13; BSG, Urt. v. 31.3.2017 - B 12 R 7/15 R; BSG, Urt. v. 29. 8. 2012 - B 12 KR 25/10 R, *NZA-RR*, 2013, 252–56; BSG, Urt. v. 25.01.2006 - B 12 KR 30/04 R, *BeckRS* 41119 (2006).

1524 Cf. LSG Baden-Württemberg, Urt. v. 13.09.2016 - L 4 R 2120/15 ZVW, *BeckRS* 72977 (2016).

1525 Cf. BSG, Beschl. v. 04.07.2022 - B 12 R 35/21 B, *BeckRS* 18893 (2022): para. 10; BSG, Urt. v. 28.6.2022 - B 12 R 3/20 R, *Neue Zeitschrift für Sozialrecht*, 2022, para. 11; BSG, Urt. v. 07.06.2019 - B 12 R 6/18 R, para. 13; BSG, Urt. v. 26.9.2017 - B 1 KR 31/16 R, *Neue Zeitschrift für Sozialrecht*, 2018, 319–26; BSG, Urt. v. 31.3.2017 - B 12 R 7/15 R; BSG, Urt. v. 18.11.2015 - B 12 KR 16/13 R.

1526 Cf. BSG, Urt. v. 26.9.2017 - B 1 KR 31/16 R; BSG, Urt. v. 31.3.2017 - B 12 KR 16/14 R, *Neue Zeitschrift für Sozialrecht*, 2017, 784–89.

1527 Armin Knospe, "§ 7 SGB IV" in *Sozialgesetzbuch (SGB) Gesamtkommentar. SGB IV – Gemeinsame Vorschriften für die Sozialversicherung*, by Karl Hauck and Wolfgang Noftz (Berlin: Erich Schmidt Verlag, 2016), para. 31 ff.; BSG, Urt. v. 14.3.2018 – B 12 R 3/17 R, para. 13.

1528 cf. BSG, Beschl. v. 23.01.2018 - B 12 KR 55/17 B, *BeckRS* 1249 (2018): para. 11; BSG, Urt. v. 04.06.2019 - B 12 R 10/18 R, *BeckRS* 21298 (2019): para. 23.

1529 BSG, Urt. v. 14.3.2018 – B 12 R 3/17 R, para. 13.

individual's previous professional life so far¹⁵³⁰. In summary, the BSG thus, like the BAG, bases its approach on a typological concept of employment status assessment.

The determination of status in Germany has the most far-reaching consequences. This is because insurance coverage across all branches of social security applies to all employees who work for remuneration¹⁵³¹. On the other hand, self-employed individuals are generally not subject to mandatory statutory insurance – neither in pension¹⁵³², accident, health¹⁵³³, long-term care, nor unemployment insurance. However, there are exceptions.

6.1.1. Pension insurance

On one hand, there is mandatory insurance for self-employed activities in certain professional groups, such as caregivers, specific artists and journalists, or domestic servants¹⁵³⁴. Additionally, mandatory insurance applies to so-called 'employee-like self-employed persons'¹⁵³⁵. These are individuals who, in connection with their self-employment, generally do not employ employees subject to mandatory insurance and are engaged on a long-term basis predominantly for a single client¹⁵³⁶. Minor work for other clients does not exempt this self-employed person from mandatory pension insurance. Factual commitment to one single client is sufficient, i.e., the contract may allow for work with other clients. However, these individuals are not identical to 'employee-like persons' in employment law despite certain similarity in their characteristics. Their need for protection is assumed also because they are considered socially vulnerable and dependent in a manner comparable to employees¹⁵³⁷. Yet, the reason for their coverage in the pension insurance system is however based on the assumption that they typically do not earn enough to secure themselves outside the statutory pension insurance system¹⁵³⁸ despite being self-employed. Unlike with the 'employee-

1530 Cf. BSG, Urt. v. 26.9.2017 - B 1 KR 31/16 R; BSG, Urt. v. 31.3.2017 - B 12 R 7/15 R; BSG, Urt. v. 25.11.2015 - B 3 KS 3/14 R, *BeckRS* 66498 (2016).

1531 SGB IV, sec. 2 para. 2 no. 1.

1532 SGB VI, sec. 5 para. 2.

1533 SGB V, sec. 5 para. 5; This concerns individuals who are self-employed on a full-time basis, who are generally excluded from the protection of statutory health insurance. A self-employment activity is considered full-time if, when viewed in its entirety, it significantly surpasses other economic activities in terms of economic importance and time commitment, and represents the primary focus of the individual's professional activity, cf. Entwurf eines Gesetzes zur Strukturreform im Gesundheitswesen (Gesundheits-Reformgesetz – GRG), May 3, 1988, 159, <https://dserver.bundestag.de/btd/11/022/1102237.pdf>.

1534 SGB VI, sec. 2 sentence 1 no. 1-8.

1535 *Ibid.*, sec. 2 sentence 1 no. 9.

1536 *Ibid.*

1537 BSG, Urt. v. 10.5.2006 - B 12 RA 2/05 R, *Neue Zeitschrift für Sozialrecht*, 2007, 97–102.

1538 Herrmann, "Arbeitnehmerähnliche Person," para. 23; BSG, Urt. v. 23.4.2015 - B 5 RE 21/14 R, *Neue Zeitschrift für Sozialrecht*, 2015, 710–12.

like person' in employment law, the need for social protection in this context is not necessarily derived from economic dependence on a specific work provider. Rather, in line with the purpose of social security law, it is assessed based on the overall (assumed) economic situation of the working individual.

According to the case law of the BSG, a long-term commitment to working for a single client is assumed when the work is carried out under a continuous contractual relationship or a regularly recurring assignment. When assessing these conditions, it is not sufficient to focus solely on contractual arrangements and business models; the actual circumstances are of decisive importance. Both temporal and economic criteria must be considered, as well as industry-specific circumstances. If the engagement with a client is limited to a specific, temporary period (e.g., project-based work) and within certain time limitations, the activity generally does not meet the criteria for long-term work for a single client. Even with longer project durations, a permanent commitment to one client may not be established. An anticipatory assessment should be made at the start of the assignment. But the requirement that a self-employed person primarily works for a single client encompasses not only situations where the individual is legally (contractually) bound to one client but also cases where the person is economically dependent on that single client. The client relationship must leave no significant entrepreneurial flexibility for the individual. When both self-employment and dependent employment are pursued simultaneously, the employer in the dependent employment is not considered an additional client¹⁵³⁹. According to the German pension insurance *Deutsche Rentenversicherung*, self-employed individual can be considered primarily dependent on a single client if at least 5/6 of their total business income from the activities in question is derived exclusively from work for that one client¹⁵⁴⁰. For this assessment, a forward-looking evaluation of business income is required. The primary assessment period is one calendar year. The evaluation should consider the business income from all self-employed activities, but not income from dependent side jobs¹⁵⁴¹. Therefore, different thresholds exist as they would apply for 'employee-like persons' under German employment law.

If these conditions for 'employee-like self-employed persons' status¹⁵⁴² are met, the self-employed individual is subject to mandatory pension insurance under the statutory pension insurance system. For self-employed individuals with one main client who, based on their business model, plan to work for multiple clients in the future and would then no longer meet the criteria for mandatory insurance, an opt-out option for

1539 Cf. BSG, Urt. v. 04.11.2009 - B 12 R 7/08 R, *BeckRS* 66916 (2010).

1540 Cf. Deutsche Rentenversicherung, "Erläuterungen zum Fragebogen zur Feststellung der Versicherungspflicht kraft Gesetzes als selbständig Tätiger beziehungsweise zum Antrag auf Versicherungspflicht als selbständig Tätiger," September 29, 2023, 7, https://www.deutsche-rentenversicherung.de/SharedDocs/Formulare/DE/_pdf/V0021.pdf?__blob=publicationFile&v=8.

1541 Cf. *Ibid.*

1542 SGB VI, sec. 2 sentence 1 no. 9.

start-ups exists¹⁵⁴³. Although the mandatory insurance is based on the similarity with employees, the contribution payments are made by the self-employed individual¹⁵⁴⁴. But even if the working individual fulfils the described conditions, they would remain generally exempt from other statutory insurances (such as statutory health insurance, long-term care insurance, and unemployment insurance).

6.1.2. Accident insurance

In the German accident insurance system, self-employed individuals are covered if they show characteristics similar to a person working in an employment relationship, even though they do not meet all the criteria of a traditional employment situation. This applies when the self-employed person performs work that serves the interests of another company, aligns with the company's objectives, and has economic value as such work is considered to be typically carried out by individuals who are in an employment relationship¹⁵⁴⁵. These individuals are sometimes also called 'as-employees' ('Wie-Beschäftigte')¹⁵⁴⁶. A key requirement is that the person must have a primary intention to benefit others, meaning they should not pursue personal goals with the activity beyond receiving remuneration for their work. If the individual primarily acts in their own interest, they are considered to be operating as an entrepreneur rather than as an employee¹⁵⁴⁷. The contributions for accident insurance must be paid by the entity commissioning the work, i.e., the client or company that has engaged the self-employed individual¹⁵⁴⁸.

6.1.3. Voluntary social insurance

For other self-employed individuals, there is only the option of voluntary insurance in some of the various remaining branches, which comes with strict requirements and, if possible at all, often high costs. Full-time self-employed persons are generally excluded from membership in the statutory health insurance system. This also includes insurance for maternity benefits. They can only join if they were previously already insured under the statutory health insurance system for a specific period¹⁵⁴⁹.

1543 Ibid., sec. 6 para. 1a.

1544 Ibid., sec. 169 no. 1.

1545 BSG, Urt. v. 05.07.2005 - B 2 U 22/04 R, *BeckRS* 43197 (2005); BSG, Urt. v. 19.06.2018 - B 2 U 32/17 R, *BeckRS* 24148 (2018).

1546 "Arbeitsunfall eines 'Wie-Beschäftigten,'" *Neue Zeitschrift für Sozialrecht*, 2006, 375–76; "Bei Verkehrsunfall verletzte Ehefrau kann als 'Wie-Beschäftigte' im Familienbetrieb trotz anderweitiger Vollbeschäftigung gesetzlich unfallversichert sein," *NZV*, 2019, 216.

1547 BSG, Urt. v. 26.06.2007 - B 2 U 35/06, *BeckRS* 48837 (2007); BSG, Urt. v. 20.8.2019 - B 2 U 1/18 R, *NZA-RR*, 2020, 162–65.

1548 SGB VII, sec. 150 para. 1 sentence 1.

1549 SGB V, sec. 9.

Otherwise, self-employed individuals have the option of private health insurance, for which they must pay the premiums themselves.

6.2. The UK

As in Germany, the eligibility for social security does not fit neatly into the categories from employment law, as social security definitions do use different terms. The definitions from employment law influence but are distinct from the definition used for social security purposes. This is first but foremost since social security law essentially continues to rely on a binary system of distinction compared to the trinary system in employment law¹⁵⁵⁰. In UK social security law, the terms ‘employed earner’ and ‘self-employed earner’ are used instead of the more familiar tripartite classification in employment law: employee, limb (b) worker, and self-employed person. However, the criteria developed by case law in the context of employment law still play a certain role.

According to Sec. 2 para. 1 lit. a SSCBA 1992, ‘employed earner’ means a person who is gainfully employed under a contract of service, or in an office (including elective office) with earnings. Self-employed earner is according to lit. b, a person who is gainfully employed otherwise than in employed earner’s employment (whether or not he is in addition also employed in such employment)¹⁵⁵¹. Sec. 122 para. 1 SSCBA 1992 clarifies that the term ‘employment’ includes “any trade, business, profession, office or vocation” while the term ‘contract of service’ includes “any contract of service or apprenticeship whether written or oral and whether express or implied”¹⁵⁵². While these categories may initially seem distinct from terms used in employment law, a closer analysis reveals at least familiar similarities, as the legal definition of an ‘employed earner’ generally refers to an individual working under a ‘contract of service’ – a term that essentially equates to a contract of employment¹⁵⁵³ from Sec. 230 para. 2 ERA 1996. Consequently, an employed earner more or less equates an employee from Sec. 230 para. 1 ERA 1996¹⁵⁵⁴.

This classification brings up the core issue examined in the cases *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* or *Autoclenz v Belcher*. A similar distinction is crucial as in employment law when assessing the difference between an employee and a limb (b) worker, as a limb (b) worker operates under a ‘contract for services’, while an employee works under a ‘contract of service’, as also outlined in the definition of an ‘employed earner’. It is entirely possible for someone to be classified as a worker in employment law without being considered

1550 Freedland and Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” 17.

1551 Social Security Contributions and Benefits Act 1992, c. 4,” sec. 2 para. 1 lit. a and b, accessed March 24, 2025, <https://www.legislation.gov.uk/ukpga/1992/4>.

1552 *Ibid.*, sec. 122 para. 1.

1553 *Autoclenz Ltd v Belcher* [2011] UKSC 41, para. 18.

1554 ERA 1996, sec. 230.

an employed earner. A prominent example is Mr. Smith in the case *Pimlico Plumbers Ltd v Smith*, where the nature of his contractual relationship meant that he did not meet the criteria for ‘employee’ status. However, the concept of control and direction as observed regarding the employment statuses of UK employment law is critical to these social security classifications, but not of itself decisive. Important factor is more the answer to the question: “Is the person who has engaged himself to perform these services performing them as a person in business on his own account?”¹⁵⁵⁵ There exists no exhaustive list of tests so that an even more typological assessment of all the circumstances of the case is necessary. While working under the supervision of another for remuneration may be enough to establish worker status, it does not automatically make the individual subject to UK’s social security law. In the case *Pimlico Plumbers Ltd v Smith*, the claimant was not considered an employee because he retained the discretion to accept or decline work assignments. The work relationship failed the ‘mutuality of obligation’ test which meant that he could reject tasks without facing consequences – in comparison, employees cannot do this, as they are contractually obligated by the ‘contract of service’ to perform assigned duties. On the other hand, employers are required to ensure that employees have sufficient work to fulfill their contractual obligations and cannot arbitrarily send them home without pay. Another factor in determining employment as well as social security status is the requirement of personal service. The case of *Autoclenz Ltd v Belcher* illustrates this principle, as the contract in question included a clause allowing a subcontractor to appoint a substitute. Unlike an employee, who cannot simply delegate their obligations to someone else at will, a subcontractor under such an agreement would not be considered an employee if the substitution clause is not just a ‘sham’, meaning it does not accurately reflect the actual working arrangement between the parties. However, there can also be cases where a person classified as limb (b) worker under employment law could theoretically be treated as an employee under social security law as will be discussed in the following.

First, it must be noted that the UK provides public healthcare to all permanent residents paid for by general taxation, in comparison to the pay-as-you-go health insurance systems in Germany and Lithuania. This makes a comparison difficult.

National Insurance (NI) plays a crucial role in supporting the welfare system in the UK and includes in general the following branches:

- state pension;
- jobseeker’s allowance;
- employment and support allowance;
- bereavement support payment;
- maternity allowance.

Access to benefits and insurance entitlements is determined by contributions payment of NI contributions, which are categorized into different classes. Class 1 contributions are paid jointly by employers and employees. In this case, the employee’s share is paid by PAYE (‘Pay As You Earn’), deducted automatically from their gross wages

1555 Cf. *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173.

by the employer, meaning the employee does not need to take any further steps. Self-employed individuals are responsible for making Class 2 contributions. However, in some cases, also limb (b) workers can be paid by PAYE¹⁵⁵⁶. The reason for this is that although the tests for determining employment status overlap, social security law – which in many areas is linked to a worker’s tax status – can result in a person who is classified under employment law not as an employee but merely as a limb (b) worker still being classified by *His Majesty’s Revenue and Customs* (HMRC) as an employee for tax purposes, since HMRC conducts its own independent tax assessment¹⁵⁵⁷.

Contributions by self-employed persons generally do not count towards qualifying for contribution-based jobseeker’s allowance, although they do contribute towards eligibility for employment and support allowance, which supports adults under the pension age who are unable to work due to long-term illness or disability. Class 3 contributions are voluntary and allow individuals to make payments to cover gaps in their NI record, typically arising from periods of unemployment or low earnings. These voluntary contributions are relevant solely to entitlements such as the state pension and bereavement benefits. In addition, self-employed individuals must pay Class 4 contributions, which are calculated as a percentage of their annual profits. However, unlike Class 2 contributions, Class 4 payments do not contribute to the individual’s qualifying record for benefits, including the state pension.

The different treatment could first be explained by pragmatic reasoning. Employees (and limb (b) workers) who are paid by PAYE work on a continuous real time system and are taxed on wages which can be checked by HMRC. Self-employed persons (incl. limb (b) workers) who are not paid by PAYE, are taxed on profits and submit only a tax return which does not contain any information that can enable HMRC to ascertain whether they are in fact limb (b) workers or whether they are completely self-employed in business on their own account¹⁵⁵⁸. A person may have too little control or too much freedom to be considered an employee under employment law but receive enough integration and regular payments to be treated as an employee under tax and consequently under social insurance law.

In summary, it can be said that in UK law, the employment law status differs from the social security status. In most cases, limb (b) workers are likely to be classified as self-employed and thus not subject to full compulsory social security legislation as employees, but fall under rules for self-employed persons, with insurance in most branches of social security, except for jobseeker’s allowance; or gaps of insurance can be at least closed by additional voluntary insurance.

1556 R (Adiatu & IWGB) v HM Treasury [2020] EWHC 1554, para. 47.

1557 Cf. HMRC, “ESM0500 - Guide to Determining Status,” accessed April 5, 2025, <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm0500>.

1558 R (Adiatu & IWGB) v HM Treasury [2020] EWHC 1554, para. 48.

6.3. Lithuania

Lithuanian social security law initially distinguishes between individuals who work under employment contracts (i.e., in an employment relationship) or a relationship that essentially resembles an employment relationship on one side, and self-employed individuals on the other side. The LR VSDĮ lists various forms of self-employment in its Art. 2 para. 9. This includes owners of individual companies, members of small partnerships, individuals receiving income under author contracts, those earning income from sports or performing arts activities, and individuals engaged in self-employment. For the latter category, the definition is referenced in Art. 2 para. 7 LR GPMĮ. Consequently, social security law in this context follows the definitions of tax law rather than directly those of employment law. Therefore, the answer to the question of what constitutes individuals working under employment contracts must also be sought initially in tax law. In the absence of alternative definitions, this must refer to the employment contract definition as outlined in Art. 32 LR DK and should be interpreted accordingly, even though a different interpretation aligned with social security law purposes might be conceivable and possible.

Interestingly, the commentary from the VMI lists the essential characteristics that align with the key attributes of an employment contract as described in Art. 32 LR DK. However, it further notes that it is important to consider the functions performed by the individual within the company. Specifically, if the functions carried out by the self-employed individual are similar to those performed by the company's employees, this similarity could serve as an indicator of an employment relationship¹⁵⁵⁹. It basically addresses to some extent the issue of solo self-employed persons working 'side-by-side' with employees. Such an indicator would go well beyond the definition of an employment contract in Art. 32 LR DK, because it would not be based on the subordination from the contract between the parties, but on the structure-independent activity of the working individual depending on the status of other persons in the work provider's organization. This approach has a right to exist in tax law, as tax law does not fulfil any protective purposes for the working individual, as employment law does, and therefore does not have to be linked to the structure of the individual contractual relationship that makes the working individual vulnerable. This approach would also serve a purpose in social security law, as it prevents the parties to the contractual relationship from withdrawing higher contributions through targeted structuring and thus harming the solidarity community of contributors. In employment law, however, this approach would have no *raison d'être* because it serves to protect individuals based on their vulnerability, over which the status of other persons in the organization of the work provider has no influence. A court in an employment dispute could not use such an indicator for interpreting Art. 32 LR DK. A court in a tax or social insurance matters, however, could well use it since Lithuanian law has yet not established a doctrine that the social security definition must necessarily fully align with the employment law

1559 VMI, "KM0292 11/22/18."

definition of an employment contract. As a result, an approach to a possible divergent definition between employment law and social security law would be possible following VMI's interpretation. Since the VMI commentary considers this indicator to be important separately to the existence of subordination, it certainly opens the possibility of also classifying the relationship of a self-employed person who is rightfully not working under an employment contract as an employment relationship in the sense of social security law. So far, however, there is no evidence that such an approach has been adopted by social security case law or SoDra. Both Lithuanian literature and case law, across all areas of employment law and even all areas of law, seem to generally assume the existence of only one single basic concept of employee or they are at least in search of it. Subsequently, other legal acts usually seem to refer to the concept of employee or employment contract from the LR DK¹⁵⁶⁰. However, certain exceptions exist that seem to go beyond this binary approach. Individuals who receive income from author contracts with a Lithuanian company which is neither performed under an individual activity nor an employment contract, are subject to a different pension, sickness, and maternity social insurance regime than employees and purely self-employed persons. The same applies to individuals who receive income from sporting or performing arts activities¹⁵⁶¹. Such relationships can, in principle (e.g., agreements on terms of remuneration, workplace conditions, job functions, work discipline, etc.), resemble an employment relationship based on an employment contract, without actually being one¹⁵⁶². However, this approach differs from the German and UK models in that it ties this status mainly to a specific type of activity rather than solely to a particular structure of activity.

There are 6 branches of social insurance in Lithuania¹⁵⁶³:

1. Pension Social Insurance;
2. Sickness Social Insurance;
3. Maternity Social Insurance;
4. Unemployment Social Insurance;
5. Work Accident and Occupational Disease Social Insurance;
6. Compulsory Health Insurance.

Persons working under employment contracts within the territory of the Republic of Lithuania, i.e., employees, are subject to all branches of social insurance¹⁵⁶⁴. Self-employed individuals, on the other hand, are only subject to compulsory health insurance, provided they have at least their permanent residence in the Republic of

1560 E.g. Health and safety: LR DSSĮ, art. 2 para. 9; Social security: LR VSDĮ, art. 4 para. 1; Personal Income Tax: LR GPMĮ, art. 2 para. 31.

1561 LR VSDĮ, art. 5 para. 2.

1562 LR GPMĮ, art. 2 para. 31.

1563 LR VSDĮ, art. 3.

1564 Ibid., art. 4 para. 1.

Lithuania¹⁵⁶⁵, an approach that is not necessarily aimed at self-employed individuals but seeks to include as many persons as possible in the health insurance system.

If self-employed individuals work with a business license, they are also subject to the statutory pension insurance¹⁵⁶⁶, which they must pay themselves. Here, pragmatic considerations can once again be applied, in that operating under a business license brings a certain continuity that makes it possible to calculate contributions based on essentially uninterrupted periods of time, although independently of continuous income or wages, as would be the case for employees.

Additionally, there is only the option of voluntary insurance in a few other branches: sickness social insurance, which includes social insurance for sickness benefits, and maternity social insurance providing maternity benefits¹⁵⁶⁷. An exception applies again to individuals who receive income from author contracts with a Lithuanian company, however, provided that such income is not derived from individual activity. These individuals are subject to the pension, sickness, and maternity social insurance systems. The same applies to individuals who receive income from sporting or performing arts activities¹⁵⁶⁸.

Accordingly, freelance workers in Lithuania performing an individual activity are only subject to compulsory health insurance and have the option of voluntary insurance in sickness social insurance and maternity social insurance. Only if they operate under a business license, they are also subject to pension insurance, however, would be excluded from the mandatory pension, sickness, and maternity social insurance systems.

If one were to adopt the VMI's approach and look beyond the contractual relationship to include individuals who, despite the absence of subordination, perform the same functions as employees within the company, could a comprehensive social insurance also extend to these individuals. However, there is currently no corresponding approach in case law or SoDra's practice.

6.4. Interim conclusion

When comparing the approaches of Germany, the UK, and Lithuania, one can observe both similarities and fundamental differences, especially when attempting to distill the spirit of the regulations. Undoubtedly, all three countries focus on limiting comprehensive mandatory social insurance in all branches essentially to traditional employees. It can be observed that an 'employee' relationship under employment law seems to be typically always an employment relationship under social security law, but not necessarily *vice versa*. However, this is where the similarities end. While the system

1565 LR SDĮ, e-TAR, art. 6 para. 1 no. 1, accessed April 5, 2025, <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F6B680E8B8/HAgeXEOytf>.

1566 LR VSDĮ, art. 5 para. 3.

1567 Ibid., art. 7 para. 1.

1568 Ibid., art. 5 para. 2.

in the UK is closely aligned with tax law and offers protection, at least on a voluntary basis, across almost all branches of social insurance (except for e.g. jobseeker's allowance), Germany aims for a high level of diversification within the individual branches of social insurance in order to extend protection to those who, in the eyes of the legislator, urgently need it, but who do not fall under the traditional concept of personally dependent employment. This applies to certain types of activities that have empirically shown to involve individuals typically in need of protection, as well as to the structure of the activity itself. However, protection in Germany for self-employed individuals decreases rapidly and approaches zero unless they fall under these catch-all provisions. As such, genuine self-employed persons are regarded as fully self-responsible for their own social protection. In contrast, Lithuania's social insurance law seems to strive to cover as many working individuals as possible, as evidenced by the mandatory health insurance that applies to nearly everyone, including self-employed individuals working under a business license, who are also covered for pensions, even if the business license does not always represent reliable, continuous work patterns, as required by a pay-as-you-go pension system. At the same time, certain types of activities are covered in some branches of social insurance, which empirically require protection, leading to a broader inclusion of individuals who might not need such coverage. The published opinion of the VMI's commentary on tax law at least leaves open the possibility of including also self-employed individuals who work 'side-by-side' with employees, however, this would require a significant departure from the principle that social insurance law follows employment law.

In all three countries, there is the challenge regarding essentially self-employed individuals of measuring and achieving necessary minimum insurance periods or amounts, as required by a pay-as-you-go insurance system for its financial sustainability. This is difficult due to the often fluctuating work patterns and income of non-employees.

In the case of freelance workers, distinct challenges arise under social security law as compared to employment law. While employment law primarily struggles with the issue of freelance workers' lack of personal dependence or organizational subordination and the continuity of the working relationship plays a comparatively lesser role; in contrast, social security law faces greater difficulties stemming from the absence of (measurable) continuity and from often insufficient or irregular levels of remuneration. These factors complicate both eligibility and contribution assessment within systems that rely on stable, ongoing participation. However, there are at least some potential solutions to this problem.

Schoukens and *Bruynseraede* suggest breaking down qualifying and waiting periods into smaller time units, ensuring that the cumulative work or contributions add up to the equivalent requirements set for standard employees or smaller benefits in proportion to the contributions made. This adjustment would better accommodate the irregular work patterns of non-standard and self-employed workers while maintaining

the overall integrity of the system¹⁵⁶⁹. Qualifying periods, minimum work records, waiting periods, and similar eligibility conditions that establish time or income thresholds play a central role in work-related social protection schemes. These requirements are typically introduced with specific objectives in mind and are largely rooted in the insurance principles of pay-as-you-go systems that underpin many social protection systems for both employees and the self-employed. These eligibility conditions serve to ensure a balance between contributions and entitlements, promote insurance continuity, support the financial sustainability of the system¹⁵⁷⁰ and protect the solidarity community of contributors. This presents an additional challenge beyond those existing in employment law and the mere classification of legal relationships. However, these are challenges that can also occur to some extent in relationships under flexible employment contracts, such as project-based, fixed-term and temporary employment contracts. This illustrates that social security law faces further complexities when it comes to the treatment of freelance workers – challenges that could, at least in part, be addressed through the approaches outlined above.

1569 Schoukens and Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers*, 64 ff.

1570 Ibid., 70.

CONCLUSIONS

1. Key challenges in defining the legal nature of freelance work and granting appropriate employment rights and social guarantees arise from the structural features of freelance arrangements. While freelance work shares some similarities with traditional employment, it diverges in crucial ways. The classification of employment relationships still relies heavily on formal criteria of personal dependence and organizational subordination to determine access to employment rights and social security – in particular in Lithuania. However, freelance work often dilutes these elements: formal autonomy over where, when, how, and whether to work masks subtle behavioral control through indirect mechanisms and obscures the actual dependence and vulnerability of freelance workers. Economic realities can entrench a form of subordination or dependence that is less visible or pronounced but can be equally impactful. This mismatch creates significant difficulties when applying traditional distinction criteria to such new forms of work. Nonetheless, the experiences of the UK and especially Germany illustrate that legal frameworks can adapt without altering their foundations. Social security law faces further distinct challenges. They stem from a purpose external to employment law – namely, to protect the solidarity community of contributors and ensure the financial sustainability of the system. Social security law faces difficulties resulting from the fragmented, intermittent nature of freelance work. The absence of stable continuity and predictable income complicates eligibility and contribution calculations. Even when freelance workers demonstrate dependence or subordination and could therefore be protected under employment law, integrating them into social security systems remains a complex legal and administrative challenge.
2. Lithuania's current framework, especially following the 2017 reform of the LR DK, retains a relatively narrow conception of employment, strictly tied to an organizational subordination based on a classic control/obeyance relationship which essentially stems from the contractually agreed rights and obligations. While this model promotes legal clarity, it reflects more the realities of the twentieth-century labor market rather than the diverse contemporary world of work. This dissertation has demonstrated that countries such as Germany and the UK extend certain employment rights and social protections to specific self-employed groups, partly in response to higher-ranking law that also applies in Lithuania. However, the scope and methods differ: The UK's current trinary classification system – comprising employees, workers, and the self-employed – grants partial employment rights to workers despite the absence of formal organizational subordination (particularly mutual obligations), recognizing forms of soft control, including indirect sanction mechanisms and algorithmic management. By contrast, German law, which applies the typological method consistently and employs the most context-sensitive and case-by-case assessment among the jurisdictions examined in this dissertation, can classify

individuals even as full employees where only soft forms of influence are present. These may include behavioral nudges or incentive structures that subtly guide the conduct of the working individual without exerting any formal or direct control. Before the 2017 reform, a more flexible understanding of subordination could have been also applied in Lithuania to some extent. However, the adoption of a strict definition and narrow concept of subordination under Art. 32 para. 2 LR DK – with its strong emphasis on formal control and obedience – has foreclosed this path. Moreover, German law provides an additional open catch-all provision – the employee-like person – across punctual areas of employment law. This open concept ensures protection for those falling outside the already broad German employee concept, either because higher-ranking law requires it or because national policy considerations demand it. The concept can be interpreted in varying degrees, depending on the legal context and regulatory purpose. Germany’s contextual approach, rooted in the typological method, treats the defining criteria of the different concepts not as rigid thresholds but more as flexible guidance that can vary in relevance according to the diversity of real-world work arrangements. A method that the CJEU has, in principle, claimed for itself – although it is not always evident whether it consistently adheres to it. While German law attempts to reflect a similar methodology in social security law but using different terms, the UK system relies on a binary system. Lithuania, on the other hand, attempts to integrate at least certain predefined activities into individual branches of its social security law. As a result, the personal scopes of application in Lithuanian, German and UK employment and social security law differ both methodologically and substantively – a divergence unlikely ever to be fully harmonized.

3. Lithuania’s narrower personal scope of application in employment law retains some justification in promoting legal clarity. The current concept properly serves a ‘generalized justice’ traditionally inherent in employment law. However, where higher-ranking law – such as the ECHR, RESC, EU law or constitutional law – directly mandates broader protection, Lithuania must act. Although definitive rulings from bodies like the CJEU are still pending, clear legal trends point towards an expanding understanding of workers, employment relationships, and employment contracts – trends Lithuania cannot ignore. The central issue is that there is no single purpose of employment and social security protection, but rather a plurality of overlapping, nuanced purposes. This diversity is particularly reflected in the different regulatory aims of EU directives. Lithuania’s rigid approach captures only a single, highly generalized justification for the existence of the employment status and, as a result, either falls short of meeting evolving legal and social standards or runs the risk of overextending its scope inappropriately. Gaps in compliance are most evident in the rights connected to trade union participation. Although freelance workers are generally permitted to form and join trade unions in Lithuania, significant limitations on full active membership rights and real representation

render these rights largely illusory, potentially violating, i.a., Art. 11 ECHR. Further gaps exist in individual employment law, notably in the areas of non-discrimination and occupational health and safety. Here, reliance solely on the absence of an organizational subordination to exclude certain individuals from protection seems heavily inadequate. Only in relation to working time and annual leave – following the CJEU’s *Yodel* judgment – does the matter seem, for now, relatively settled. Nevertheless, further detailed national analyses could urgently be needed to identify the EU law origins of various Lithuanian law provisions and to expand protection where necessary. This would not result in the emergence of hundreds of different personal scopes of application within Lithuanian law; rather, legal subject matters must be clustered in a way that reflects the broader diversity of purposes pursued by employment and social security law. But even at present, there is a risk that certain requirements derived from higher-ranking law may already be directly applicable in vertical freelance relationships between freelance workers and Lithuanian ‘state’ work providers – and even a horizontal application in certain areas cannot be entirely ruled out, given the unpredictability of CJEU jurisprudence in this domain.

4. There are several possible solutions to tackle these issues methodically. One would be to move away from a codified employment law system towards individual statutes with individual personal scopes of application better aligned with EU requirements which primarily stem from different directives pursuing distinct objectives. Another solution would be to retreat from the rigid 2017 definition of the employment contract to once again allow for a more flexible interpretation of the personal scope of Lithuanian employment law – one that fully reflects a genuine ‘primacy of facts’ principle and takes into account indeed all and any circumstances of the individual case. However, both approaches would conflict with Lithuania’s tradition of structuring employment relationships in a clear and comprehensive manner. A solution more in line with this tradition could therefore be the introduction of one or several open intermediate statuses in only certain areas in addition to the existing concepts of ‘employee’ and ‘employment contract’. However, the mere creation of another fixed ‘employee-like’ status would likely replicate existing distinction problems – as seen with the limb (b) status in the UK. A better alternative – partly based on the German model – would be instead a flexible catch-all provision, adaptable to different regulatory areas. This catch-all provision should focus on three factors: employee-likeness, vulnerability and need for protection – the latter in each case derived from the former. Because all and any facts and circumstances of the individual case can be decisive and must be considered, all indicators discussed in this dissertation could be clustered under these factors if, in the individual case, they can appropriately indicate these factors considering the specific context. The relationship between employee-likeness, vulnerability, and the resulting need for protection must be evaluated contextually and teleologically according to the specific purpose of the law provision in question.

Employee-likeness could be determined both by public perception and by the sociological typology typical for employees. This flexible, purpose-driven approach would ensure that protections remain really ‘future proof’ and resistant to deliberate or inadvertent circumvention. However, successful implementation would require that courts and administrative bodies apply the typological method dynamically – not mechanically through ‘checklists’, but thoughtfully, interrogating the purpose of a legal provision in question. This dissertation has shown that courts, including the CJEU, sometimes tend toward ontological interpretations, whereby nuanced legal concepts from previous decisions were reduced to mere keywords. Such an approach must be avoided in the implementation of fundamental rights, where teleological reasoning and transparency in judicial reasoning are essential. A similar concept could be adopted in the context of social security law, differentiated according to the various branches of the system and their respective objectives. However, since the challenges in social security law extend beyond mere issues of legal classification, a potential further approach would be to address the specific problems posed by the fragmented and intermittent nature of freelance work – including the lack of stable continuity and the irregularity or insufficiency of remuneration – by recalibrating qualifying and waiting periods to smaller units. This would allow for greater adaptability to non-standard work patterns and improve access to social protection for freelance workers – at least on a voluntary basis. In this way, cumulative work or contributions could be aggregated to meet the equivalent thresholds established for standard employees, or alternatively, proportionally smaller benefits be granted based on the contributions made.

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ANNEX – DE LEGE FERENDA PROPOSALS FOR THE LITHUANIAN LEGISLATOR

The following chapter illustrates how the approach of an open catch-all provision could be implemented in practice. This proposal is based on two example areas identified in this dissertation where there are doubts as to whether the personal scope of application under Lithuanian law is sufficiently broad based on considerations related to higher-ranking law – (1) the right to (effectively) form and join trade unions, including the right to collective bargaining, and (2) the right to occupational health and safety.

I. The right to (effectively) form and join trade unions, including the right to collective bargaining

In order to expand the personal scope of application in line with a broader interpretation of higher-ranking law, it could be considered amending the following provisions of Lithuanian legislation:

a. Amendments to provisions of the LR DK

165 straipsnis. Darbuotojų atstovavimo sistema

<...> 3. Profesinės sąjungos šio kodekso ir kitų įstatymų nustatytais atvejais kolektyviai atstovauja savo nariams – darbuotojams ir asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais kolektyviniuose darbo santykiuose. <...> [3. In the cases established by this Code and other laws, trade unions shall collectively represent their members – employees and persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment – in collective labor relations.]

Amendments:

<...> 3. Profesinės sąjungos šio kodekso ir kitų įstatymų nustatytais atvejais kolektyviai atstovauja savo nariams – darbuotojams, asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais kolektyviniuose darbo santykiuose, ir asmenims, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga. <...> [3. In the cases established by this Code and other laws, trade unions shall collectively represent their members – employees, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment, and Persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection – in collective labor relations.]

179 straipsnis. Profesinės sąjungos

<...> 2. Darbdavio (fizinio asmens, įmonės, įstaigos ar organizacijos ar šio kodekso 21 straipsnio 4 dalyje nustatytu atveju – padalinio (filialo, atstovybės) lygmeniu veikiančiai profesinei sąjungai įsteigti būtina, kad ji turėtų dvidešimt steigėjų arba steigėjais būtų ne mažiau kaip 1/10 visų darbdavio darbuotojų, bet ne mažiau kaip trys. <...> [2. In order to establish a trade union operating at the level of the employer (a natural person, enterprise, institution or organisation, or, in the case established in Article 21 paragraph 4 of this Code – a division (branch, representative office)), it must have 20 founders or at least one-tenth but no less than three of all of the employer's employees must be founders.]

Amendments:

<...> 2. Darbdavio (fizinio asmens, įmonės, įstaigos ar organizacijos ar šio kodekso 21 straipsnio 4 dalyje nustatytu atveju – padalinio (filialo, atstovybės) lygmeniu veikiančiai profesinei sąjungai įsteigti būtina, kad ji turėtų dvidešimt steigėjų arba steigėjais būtų ne mažiau kaip 1/10 visų darbdavio darbuotojų, bet ne mažiau kaip trys. Darbuotojais šio straipsnio prasme taip pat laikomi asmenys, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga. <...> [2. In order to establish a trade union operating at the level of the employer (a natural person, enterprise, institution or organization, or, in the case established in Article 21 paragraph 4 of this Code – a division (branch, representative office)), it must have 20 founders or at least one-tenth but no less than three of all of the employer's employees must be founders. For the purposes of this article, persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection shall also be considered employees.]

181 straipsnis. Darbdavių atstovavimas socialinėje partnerystėje šakos, teritoriniu ar nacionaliniu lygmeniu

<...> 5. Šio straipsnio nuostatos taikomos ir tuo atveju, jeigu šios įmonės, įstaigos ar organizacijos dalyvauja socialinės partnerystės santykiuose su profesinėmis sąjungomis, atstovaujančiomis asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais. [5. The provisions of this Article shall also apply in cases where these enterprises, institutions or organizations participate in social partnerships with trade unions that represent persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment.]

Amendments:

<...> 5. Šio straipsnio nuostatos taikomos ir tuo atveju, jeigu šios įmonės, įstaigos ar organizacijos dalyvauja socialinės partnerystės santykiuose su profesinėmis sąjungomis, atstovaujančiomis asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, arba asmenims,

kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga. [5. The provisions of this Article shall also apply in cases where these enterprises, institutions or organisations participate in social partnerships with trade unions that represent persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment, or with persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection.]

186 straipsnis. Kolektyvines derybas ir kolektyvines sutartis reglamentuojančių teisės normų taikymas

1. Šio skirsnio nuostatos taikomos darbuotojams ir asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais. [1. The provisions of this Section shall apply to employees and persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment.]

2. Pagal šio skirsnio normas asmenys, dirbantys Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, laikomi darbuotojais, o kitas santykių dalyvis (įmonė, įstaiga, organizacija) laikomas darbdaviu. <...> [2. According to the provisions of this Section, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment shall be considered employees, and the other participant in the relationship (an enterprise, institution or organization) shall be considered the employer.]

Amendments:

1. Šio skirsnio nuostatos taikomos darbuotojams, asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, ir asmenims, kurie dėl savo panašumo į darbuotojus yra panašiai ir todėl jiems reikalinga apsauga. [1. The provisions of this Section shall apply to employees, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment, and persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection.]

2. Pagal šio skirsnio normas asmenys, dirbantys Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, ir asmenys, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga, laikomi darbuotojais, o kitas santykių dalyvis (įmonė, įstaiga, organizacija) laikomas darbdaviu. <...> [2. According to the provisions of this Section, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment and persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection, shall be considered employees, and the other participant in the relationship

(an enterprise, institution or organization) shall be considered the employer.]

234 straipsnis. Kolektyvinius darbo ginčus dėl interesų reglamentuojančių teisės normų taikymas

1. Šio skyriaus nuostatos taikomos darbuotojams ir kitiems asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, ir juos atstovaujančioms profesinėms sąjungoms, turinčioms teisę į kolektyvines derybas ir kolektyvinių sutarčių sudarymą ir siekiančioms išspręsti dėl to kylančius kolektyvinius darbo ginčus dėl interesų. [1. The provisions of this Chapter shall apply to employees and persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment, and the trade unions that represent them and have the right to collective bargaining and the conclusion of collective agreements and are striving to resolve the collective labor disputes on interests that arise as a result.]

2. Jeigu nenustatyta kitaip, pagal šio skyriaus normas asmenys, dirbantys Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, laikomi darbuotojais, o kitas santykių dalyvis (įmonė, įstaiga, organizacija) laikomas darbdaviu ar darbdavių organizacija. <...> [2. According to the provisions of this Chapter, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment shall be considered employees, and the other participant in the relationship (an enterprise, institution or organization) shall be considered the employer or employers' organization, unless established otherwise.]

Amendments:

1. Šio skyriaus nuostatos taikomos darbuotojams, kitiems asmenims, dirbantiems Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, ir kitiems asmenims, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga, ir juos atstovaujančioms profesinėms sąjungoms, turinčioms teisę į kolektyvines derybas ir kolektyvinių sutarčių sudarymą ir siekiančioms išspręsti dėl to kylančius kolektyvinius darbo ginčus dėl interesų. [1. The provisions of this Chapter shall apply to employees, other persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment and persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection, and the trade unions that represent them and have the right to collective bargaining and the conclusion of collective agreements and are striving to resolve the collective labor disputes on interests that arise as a result.]

2. Jeigu nenustatyta kitaip, pagal šio skyriaus normas asmenys, dirbantys Lietuvos Respublikos užimtumo įstatyme nurodytais darbo santykiams prilygintų teisinių santykių pagrindais, ir asmenys, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga, laikomi darbuotojais, o kitas santykių

dalyvis (įmonė, įstaiga, organizacija) laikomas darbdaviu ar darbdavių organizacija. <...> [2. According to the provisions of this Chapter, persons working on the basis of legal relations deemed the equivalent of employment relations as specified in the Republic of Lithuania Law on Employment and persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection shall be considered employees, and the other participant in the relationship (an enterprise, institution or organization) shall be considered the employer or employers' organization, unless established otherwise.]

b. Amendments to provisions of the LR PSĮ

1 straipsnis. Teisė jungtis į profesines sąjungas

<...> Įmonės ar jos struktūrinio padalinio lygiu organizuotų profesinių sąjungų nariais gali būti tik tos įmonės ar jos struktūrinio padalinio darbuotojai. <...> [Trade unions organized at the level of an enterprise or a structural unit of an enterprise may only include employees of that enterprise or structural unit.]

Amendments:

<...> Įmonės ar jos struktūrinio padalinio lygiu organizuotų profesinių sąjungų nariais gali būti tik tos įmonės ar jos struktūrinio padalinio darbuotojai. Darbuotojais šio įstatymo prasme taip pat laikomi asmenys, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga. <...> [Trade unions organized at the level of an enterprise or a structural unit of an enterprise may only include employees of that enterprise or structural unit. For the purposes of this law, employees are also persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection.]

II. The right to occupational health and safety

a. Amendments to provisions of the LR DK

XI SKYRIUS DARBUOTOJŲ SAUGA IR SVEIKATA

158 straipsnis. Darbuotojų saugos ir sveikatos organizavimas

1. Kiekvienam darbuotojui turi būti sudarytos tinkamos, saugios ir sveikatai nekenksmingos darbo sąlygos, nustatytos Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatyme. Šis įstatymas taip pat nustato darbuotojų ir darbdavių teises ir pareigas, institucinę darbuotojų saugos ir sveikatos užtikrinimo sistemą bei specialias tam tikrų darbuotojų grupių (nėščių, neseniai pagimdžiusių ar krūtimi maitinančių darbuotojų, asmenų iki aštuoniolikos metų) apsaugos nuostatas. <...> [1. Every employee must be provided with the appropriate, safe and healthy working conditions as established in the Republic of Lithuania Law on Safety and Health at Work. This law also establishes the rights and obligations of employees and employers, the institutional assurance

system for health and safety at work, and special provisions for the protection of individual employee groups (employees who are pregnant, who recently gave birth, or who are breast feeding, persons under the age of 18 and disabled persons).]

Amendments:

1. *Kiekvienam darbuotojui turi būti sudarytos tinkamos, saugios ir sveikatai nekenksmingos darbo sąlygos, nustatytos Lietuvos Respublikos darbuotojų saugos ir sveikatos įstatyme. Darbuotojais šio skyriaus prasme taip pat laikomi asmenys, kurie dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jiems reikalinga apsauga. Šis įstatymas taip pat nustato darbuotojų ir darbdavių teises ir pareigas, institucinę darbuotojų saugos ir sveikatos užtikrinimo sistemą bei specialias tam tikrų darbuotojų grupių (nėščių, neseniai pagimdžiusių ar krūtimi maitinančių darbuotojų, asmenų iki aštuoniolikos metų) apsaugos nuostatas. <...> [1. Every employee must be provided with the appropriate, safe and healthy working conditions as established in the Republic of Lithuania Law on Safety and Health at Work. For the purposes of this chapter, employees are also persons who, due to their employee-likeness, are similarly vulnerable and therefore in need of protection. This law also establishes the rights and obligations of employees and employers, the institutional assurance system for health and safety at work, and special provisions for the protection of individual employee groups (employees who are pregnant, who recently gave birth, or who are breast feeding, persons under the age of 18 and disabled persons).]*

b. Amendments to provisions of the LR DSiSĮ

2 straipsnis. Pagrindinės šio Įstatymo sąvokos

<...> 2. *Darbdavys – kaip nustatyta Lietuvos Respublikos darbo kodekso 21 straipsnio 3 dalyje, taip pat valstybės ar savivaldybės institucija ar įstaiga. <...> [2. Employer – as established in Article 21 paragraph 3 of the Labor Code of the Republic of Lithuania, as well as a State or municipal institutions or agencies.]*

<...> 8. *Darbo vieta – vieta, kurioje asmuo dirba darbo sutartyje sulygtą darbą arba atlieka viešojo administravimo funkcijas. <...> [8. Place of work – the place where a person performs the work agreed in the employment contract with the employer or carries out public administration functions.]*

<...> 9. *Darbuotojas – kaip nustatyta Darbo kodekso 21 straipsnio 2 dalyje. Šiame Įstatyme darbuotoju taip pat yra laikomas asmuo, dirbantis kitų darbuotojų santykiams prilygintų teisinių santykių pagrindu pagal Lietuvos Respublikos užimtumo įstatymo 4 straipsnio 3 dalį, ir asmuo, kuris vykdo neatlygintą veiklą pagal Užimtumo įstatymo 9 straipsnį. <...> [Employee – as defined in Article 21 para. 2 of the Labor Code. For the purposes of this Law, an employee shall also include a person who is employed on the basis of other legal relations equivalent to employment within the meaning of Article 4 para. 3 of the Law on Employment of the Republic of Lithuania, and a person who carries out unremunerated activity within the meaning of Article 9 of the Law on*

Employment.]

Amendments:

<...> 2. *Darbdavys – kaip nustatyta Lietuvos Respublikos darbo kodekso 21 straipsnio 3 dalyje, valstybės ar savivaldybės institucija ar įstaiga, taip pat kaip nurodyta 9 punkto 3 sakinyje.* <...> [2. Employer – as established in Article 21 paragraph 3 of the Labor Code of the Republic of Lithuania, a State or municipal institution or agency, as well as established in the third sentence of point 9.]

<...> 8. *Darbo vieta – vieta, kurioje asmuo dirba sutartyje su darbdaviu suldytą darbą arba atlieka viešojo administravimo funkcijas.* <...> [8. Place of work – the place where a person performs the work agreed in the contract with the employer or carries out public administration functions.]

<...> 9. *Darbuotojas – kaip nustatyta Darbo kodekso 21 straipsnio 2 dalyje. Šiame Įstatyme darbuotoju taip pat yra laikomas asmuo, dirbantis kitų darbo santykiams prilygintų teisinių santykių pagrindu pagal Lietuvos Respublikos užimtumo įstatymo 4 straipsnio 3 dalį, asmuo, kuris vykdo neatlygintą veiklą pagal Užimtumo įstatymo 9 straipsnį. Šiame Įstatyme darbuotoju taip pat yra laikomas asmuo, dirbantys sutartiniais santykiais, kuris dėl savo panašumo į darbuotojus yra panašiai pažeidžiami ir todėl jam reikalinga apsauga, o kitas santykių dalyvis (įmonė, įstaiga, organizacija) laikomas darbdaviu ar darbdavių organizacija.* <...> [Employee – as defined in Article 21 para. 2 of the Labor Code. For the purposes of this Law, an employee shall also include a person who is employed on the basis of other legal relations equivalent to employment within the meaning of Article 4 para. 3 of the Law on Employment of the Republic of Lithuania, and a person who carries out unremunerated activity within the meaning of Article 9 of the Law on Employment. For the purposes of this law, an employee is also considered to be a person engaged in a contractual relationship, who, due to their employee-likeness, is similarly vulnerable and therefore in need of protection, while another party to the relationship (undertaking, institution, organization) is considered to be an employer or employers' organization.]

MYKOLAS ROMERIS UNIVERSITY

Hans Lauschke

RIGHTS AND SOCIAL GUARANTEES FOR
FREELANCE WORKERS – STATUS QUO AND
DEVELOPMENTS OF LEGAL INSTRUMENTS IN
LITHUANIA IN COMPARISON WITH OTHER
EUROPEAN COUNTRIES

Summary of Doctoral Dissertation
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This doctoral dissertation was prepared during the period of 2021-2025 at Mykolas Romeris University, under the right to conduct doctoral studies granted jointly to Mykolas Romeris University and Vytautas Magnus University by the Order No. V-160 of the Minister of Education, Science and Sport of the Republic of Lithuania on 22 February 2019.

Scientific supervisor:

Prof. Dr. Rytis Krasauskas (Mykolas Romeris University, Social Sciences, Law, S 001).

The dissertation is defended at the Law Research Council of Mykolas Romeris University and Vytautas Magnus University:

Chairperson:

Prof. Dr. Salvija Mulevičienė (Mykolas Romeris University, Social Sciences, Law, S 001).

Members:

Prof. Dr. Tomas Davulis (Vilnius University, Social Sciences, Law, S 001);

Prof. Dr. Lina Mikalonienė (Mykolas Romeris University, Social Sciences, Law, S 001);

Prof. Dr. Raimundas Moisejevas (Mykolas Romeris University, Social Sciences, Law, S 001);

Dr. Tatiana Wrocławska (University of Lodz, Poland, Social Sciences, Law, S 001).

The doctoral dissertation will be defended in the public meeting of the Law Research Council at 9:30 am on 17th of April, 2026 in Mykolas Romeris University, Room I-414.

Address: Ateities g. 20, LT-08303 Vilnius, Lithuania.

Hans Lauschke

RIGHTS AND SOCIAL GUARANTEES FOR FREELANCE WORKERS –
STATUS QUO AND DEVELOPMENTS OF LEGAL INSTRUMENTS
IN LITHUANIA IN COMPARISON WITH OTHER EUROPEAN
COUNTRIES

SUMMARY

The doctoral dissertation presents a comprehensive legal analysis of the rights and social guarantees applicable to freelance workers in Lithuania, in comparison with legal developments in Germany, the United Kingdom (UK) and internationally. Against the backdrop of evolving labor markets and the increasing prevalence of non-standard forms of work, it aims to determine the current status of employment and social security regulation for freelance workers in Lithuania, evaluate its compatibility with international, European, and constitutional standards, and propose necessary or feasible improvements based on comparative analysis with Germany and the UK. The dissertation is motivated by the growing number of individuals in Lithuania and across Europe working outside traditional employment relationships. These individuals frequently operate in a grey area between self-employment and employment, often lacking sufficient legal protection.

Research problem. The struggle of legislators to keep pace with the evolving world of work is evident in the case of so-called ‘freelance work’. As lifestyles and work structures continue to evolve, growing numbers of individuals find themselves in a space that does not fully align with traditional legal classifications. This raises fundamental questions about how traditional employment rights and social guarantees should or must apply to individuals who do not fit neatly into conventional legal categories. The term ‘freelance worker’ or ‘freelancer’ is not a legal term¹⁵⁷¹, but is commonly used to describe self-employed individuals who, based on a freelance (non-deliverable-oriented) service contract or (deliverable-oriented) contract to produce a specific work, carry out assignments independently and personally without being considered an employee of their work provider. However, freelance worker does not necessarily mean the same as self-employed¹⁵⁷², as the dividing lines between self-employment and employment are often blurred. Freelance worker is also not necessarily linked to the concept of ‘worker’ under EU or UK law. Therefore, the dissertation considers a ‘freelance worker’ to be broadly a natural person who performs work for another natural or legal

1571 In various translations and jurisdictions, however, the term is sometimes used legally, e.g. in Germany under the terms ‘Freier’ and ‘freier Mitarbeiter’.

1572 In part, the term is equated with self-employed in academia, e.g. Martin Maties, “§ 37 Arbeitsrechtliche Bezüge,” in *Handbuch IT- und Datenschutzrecht*, by Astrid Auer-Reinsdorff and Isabell Conrad (Munich: C.H. Beck, 2019), para. 35.

person, without employees of their own, in exchange for remuneration without being regarded as an employee of the other natural or legal person¹⁵⁷³. This is not limited to a specific economic sector or qualification¹⁵⁷⁴. The term can cover almost all sectors in which individual services can be outsourced and is intentionally chosen as it conveys a specific form of activity structure without implying any legal qualification. The framework conditions under which a legal qualification takes place is examined in the course of the dissertation. Such a qualification typically takes place methodically based on criteria derived from the characteristics of the legal relationships being distinguished from each other¹⁵⁷⁵.

Subject of the research. The dissertation addresses a pressing scientific problem: the legal uncertainties and regulatory gaps in Lithuania regarding freelance workers due to the evolving nature of work in a social market economy.

Relevance of the topic and the research problem. The topic is relevant both globally and in Lithuania. The first reason is that the number of individuals working in such non-standard work arrangements can no longer be neglected. The phenomenon of freelance workers can be modeled statistically by examining the number of solo self-employed persons, i.e. self-employed persons without own employees. According to the *Joint Employment Report 2024* by the European Commission and the Council, in 2022, solo self-employed persons in Lithuania accounted for 10% of the total working population, significantly above the EU average, while Germany's figure was highlighted with below 6%¹⁵⁷⁶. The disparity is striking. Like Lithuania, Germany is an EU member state, which suggests that the overall employment and social security frameworks should be broadly similar. At the same time, Germany is Lithuania's most important non-neighboring trading partner¹⁵⁷⁷. Furthermore, Germany is by far the major partner of Lithuania for exports of services¹⁵⁷⁸. Both economies are therefore closely intertwined despite a certain geographical distance. It can therefore be assumed that both face similar structural challenges. On the other hand, in 2022, Lithuania had a comparatively high share of 3.7% in agriculture, whereas Germany had only

1573 Expressly excluded from the review are: civil servants, regulated professions such as attorneys or bailiffs and other professions expressly defined as self-employed by legal definition.

1574 As the term 'freelancers' is sometimes used to describe only persons working in high skilled occupations being a subcategory of solo self-employed persons, e.g., "The Self-Employed Landscape 2022," *IPSE*, accessed March 1, 2025, <https://www.ipse.co.uk/campaigns/the-self-employed-landscape/self-employed-landscape-2022>.

1575 Ipolitas Nekrošius and Daiva Petrylaitė, *Darbo teisė: vadovėlis* (Vilnius: Teisinės informacijos centras, 2008), 13 ff.

1576 European Commission, *Joint Employment Report 2024: Commission Proposal*. (Luxembourg: Publications Office of the European Union, 2023), 71, <https://data.europa.eu/doi/10.2767/17157>.

1577 "Informaciniai Pranešimai," *Official Statistics Portal*, accessed March 1, 2025, <https://osp.stat.gov.lt/informaciniai-pranesimai?articleId=13209829>.

1578 "International Trade in Services in Q1 2024," *Bank of Lithuania*, accessed March 1, 2025, <https://www.lb.lt/en/news/international-trade-in-services-in-q1-2024>.

a share of 0.9% in the same period¹⁵⁷⁹. In terms of sectors, the highest proportion of self-employment is traditionally found in this sector¹⁵⁸⁰. This suggests at first glance that the disparity seems to be related to the different economic structures of the two countries and the distribution of the labor force across the economic sectors. However, taking into account the figures from the UK in comparison, the sectorial reasons seem considerably less significant. In the UK with its common law background, the same legal EU framework applied at least until its final exit from the EU on 1 January 2021. The number of solo self-employed persons was with 12.5% in 2022¹⁵⁸¹ even higher than in Lithuania, but with a lower share than Germany of 0,6% in agriculture, albeit with a higher proportion in the services sector (UK: 91.5%, Germany: 85.4%, Lithuania: 80.1%)¹⁵⁸².

These overlapping but at the same time distinct figures indicate two things: The topic affects a considerable number of working individuals and the reasons for these discrepancies cannot be solely rooted in the economic structures of the countries. Instead, legal frameworks and regulations may have a substantial impact on the prevalence of freelance work. The latter hypothesis is driven by recent legal developments in Germany and the UK which have highlighted the evolving legal recognition of freelance workers. In Germany, the Bundesarbeitsgericht granted so-called crowdworkers full ‘employee’ status in 2021¹⁵⁸³, while the Supreme Court of the United Kingdom (UKSC) ruled in favor of Uber drivers, recognizing them at least as ‘workers’¹⁵⁸⁴ and granting them partial employment rights in the same year. This decision in the UK attracted attention also in Lithuania¹⁵⁸⁵, especially since similar decisions have not been issued here, where the same company is active, but such transportation services are required by law to be performed by self-employed individuals¹⁵⁸⁶. These developments

1579 “Employment by Sector (%)” *World Bank Gender Data Portal*, accessed March 1, 2025, <https://genderdata.worldbank.org/en/indicator/sl-empl-zs?year=2022&employmentSector=Services>.

1580 Eurofound, *Psychosocial Risks to Workers’ Well-Being: Lessons from the COVID 19 Pandemic*. (Luxembourg: Publications Office of the European Union, 2023), 9, <https://data.europa.eu/doi/10.2806/350964>.

1581 Due to the UK’s withdrawal from the EU, the UK is no longer included in EU statistics. According to the report ‘The Self-Employed Landscape 2022’ by the IPSE, there were about 4.1 million solo self-employed persons in the UK in 2022. The total number of persons in employment in the UK during the same period was approximately 32.8 million. This means that around 12.5% of the working population were solo self-employed.

1582 “Employment by Sector (%)”

1583 Bundesarbeitsgericht, Urteil. vom 01.12.2020 – 9 AZR 102/20, *Neue Zeitschrift für Arbeitsrecht*, 2021, 552–62.

1584 Uber BV & Ors v Aslam & Ors [2021] UKSC 5, para. 119.

1585 Vilija Mačiulskytė, “Gyventojai vis dažniau įdarbinami kaip laisvai samdomi: paaiškino, ką jie praranda ir kuo tai gresia,” *TV3*, February 28, 2021, <https://www.tv3.lt/naujiena/verslas/gyventojai-vis-dazniau-idarbinami-kaip-laisvai-samdomi-paaiskino-ka-jie-praranda-ir-kuo-tai-gresia-n1083285>.

1586 Lietuvos Respublikos kelių transporto kodeksas, *e-TAR*, art. 18–1, accessed March 22, 2025, <https://e-tar.lt/portal/lt/legalAct/TAR.65AD818F5F9C/asr>.

illustrate the need for a cross-jurisdictional analysis, as they underscore the growing recognition of freelance workers in non-standard employment arrangements.

A second key reason for the relevance of the dissertation is that significant regulatory gaps persist, particularly in light of the rise of digital platform work. Since the 1990s, the EU has pursued a policy of promoting more diversity in employment contracting. In the three Directives on flexible working arrangements¹⁵⁸⁷, this is particularly evident¹⁵⁸⁸. Recently, the 2024 Directive on improving working conditions for platform workers (who could be seen as a subset of freelance workers) acknowledged the legal and social challenges posed by the misclassification of employment status, which limits access to crucial employment rights and social protections. The challenges require the most urgent action in this area¹⁵⁸⁹, but are not limited to platform work, as increasingly precarious conditions are also seen to emerge in other non-standard forms of work¹⁵⁹⁰. A Green Paper by the European Commission highlighted already in 2006 the growing uncertainty and blurred boundaries regarding the legal status of certain self-employed individuals, particularly the growing group of economically dependent self-employed persons¹⁵⁹¹. Furthermore, there are gaps in the international (EU) context itself due to apparent different legal classification concepts of the EU member states. In the course of the introduction of the Written Statement Directive 91/533/EEC, the European Commission noted in the so-called *REFIT* evaluation that due to different concepts of ‘employee’, ‘employment relationship’ and ‘employment contract’ in different member states, there is legal uncertainty regarding coverage of new and atypical work forms and this diversity of approaches becomes an obstacle for

1587 Council Directive 97/81/EC of 15 December 1997 Concerning the Framework Agreement on Part-Time Work Concluded by UNICE, CEEP and the ETUC - Annex: Framework Agreement on Part-Time Work, *EUR-Lex*, accessed August 16, 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01997L0081-19980525>; Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, *EUR-Lex*, accessed March 16, 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01999L0070-19990710>; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work, *EUR-Lex*, accessed August 16, 2021, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0104>.

1588 Simon Deakin, “New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014,” *Nova School of Law*, accessed August 16, 2021, https://www.fd.unl.pt/docentes_docs/ma/jja_MA_24419.pdf.

1589 Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on Improving Working Conditions in Platform Work, *EUR-Lex*, accessed March 15, 2025, <https://eur-lex.europa.eu/eli/dir/2024/2831/oj/eng.recital.6>.

1590 “First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 1127 Final,” accessed March 15, 2025, <http://ec.europa.eu/social/BlobServlet?docId=23655&langId=en>.

1591 “GREEN PAPER Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 Final” (Brussels: European Commission, November 22, 2006), 10, [https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2006\)0708_/com_com\(2006\)0708_en.pdf](https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0708_/com_com(2006)0708_en.pdf).

the full effectiveness of EU legislation¹⁵⁹². Moreover, the question is relevant whether certain individuals working in apparent intermediary relationships traditionally assigned to the independent domain should be granted similar rights as employees. As early as 1999, the so-called *Supiot Commission* recommended in a report to create an intermediary status for dependent self-employed persons in the EU¹⁵⁹³. Building on this, an expert report commissioned by the European Commission argued in 2003 for the creation of a main core of social rights at the EU level that would apply to all workers, i.e., not only to traditional employees, but also to economically dependent working individuals¹⁵⁹⁴. After not being pursued for a while, this issue has gained new momentum with the latest legal developments mentioned related to platform work¹⁵⁹⁵. Furthermore, in 2022, the European Commission issued guidelines which suggested exemptions from EU competition law restrictions with regard to collective agreements for solo self-employed individuals if they are ‘in a situation comparable to that of workers’¹⁵⁹⁶. This illustrates the increasing recognition that at least certain freelance workers working on a self-employed basis require protection similar to those of employees. These discussions are crucial, especially when non-standard work is misused to reduce labor costs at the expense of freelance workers’ rights, as it carries the risk for social dumping¹⁵⁹⁷. When it comes concretely to guaranteeing rights and social guarantees in the EU, measures are being discussed, which show that the issue is under surveillance¹⁵⁹⁸. Furthermore, there are reports by EU institutions highlighting the issues of less social protection of self-employed individuals¹⁵⁹⁹. Various reports from EU institutions at least give a teaser that the goal might not be to push back or prohibit

1592 “REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC)” (Brussels: European Commission, April 26, 2017), 25, <https://ec.europa.eu/social/BlobServlet?docId=17615&langId=en>.

1593 Cf. Alain Supiot and Pamela Meadows, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford/New York: Oxford University Press, 2001).

1594 Cf. Adalberto Perulli, *Wirtschaftlich abhängige Beschäftigungsverhältnisse/arbeitnehmerähnliche Selbständige: rechtliche, soziale und wirtschaftliche Aspekte* (Brussels: European Commission, 2003), https://www.labourline.org/GED_CUY/118355793653/D2398.PDF.

1595 Cf. Directive (EU) 2024/2831.

1596 European Commission, “Communication from the Commission - Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons 2022/C 374/02,” *EUR-Lex*, para. 20, accessed March 17, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_374_R_0002.

1597 ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Geneva: International Labour Office, 2016).

1598 “Draft Report on Fair Working Conditions, Rights and Social Protection for Platform Workers - New Forms of Employment Linked to Digital Development (2019/2186(INI))” (Legislative Observatory), accessed August 16, 2021, https://www.europarl.europa.eu/doceo/document/EMPL-PR-657498_EN.pdf.

1599 European Commission, *Access to Social Protection for Workers and the Self-Employed: Best Practice Examples from EU member states*. (LU: Publications Office, 2018), <https://data.europa.eu/doi/10.2767/70549>.

such atypical work relationships (and in particular platform work), but rather to expand them in a regulated way¹⁶⁰⁰. In addition to these EU-wide concerns, practical experiences in member states highlight the urgency of the topic¹⁶⁰¹.

This not only shows the current relevance, but also the extremely complex interplay of different regulations in relation to the topic of the dissertation. New regulatory gaps open up that can only be closed gradually. For these reasons, the dissertation looks in detail at the question of which regulatory framework already covers working individuals on the boundary between ‘employee’ and ‘self-employed person’ and what measures have already been taken recently nationally and internationally to address this issue. As a result, the dissertation thoroughly analyzes the current regulatory framework of freelance work in general as well as in different jurisdictions in order to identify possible regulatory gaps in Lithuania and find solutions that strike an appropriate balance between the on-demand economy’s need for flexible work arrangements as well as the rights and social guarantees of freelance workers.

Aim of the research. The aim of the dissertation is to determine the current status of employment and social security regulation for freelance workers in Lithuania, evaluate its compatibility with international, European, and constitutional standards, and propose necessary or feasible improvements based on comparative analysis with Germany and the UK.

Objectives of the research. To achieve the aim, the following objectives are pursued:

1. To analyze the challenges in accurately classifying freelance work relationships in relation to typical employment rights and social guarantees;
2. To identify legal instruments from Germany and/or the UK that could inform or improve Lithuania’s approach on freelance work;
3. To assess whether Lithuania’s legal framework for freelance workers aligns with higher-ranking law (EU, international, and constitutional law);
4. To formulate a proposal for instruments to address identified gaps in Lithuania but taking into account Lithuanian legal tradition.

Research Review. The topic of the dissertation is multifaceted, drawing on research conducted by scholars from various countries. Most of this research either addresses the subject from a broader perspective¹⁶⁰² or focuses only on partial aspects. The most

1600 Alex J. Wood, “Algorithmic Management Consequences for Work Organisation and Working Conditions,” JRC Working Papers Series on Labour, Education and Technology (Seville: European Commission, Joint Research Centre (JRC), 2021), <https://www.econstor.eu/bitstream/10419/233886/1/1757203559.pdf>.

1601 Cf. Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz (Arbeitsschutzkontrollgesetz), *Bundesgesetzblatt Online*, art. 2, accessed March 1, 2025, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl120s3334.pdf.

1602 Cf. Eurofound, *New Forms of Employment: 2020 Update*. (Luxembourg: Publications Office of the European Union, 2020), <https://data.europa.eu/doi/10.2806/278670>; Valeria Pulignano et al., “Creative Labour in the Era of Covid-19: The Case of Freelancers,” Working Paper (Brussels: ETUI aisbl, 2021), <https://www.etui.org/sites/default/files/2021-03/Creative%20labour%20in%20the%20era%20of%20Covid-19%20the%20case%20of%20freelancers-2021-web.pdf>.

comprehensive and up-to-date overview of international research in this field is provided by *Kocher*. In her work *Digital Work Platforms at the Interface of Labour Law*, she analyzes the extent to which formally self-employed individuals should be entitled to traditional employment rights under existing law or whether a fundamental paradigm shift in the core principles of employment law is necessary. She also examines the purposes of employment law as part of her analysis¹⁶⁰³. The dissertation shares certain overlaps with her research; however, *Kocher's* focus is exclusively on platform work and takes a more interdisciplinary approach. She provides a general overview without conducting a detailed comparative analysis of individual jurisdictions, as the dissertation does. Additionally, *Kocher's* discussion of the purposes of employment law seems to assume that employment law inherently serves one or more specific purposes. The dissertation, by contrast, takes a grounded theory methodology and a contextual legal analysis approach, intentionally leaving open the question of whether aspects or protective regulations within both employment law and social security law may serve distinct purposes that only partially overlap.

Different (historical) purposes of specific aspects of employment and social security law have been examined by *Kendzia*¹⁶⁰⁴ and *Rebhahn*¹⁶⁰⁵, though research on these individual-purpose aspects remain limited¹⁶⁰⁶. In *Kendzia's* analysis, he references scholars such as *Nipperdey*, *Sinzheimer*, *Mückenberger*, and *Schmuhl*. While *Kendzia* primarily explores the objectives and justifications of employment and social security law from a German historical perspective, his findings have broader relevance beyond Germany. His research traces developments as far back as the 16th century, identifying the late 19th century as a key turning point in the emergence of structures comparable to those in place today. At that time, Germany was a pioneer in employment and social security law, leading Europe in legislative advancements that served as a model for the rest of the continent.

When considering the UK, the works of *Freedland* and *Adams-Prassl* are particularly

1603 Eva Kocher, *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers* (Oxford/New York: Hart, 2022), 129–34.

1604 Michael J. Kendzia, “Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland,” Discussion Paper (Institute of Labor Economics (IZA), August 2010), <https://docs.iza.org/dp5107.pdf>; Michael J. Kendzia, “Der Institutionalisierungsprozess des Lohnarbeitsverhältnisses vom Ersten bis zum Zweiten Weltkrieg in Deutschland,” Discussion Paper (Institute of Labor Economics (IZA), October 2010), <https://docs.iza.org/dp5231.pdf>.

1605 Cf. Robert Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” *Recht der Arbeit*, 2009, 236–53.

1606 *Ibid.*, 242.

significant¹⁶⁰⁷. Their analysis of the distinction between employment statuses and self-employment contributes significantly to the understanding and commenting on UK case law. Their insights are essential for differentiating freelance workers, and *Adams-Prassl*, in particular, has extensively examined issues related to algorithmic management in work¹⁶⁰⁸. Furthermore, it is important to highlight *Countouris*, who has even already considered what a future-proof employment status might look like in the UK context – one that sufficiently addresses the challenges of the modern world of work¹⁶⁰⁹.

In Germany, the debate surrounding the distinction between employment and self-employment presents a mixed picture. *Preis* advocates for a rigid distinction between different employment statuses¹⁶¹⁰, while other scholars such as *Juncker* and *Rebhahn* propose more nuanced perspectives, suggesting that national definitions, as applied by case law, should allow for a more flexible approach to accommodate especially non-standard employment relationships¹⁶¹¹. In addition, *Wank* advocates the concept of the ‘lack of entrepreneurial opportunities’ more than 30 years, a concept which also plays a role in the dissertation and has gained recognition beyond Germany¹⁶¹². *Wank*’s idea remains highly relevant in addressing the classification challenges of emerging work models¹⁶¹³. All these German authors, including *Preis*, do not limit their analysis to

1607 Mark Freedland and Jeremias Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” *Spanish Labour Law and Employment Relations Journal* 6, no. 1–2 (November 6, 2017): 16–29, doi:10.20318/sllerj.2017.3922; Guy Davidov, Mark Freedland, and Nicola Countouris, “The Subjects of Labor Law: ‘Employees’ and Other Workers,” in *Forthcoming in Research Handbuch in Research Handbooks in Comparative Law*, ed. Matthew Finkin and Guy Mundlak, Hebrew University of Jerusalem Legal Research Paper, No. 15-15, 2015, <https://ssrn.com/abstract=2561752>; Jeremias Adams-Prassl and Martin Gruber-Risak, “Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork,” *Comparative Labor Law & Policy Journal*, *Forthcoming* 37, no. 3 (2016): 619–51.

1608 Cf. Jeremias Adams-Prassl, Reuben Binns, and Aislinn Kelly-Lyth, “Directly Discriminatory Algorithms,” *Mod. L. Rev.* 86, no. 1 (January 2023): 144–75, doi:10.1111/1468-2230.12759; Jeremias Adams-Prassl et al., “Regulating Algorithmic Management: A Blueprint,” *European Labour Law Journal* 14, no. 2 (June 2023): 124–51, doi:10.1177/20319525231167299.

1609 Nicola Countouris, “‘Waiting for Godot’ – The Employment Rights Bill 2024 and the ‘Single Status of Worker’ Omission,” *Institute of Employment Rights*, March 11, 2025, <https://www.ier.org.uk/comments/waiting-for-godot-the-employment-rights-bill-2024-and-the-single-status-of-worker-omission/>.

1610 Ulrich Preis, “§ 611 a BGB – Potenziale des Arbeitnehmerbegriffes,” *Neue Zeitschrift für Arbeitsrecht*, 2018, 817 ff.

1611 Abbo Junker, “Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs,” *Europäische Zeitschrift für Arbeitsrecht*, 2016, 184–206; Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive.”

1612 European Commission, ed., *Transformation of Labour and Future of Labour Law in Europe: Final Report*, Employment & Social Affairs (Luxembourg: Office for Official Publications of the European Communities, 1999), 7 ff.

1613 Cf. Rolf Wank, “Von Honorärärzten und Piloten – der ‘Beschäftigte’ in der BSG-Rechtsprechung,” *Recht der Arbeit*, 2020, 115.

the legal qualification of standard employment but also explore non-standard employment – this is evident alone from the fact that German employment law recognizes a hybrid position between traditional employees and self-employed individuals, known as ‘employee-like persons’.

Regarding Lithuania, which is in the focus of the dissertation, research on non-standard employment remains relatively marginal. Only a few scholars, such as *Globytė*¹⁶¹⁴ and *Davulis*¹⁶¹⁵, have explicitly addressed freelance work recently in publications. To date, the research has primarily focused on introducing greater flexibility into standard employment, including the creation of new, more flexible employment contract types¹⁶¹⁶. Additionally, while the distinction between standard employment and self-employment has been a central theme, much of the research merely categorizes and describes the scope of the Lithuanian legal framework rather than fundamentally questioning it with regard to its compliance with higher-ranking law. Several publications have discussed the criteria for qualifying an employment relationship versus self-employment, including those by *Dambrauskienė*, *Nekrošius*, *Tiažkijus*, *Davulis*, *Martišienė*, and *Vaičiaitis*¹⁶¹⁷. The question of introducing specific intermediate categories between traditional employees and self-employed individuals into Lithuanian law has so far been viewed more as a possibility than as a necessary response to

1614 About the Lithuanian concept of subordination in connection with platform work: Rūta Globytė, “The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania,” *Baltic Journal of Law & Politics* 17, no. 2 (2024): 61–76, doi:10.2478/bjlp-2024-00015.

1615 About the legal framework for the activities of Uber in Lithuania, cf. Tomas Davulis, “Uber and taxis: a comparative law study in Lithuania,” in *Uber and Taxis: Comparative Law Studies*, ed. Rozen Noguellou and David Renders (Brussels: Bruylant, 2018), 293–307; Tomas Davulis, “Ar legalus yra maisto išvežiotojų ‘streikas?’,” July 15, 2020, <https://www.teise.pro/index.php/2020/07/15/t-davulis-ar-legalus-yra-maisto-isveziotuju-streikas/>; about the right to collective bargaining and the right to strike for the self-employed in Lithuania, cf. Tomas Davulis, “Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką,” in *Darbo teisės iššūkiai besikeičiančiame pasaulyje*, ed. Ingrida Mačernytė-Panomariovienė (Vilnius: Mykolo Romerio universitetas, 2020).

1616 Justinas Usonis and Tomas Bagdanskis, “Problems of Introduction of Flexibility into Lithuanian Labour Law,” *Jurisprudencija* 18, no. 2 (2011): 595–612; Ingrida Mačernytė-Panomariovienė et al., “Some Aspects of Improving the Legal Regulation of Labour Relations: Thirty Years of Experience in the Baltic States,” *International Social Science Journal* 72, no. 246 (December 2022): 1237–53, doi:10.1111/issj.12385.

1617 Cf. Genovaitė Dambrauskienė, “Civilinių ir darbo sutarčių sąveika,” *Jurisprudencija* 28, no. 20 (2002): 7–16; Genovaitė Dambrauskienė, “Lanksčių užimtumo formų taikymas Lietuvoje,” *Jurisprudencija* 25, no. 17 (2002): 19–25; Genovaitė Dambrauskienė, “Darbo teisės modernizavimo bei tobulinimo problemos,” *Jurisprudencija* 8, no. 110 (2008): 7–12; Ipolitas Nekrošius, “Lietuvos Respublikos darbo kodekso rengimo problemos,” *Teisė* 33, no. 1 (1999): 25–41; Viktoras Tiažkijus, “Darbo teisė ir valstybės tarnyba: panašumai ir skirtumai,” *Justitia* 1, no. 49 (2004): 46–56; Beata Martišienė, “Kriterijų, atskiriančių skirtingas darbo organizavimo formas analizė,” *Verslo ir teisės aktualijos* 5, no. 2 (2010): 405–18; Tomas Bagdanskis and Justinas Usonis, “Problems of Qualifying an Employment Relationship and Undeclared Work in Lithuania,” *Jurisprudencija* 18, no. 3 (2011): 1101–22.

legal developments¹⁶¹⁸.

In particular, the doctoral dissertation defended by *Martišienė*, titled *Darbo santykių reguliavimo civiliniai teisiniai aspektai* [Civil Aspects of Legal Regulation of Labour Relations]¹⁶¹⁹ should be highlighted with regard to the dissertation. It focuses on the distinction between Lithuanian employment and civil law, the application of civil law norms to employment relations and the distinction between dependent and independent employment. Furthermore, *Povilaitienė's* defended doctoral dissertation *Darbo sutartis ir kitos teisinės darbo panaudojimo formos* [Employment contract and other legal forms of work]¹⁶²⁰ seeks to find universal characteristics or criteria for the existence of an employment contract to distinguish it from other types of contracts under Lithuanian law, such as the Lithuanian author's contract. In this context, *Martišienė* and *Davulis* brought the element of 'financial risks' into the discussion to varying degrees¹⁶²¹, which overlaps to some extent with *Wank's* concept of 'lack of entrepreneurial opportunities'.

Internationally, research on distinguishing various forms of employment from self-employment surged in the late 1990s and early 2000s, coinciding with the ILO's discussions on 'contract labor' and the EU's exploration of new forms of work. *Supiot* made significant contributions in this area¹⁶²², drawing also on country reports and ILO publications from the 1997/1998 discussions on contract labor up to the adoption of ILO's Recommendation No. 198 in 2006. Numerous scholars from various countries have examined the possible criteria for identifying employment relationships, including *Risak*, who addressed the challenges of independent work from both global and European regulatory perspectives¹⁶²³.

With regard to the interpretation of various fundamental rights instruments, such as the European Convention on Human Rights (ECHR) and the Revised European Social Charter (RESC), German commentaries are particularly valuable¹⁶²⁴, as they offer extensive analysis – especially concerning the personal scope of application under

1618 Cf. Tomas Davulis, "Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.," *Teisė* 104 (2017): 13, doi:10.15388/Teise.2017.104.10842.

1619 Beata Martišienė, *Darbo santykių reguliavimo civiliniai teisiniai aspektai* (Vilnius: Vilniaus Universiteto leidykla, 2012).

1620 Ieva Povilaitienė, *Darbo sutartis ir kitos teisinės darbo panaudojimo formos* (Vilnius: Vilniaus Universiteto leidykla, 2012).

1621 Beata Martišienė, "Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai," *Teisė* 80 (2011): 138–45, doi:10.15388/Teise.2011.0.156; Tomas Davulis, *Lietuvos Respublikos darbo kodekso komentaras* (Vilnius: VĮ Registrų centras, 2018), 134; Davulis, "Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.," 13.

1622 Supiot and Meadows, *Beyond Employment*.

1623 ILO, ed., *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198* (Geneva: International Labour Organization, 2013).

1624 Cf. Christian Calliess et al., *EUV/AEUV* (Munich: C.H. Beck, 2022); Dirk Ehlers, ed., *Europäische Grundrechte und Grundfreiheiten* (Berlin: De Gruyter, 2014), doi:10.1515/9783110363166; Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* (Munich: C.H. Beck, 2021).

individual provisions and, in some cases, the potential extension of such protections to working individuals beyond traditional employees.

Furthermore, *De Stefano* has specifically explored the personal scope of ILO instruments and their legal interaction¹⁶²⁵. *Wank* has contributed extensively to the teleological interpretation of the EU's worker concept¹⁶²⁶, and *Risak* has also provided a thorough analysis of this concept, advocating for a similar teleological approach¹⁶²⁷. *Ziegler* laid the foundation for the current (German) scholarly consensus¹⁶²⁸ that EU employment law encompasses multiple EU worker concepts¹⁶²⁹. *Pottschmidt* deserves recognition for her pioneering work on the legal status of 'employee-like persons' in Europe, making significant contributions to this field¹⁶³⁰.

The dissertation builds further on existing research that has examined new employment forms from various scientific perspectives or addressed partial aspects of the dissertation's topic¹⁶³¹. As an opposing concept, the 'standard employment relationship' (SER) has been described by different scholars and was partly used for conclusions on non-standard employment¹⁶³². Furthermore, false self-employment remains a perennial issue in case law, literature, and legal practice¹⁶³³.

Novelty of the research. The dissertation aims to break new ground by addressing these issues from a broad but strictly legal perspective. Moreover, due to the rapid development in this legal field and technological advancements that have facilitated the spread of new work forms, many aspects of the subject require at least reassessment. The implementation of Lithuania's new LR DK in 2017 marks a turning point in

1625 Valerio De Stefano, "Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards," *International Labour Review*, no. forthcoming (2021), <https://ssrn.com/abstract=3790766>.

1626 I.a., Rolf Wank, "Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen," *Europäische Zeitschrift für Arbeitsrecht*, 2018, 327–45; Rolf Wank, "Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff," *Europäische Zeitschrift für Arbeitsrecht*, 2023, 22–49.

1627 Martin Gruber-Risak and Thomas Dullinger, *The Concept of "Worker" in EU Law: Status Quo and Potential for Change*, 140 (Brussel: ETUI, 2018).

1628 At least in Germany.

1629 Katharina Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht* (Baden-Baden: Nomos, 2011); building on this, cf. Thomas Hohe, *Arbeitnehmerbegriffe im Recht der Europäischen Union: Ein Plädoyer für eine funktionale Begriffsbildung* (Baden-Baden: Nomos, 2022), doi:10.5771/9783748935377.

1630 Daniela Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten* (Baden-Baden: Nomos, 2006).

1631 ILO, *Non-Standard Employment around the World*.

1632 Simon Deakin, "New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014," 1.

1633 Joachim Holthausen, "Statusfeststellung und Scheinselbstständigkeit – Ein Praxisbefund über Etikettenschwindel, Umgehungs-, Schein- sowie verdeckte Rechtsgeschäfte und ihre Folgen," *Recht der Arbeit*, 2020, 92.

Lithuanian employment law. While commentators like *Davulis*¹⁶³⁴ and *Bagdanskis*¹⁶³⁵ have analyzed the distinction between employee and self-employed status, their commentaries primarily describe the legal situation without critically questioning it. Although there are numerous publications that attempt to explain and justify the existence and purpose of the ‘employment status’ as a whole¹⁶³⁶, few focus on the individual components and specific norms of employment and social security law¹⁶³⁷. The dissertation breaks down employment and social security law into constituent parts to provide more detailed insights.

Regarding social security law, several publications have addressed the question of social security for self-employed individuals. *Schoukens* offers a comprehensive international comparative analysis¹⁶³⁸. However, this analysis remains a general overview of several countries without delving into in-depth analysis of specific countries’ framework conditions, which could explain the similarities and differences observed.

Despite academic recognition of the different forms of solo self-employment, which have been divided into various clusters necessitating different regulatory approaches¹⁶³⁹, a summary and consolidation of all these individual questions to find universal approaches that go beyond certain specific forms as ‘platform work’ is missing so far.

As the dissertation provides a purely legal analysis, the outcome is not influenced by whether all or certain freelance workers should, for subjective or political reasons, be afforded greater protection. Rather, it focuses on whether existing or emerging legal developments require adjustments to the regulatory environment in Lithuania. Furthermore, the dissertation contributes novel insights by focusing specifically on Lithuania and comparing its regulatory environment with that of Germany and the UK. Existing scholarship and policy debate tend to center on Western and Eastern European

1634 Davulis, *LR DK komentaras*.

1635 Tomas Bagdanskis, Vilius Mačiulaitis, and Mantas Mikalopas, *Lietuvos Respublikos Darbo Kodekso Komentaras: Individualieji Darbo Santykiai* (Vilnius: Rito projects, 2018), 52 ff.

1636 Cf., e.g., Kocher, *Digital Work Platforms at the Interface of Labour Law*, 129–34; Simon Deakin and Frank Wilkinson, “Labour Law and Economic Theory: A Reappraisal,” in *The Legal Regulation of the Employment Relation*, by Hugh Collins, Paul Davies, and Roger Rideout (London: Kluwer Law International, 2000), 29–62; Simon Deakin, “The Comparative Evolution of the Employment Relationship,” in *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, by Guy Davidov (London: Bloomsbury Publishing PLC, 2006), 101; Hugh Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” in *The Legal Regulation of the Employment Relation*, by Hugh Collins, Paul Davies, and Roger Rideout (London: Kluwer Law International, 2000), 7 ff.; Alain Supiot, “Was ist ein Arbeitnehmer?,” in *Das europäische Sozialmodell: auf dem Weg zum transnationalen Sozialstaat*, ed. Hartmut Kaelble and Günther Schmid (Berlin: edition sigma, 2006), 423 ff.

1637 Rebhahn, “Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive,” 242.

1638 Paul Schoukens and Charlotte Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers: An Analysis Based upon the EU Recommendation on Access to Social Protection* (Leuven: Acco, 2021).

1639 Cf. Katharina Uffmann, “Aktuelle Fragen der Solo-Selbständigkeit,” *Recht der Arbeit*, 2019: 360–71.

models in isolation. By extending the comparative framework to include structural and historic diversity, the dissertation provides a more nuanced understanding of how a legal system like Lithuania's can or must adapt to freelance work. Furthermore, the dissertation uniquely integrates doctrinal legal analysis with a functionalist approach to classification. It aims to clarify which legal mechanisms are necessary for effectively regulating freelance work in a way that balances the need for flexibility with the imperative of legal protection and certainty – taking also into account Lithuania's unique legal tradition.

Methodology of the research. The title of the dissertation is deliberately vague and does not allow straightforward subsummation. Instead of imposing rigid legal definitions at the outset, it adopts an exploratory and context-sensitive approach. Rather than treating the terms 'freelance worker', 'rights' and 'social guarantees' as fixed narrowly defined concepts, their meanings will emerge and might even change through the legislative review, comparative legal analysis and policy discourse in the dissertation. This approach aligns grounded theory methodology and contextual legal analysis, both of which emphasize the importance of allowing conceptual frameworks to develop in response to empirical and comparative findings.

The aim is to explore how and under what conditions a freelance worker – who exists somewhere at the dividing line of a traditional employee and a fully and genuine self-employed individual – should or must fall under the respective scope of application of employment law and (comprehensive) social security law. Based on this categorization, the central question is whether and under what circumstances such a working individual in Lithuania and the selected comparison countries Germany and the UK could or must be entitled to rights and social guarantees that are typically reserved for employees working in an employment relationship under an employment contract. The term 'typically' is used deliberately in this context, as terms such as 'employee', 'employment relationship' or 'employment contract' evoke immediately certain associations among scholars and laypersons alike. However, these concepts do not, in themselves, constitute universal legal classifications without considering the specific legal context in which they are examined. The research of the dissertation therefore adopts a legal pluralism perspective, acknowledging that multiple overlapping legal sources – international law, EU law, national law and case law – shape the legal treatment of freelance workers. By adopting an iterative conceptual approach, the dissertation ensures that its analysis remains flexible and responsive to legal complexities, rather than being restricted by premature categorization. This approach allows for a more precise and contextually relevant discussion of freelance workers' rights and social guarantees.

Research sources. Given the subject matter of the dissertation, it relies on qualitative research. The entire research process is, therefore, centered around the analysis of legislation, case law, explanatory memoranda, draft laws, legal commentaries, statistics, conclusions reports and scientific literature. The dissertation utilizes legal research methods, including document and information analysis, comparative and analogical reasoning, as well as systematic, teleological, and generalization approaches.

The dissertation draws on a wide range of legal and academic sources, which, given the relevance of the topic, are becoming increasingly numerous. It is based mostly on international and national legal acts (international laws and legal acts, and laws and legal acts of the EU, Lithuania, Germany as well as the UK) of old and current versions in comparison as well as decisions of international, EU and national courts and institutions. Furthermore, the dissertation also considers legal commentaries and explanatory memoranda. Thirdly, the dissertation draws on academic publications, articles and non-fiction books (especially on sub-areas of the dissertation's topic).

The information collected is processed through a systematization process, leading to generalizations and conclusions on effective instruments for the protection of rights and social guarantees of freelance workers.

Structure of the dissertation. The dissertation begins by considering the inherent tension between the principle of 'freedom of contract' and the existence of specific rights and protections for certain groups of working individuals. Although 'freedom of contract' is a fundamental principle recognized under Lithuanian, German, UK, and EU law, it is restricted in the employment context due to the inherent power imbalance between employers and employees. The *first* chapter outlines briefly how these restrictions can be legally justified, providing a foundation for the subsequent chapters. Furthermore, the chapter analyzes the potential aims and purposes behind the idea of granting certain rights (through employment law) and social guarantees (through social security law) to a specific group of working individuals (typically employees), thereby enabling a teleological interpretation of existing legal norms at a later stage. The chapter also references the concept of the Standard Employment Relationship (SER) as a potential guiding concept of employment and social security law and explores the extent to which its development allows conclusions to be drawn about which individuals (beyond traditional employees) should or must be entitled to particular rights and social guarantees. The evolution of the SER in Lithuania, Germany, and the UK is traced in detail, highlighting the role of each country's historical, institutional, and legal traditions in shaping their respective legal regimes. The research uncovers that the idea of what constitutes a typical SER model can vary greatly from country to country, as it has also undergone different developments in the various countries under review. The hypothesis is put forward that if the SER itself is merely a fiction that takes different forms from different perspectives, then perhaps all subsequent questions that supposedly align with some forms of SER are also based solely on fictional assumptions. Building on this, the different purposes of employment law and social security law are examined, divided into individual employment law, collective employment law, EU employment and social law, and social security law. The research uncovers that even though the purposes of these different regulatory areas show many overlaps, parallelism is not necessarily given and any systematic and typological interpretation of these legal sources must take these differences into account.

The *second* chapter addresses the different concepts and terms that emerge when discussing the rights and social guarantees of freelance workers. Concepts that are fundamentally tied to the legal status of the working individual. The chapter furthermore

explores the unique characteristics of freelance workers that complicate the task of accurately determining their legal status in order to ensure that they receive sufficient rights and social guarantees by examining the general opposing classifications in detail. It becomes apparent that the typical characteristics on which traditional distinction criteria are based do exist in freelance work, albeit in a significantly less pronounced form than in the classic employment relationship. Nonetheless, it is precisely these characteristics that generally serve as the basis for determining the personal scope of application of employment law.

The *third* chapter offers an analysis of the specific criteria used in Lithuanian, German, and UK law, as well as by the CJEU, to assess the legal status of working individuals. With regard to the UK, the dissertation takes an additional digression into proposals pursued i.a. by the governing *Labour Party* and *Countouris*, due to the current discussions surrounding the reform of the existing national employment status(es) and evaluates them critically. Furthermore, it examines the so-called ‘general’ EU worker concept and the controversies surrounding it. The Lithuanian employment status in employment law is characterized by the Lithuanian approach of codification and a binary approach to distinguish between employees and self-employed persons. Lithuanian employment law essentially systematically follows the principle of ‘all or nothing’, which is inherent in binary systems¹⁶⁴⁰, i.e. if a contract is classified as an employment contract, employment law norms are applicable to it. If, on the other hand, a contract is classified as a civil law contract, not a single norm of employment law is applicable to it. Lithuanian employment law provisions extend in some instances beyond employment relationships based on an employment contract to persons who work on the grounds of legal relations deemed to be equal to labor relations but are not considered employment relationships in general due to a special status¹⁶⁴¹. These are listed exhaustively in the law¹⁶⁴². Furthermore, in some instances, it even extends to persons performing certain unpaid work listed exhaustively in the law as well¹⁶⁴³. However, there is no open catch-all provision or intermediary category of employment status, i.e., a consideration of whether, under certain circumstances, a broader group of addressees not working under an organizational subordination based on control and obedience would be similarly or even equally in need of protection with regard to an individual norm or at least a regulatory area of norms – such it is the case in the UK and Germany.

The dissertation highlights that with the enactment of a LR DK in 2017, some clarity was provided regarding what constitutes an employment contract, which forms the

1640 Cf. Miriam Kullmann, “‘Platformisation’ of Work: An EU Perspective on Introducing a Legal Presumption,” *European Labour Law Journal* 13, no. 1 (March 2022): 71, doi:10.1177/203195252111063112.

1641 Lietuvos Respublikos užimtumo įstatymas, *e-TAR*, art. 4 para. 1, accessed 16 March 2025, <https://www.e-tar.lt/portal/lt/legalAct/422c8b5042b811e6a8ae9e1795984391/asr>.

1642 *Ibid.*, art. 4 para. 3.

1643 *Ibid.*, art. 9.

basis for the Lithuanian concept of an employee. To achieve this, the case law related to the previously applicable employment contract concept, which was still largely based on the LTSR DĮK, was codified into written law. The dissertation traces this development from the introduction of the LTSR DĮK in 1972 to the present day. However, the dissection highlights that 2017 codification provides now potentially narrower definitions than before, eliminated the possibility of creating flexibility for the future. An employment contract is characterized by work being performed for remuneration. This work is carried out for the benefit of another and has a continuous and non-result-oriented nature¹⁶⁴⁴. This already distinguishes the Lithuanian concept from those in Germany and the UK, where employment status can arise even with result-oriented work (in Germany, at least in the case of employee-like persons). The key distinguishing criterion from self-employed persons is a form of subordination, which focuses on the right of the work provider to control or supervise at least parts of the work through instructions or internal rules on one side, and the obligation to follow them on the other¹⁶⁴⁵. This factor of subordination essentially corresponds to the control test in the UK or the concept of being bound by instructions in German law, albeit with a narrower scope than the control test and a narrower understanding than the criterion of determination in German law. The dissertation argues that it could be well justified to cover under the Lithuanian concept of organizational subordination all kinds of *de facto* obligations to follow instructions, e.g., resulting from the possibility of dismissal at any time in case of management bodies¹⁶⁴⁶. However, in some recent rulings on platform or crowdwork in Germany and the UK, it was established that in both the control test in UK law and the criterion of determination in Germany, not only instructions in the traditional sense, but also steering or nudging through rating systems or incentives could be sufficient in certain cases. Such an extensive interpretation would likely not be possible under the Lithuanian concept of subordination¹⁶⁴⁷, because it requires, as an essential element, an obligation to follow instructions, internal rules or work at least under supervision, and more indirect influence would likely not suffice¹⁶⁴⁸. An extension of the Lithuanian employee concept to crowd or platform workers, as seen in Germany or the UK, would therefore likely not be possible. The dissertation therefore concludes that the Lithuanian concept of employment status is significantly narrower and less flexible than its German and UK counterparts. In Germany, not only control or supervision and the obligation to follow instructions are covered by the domestic

1644 Lietuvos Respublikos darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Lietuvos Respublikos darbo kodeksas, *e-TAR*, art. 32 para. 1, accessed 17 April 2025, <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89/asr>.

1645 Lietuvos Respublikos darbo kodeksas, art. 32 para 2.

1646 Cf. CJEU, Judgment of 11 November 2010, *Danoso*, C-232/09, EU:C:2010:674.

1647 Cf. Globytė, “The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania,” 72.

1648 Cf. Lietuvos Aukščiausiojo Teismo, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023.

‘employee’ status, but also a much broader and softer understanding of influence over the performance of work. Furthermore, Germany and the UK recognize catch-all provisions or intermediate statuses to provide certain vulnerable groups of working individuals with the context-related protection they need according to the purpose of certain employment law provisions. The Lithuanian legal concept does not address whether certain regulations require broader interpretation in specific areas depending on their underlying purpose.

The dissertation uncovers that the principle of the ‘primacy of facts’ in all three jurisdictions hovers above everything and ensures that the issue of false self-employment is merely one of legal consequences, as falsely self-employed individuals *de facto* have employment status. However, there are nuances, while e.g., German case law clarified that a contractual employment relationship can be established alone through consistent, implied behavior if both parties exchange services and payments over a legally significant period which alone may express their mutual intent to be bound by an employment contract for the actual services provided¹⁶⁴⁹. In Lithuania, it would be also necessary that both parties at least assume it is necessary to follow or obey instructions by the work provider¹⁶⁵⁰. The dissertation highlights the highly context-sensitive interpretation of the German version of the ‘primacy of facts’ principle, which, in contrast to Lithuanian law, extends well beyond the mere consideration of the contractual intent of the parties.

The Lithuanian legal framework is fundamentally based on EU requirements¹⁶⁵¹. Recent developments in EU legislation suggest a trend toward a unified concept of ‘worker’ under EU law¹⁶⁵². The CJEU has also contributed to this perception¹⁶⁵³. To this end, the dissertation examines the case law of the CJEU in detail in order to approach this concept and its principles and reveals that the CJEU’s reasoning often appears to shift between paradigms, creating an impression of inconsistency. This perception is largely due to the CJEU’s frequent failure to disclose the underlying considerations that have led to the inclusion – or exclusion – of specific criteria in its interpretation of the worker concept. Yet, the dissertation demonstrates that the EU concept(s) of ‘worker’ can, in theory, exhibit a considerable degree of flexibility – that is, the definition may vary depending on the purpose and context of the respective EU legal instrument¹⁶⁵⁴. On the other hand, the concept of ‘worker’ generally possesses an independent and

1649 Bundesarbeitsgericht, Urteil vom 9.4.2014 – 10 AZR 590/13, para. 26; Urteil vom 17.04.2013 – 10 AZR 272/12, para. 13.

1650 Cf. Lietuvos Aukščiausiojo Teismo, 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023, para. 67.

1651 Cf. Davulis, “Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.,” 13.

1652 Cf. Directive (EU) 2019/1152, art. 1 para. 2 and recital 8.

1653 E.g., CJEU, Order of 7 April 2011, *May*, C-519/09, EU:C:2011:221, para. 21.

1654 CJEU, Judgment of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, para. 31; CJEU, Judgment of 13 January 2004, *Allonby*, C-256/01, ECLI:EU:C:2004:18, para. 63; CJEU, Judgment of 7 June 2005, *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364, para. 27.

autonomous meaning within the EU legal order¹⁶⁵⁵. This implies that the concept of ‘worker’ must be interpreted uniformly across member state borders. In other words, a person working under specific conditions and within a particular work structure in Germany must be treated in the same way as a person in an identical situation in Lithuania. The dissertation suggests that the CJEU’s concept of ‘worker’ is contextually flexible – adapting to the purpose of the specific legal act – but nonetheless consistent and identical in its application across all member states. On the contrary, the concept of the employment contract in Lithuania concentrates largely on a context-independent and narrow organizational subordination necessitating some kind of obligation of the working individual to obey to instructions or to the regulations in force at the workplace. This narrow concept based on Art. 32 para. 2 LR DK leaves little room for new interpretations. This poses particular challenges for individuals operating in the ‘grey area’ between employee and self-employed status – especially in jurisdictions like Lithuania, where employment law recognizes only a binary classification. The dissertation mentions the risk that these individuals may either fall entirely outside the scope of employment protection or of overextending the scope inappropriately. As long as the applicable EU concept of ‘worker’ largely adheres to the CJEU’s *Lawrie-Blum* formula, its influence on national interpretations may remain limited. However, should the CJEU deviate from the *Lawrie-Blum* approach in a given case, this could have far-reaching implications for Lithuanian employment law due to its operation on a rigid ‘all-or-nothing’ classification system. The dissertation analyses and discusses different possible responses by Lithuania, such as introducing intermediate categories or catch-all provisions in certain areas of the law – similar to developments in Germany or the UK – and potentially move towards a two-or-more tier regulatory framework¹⁶⁵⁶; or to address this challenge by adopting varying interpretations of the concept of subordination within Lithuania’s national employment law.

The *fourth* chapter builds on this finding and assesses its practical implications by providing an overview of the hierarchy of norms in Lithuanian employment law, setting the groundwork for a systematic interpretation of existing legal norms. Following this hierarchy provided by the Labor Code of the Republic of Lithuania itself, EU law and constitutional law take precedence. However, it must also be examined whether there are also any international treaties which also take precedence. Building on the assumption that these instruments, due to their limited number of participants or their specific focus on the topics addressed in the dissertation, provide the most concrete guidelines for the subject matter, the dissertation focuses on the ECHR, RESC, and various ILO instruments when analyzing international law. The dissertation analyzes

1655 CJEU, Judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, para. 33.

1656 Advocating the use of the intermediary statuses, cf. Rolf Wank, “Workers’ Protection National Study for Germany for the ILO” (ILO), accessed April 15, 2025. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/genericdocument/wcms_205364.pdf; Emanuele Menegatti, “The Evolving Concept of ‘Worker’ in EU Law,” *Italian Labour Law E-Journal* 12 (2019 m. liepos 23 d.): 82, doi:10.6092/ISSN.1561-8048/9699.

the requirements established by higher-ranking sources of law (such as the ECHR, the RESC, ILO instruments, EU law, and the Lithuanian Constitution), their interpretation, interconnection and varying degrees of influence. In particular, possible influences on horizontal and vertical legal relationships are discussed. Based on this analysis, an assessment is made regarding whether Lithuanian criteria for determining employment status sufficiently incorporate such higher-ranking requirements when it comes to the legal treatment of freelance workers or to what extent these higher-ranking legal norms might even already apply directly due to their possible direct horizontal and/or vertical effect.

Even though definitive rulings from bodies like the CJEU or the European Court of Human Rights (ECtHR) are still pending, clear legal trends are emerging that could require the limited inclusion of certain freelance workers in labour law regulations. The ECtHR emphasized in this regard that evolving international and domestic norms – reflected in the practices of the majority of Council of Europe member states and international bodies – should influence the interpretation of labor rights, including trade union freedoms. This reinforces the idea that labor rights, including trade union freedoms, must be interpreted in light of evolving international and domestic legal standards¹⁶⁵⁷. Also the RESC is regarded as a ‘living instrument’, meaning its interpretation can evolve as social realities and legal frameworks evolve¹⁶⁵⁸. And despite the fact that many ILO instruments were logically designed with the labor structures of the 20th century in mind, as they could not have anticipated modern forms of work like platform work at the time of their adoption. However, it would be reasonable to extend their application to these emerging work models. Otherwise, as new forms of employment become more widespread, the relevance of ILO instruments could diminish in the very countries where these changes are taking place¹⁶⁵⁹. Die Dissertation diskutiert diese Trends und stellt sie auch in Zusammenhang mit der litauischen Verfassung.

The *fifth* chapter presents a comparative analysis of German and UK law as far as it applies to certain working individuals who, based on their legal status in Lithuania, would not be afforded protection under Lithuanian employment law. As in Lithuania, in Germany, only employees are generally subject to individual employment law regulations. However, also due to the fact that employment law is not codified in Germany, some laws extend the scope of application punctually to persons who are in principle genuinely self-employed – the previously outlined employee-like persons (‘arbeitsnehmerähnliche Personen’) who are clearly not to be qualified as employees in legal terms, so that employment law does not apply to them in principle¹⁶⁶⁰. As employee-

1657 ECtHR, Judgment of 9 July 2013, *Sindicatul ‘Păstorul Cel Bun’ v. Romania* (No. 2330/09), para. 131.

1658 ECSR, Decision on the Merits: *Transgender Europe and ILGA-Europe v. the Czech Republic*: Complaint No. 117/2015, para. 75.

1659 Cf. De Stefano, “Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards,” 2.

1660 Frank Hohmeister, “BUrlG §2 Geltungsbereich,” in *Bundesurlaubsgesetz: BUrlG, BEEG, JArbSchG, MuSchG, SGB IX; Handkommentar*, by Frank Hohmeister and Angelika Oppermann (Baden-Baden: Nomos, 2013), para. 14.

like persons in Germany, limb (b) workers in the UK – in comparison to employees or limb (a) workers – are covered by “only a limited set of core rights”¹⁶⁶¹. The analysis demonstrates that both Germany and the UK respond to the need for protection of individuals who, while not classified as employees in the strict sense, are nevertheless economically or otherwise vulnerable. This is achieved through the existence of such extended protected groups. These intermediate groups benefit, to varying extents, from selected employment law protections, derived partly from broader interpretations of EU legislation and partly from independent national considerations. This differentiated protection logic is not primarily based on formal contractual relationships, but rather on the actual economic dependence or vulnerability situation of individuals. It reflects a functional concept of employment that focuses more on the effective implementation of minimum social standards in atypical employment relationships. It is examined whether and how legal instruments from these jurisdictions could or should be adopted in Lithuanian law.

The *sixth* chapter builds on the findings of the previous chapters by analyzing whether social security considerations for working individuals can simply mirror employment law considerations or whether distinct approaches are required. This is followed by an examination of how Germany, the UK, and Lithuania address these issues and whether these jurisdictions extend certain social security protections to freelance workers. When comparing the approaches of Germany, the UK, and Lithuania, one can observe both similarities and fundamental differences, especially when attempting to distill the spirit of the regulations. Undoubtedly, all three countries focus on limiting comprehensive mandatory social insurance in all branches essentially to traditional employees. It can be observed that an ‘employee’ relationship under employment law seems to be typically always an employment relationship under social security law, but not necessarily *vice versa*. However, this is where the similarities end. While the system in the UK is closely aligned with tax law and offers protection, at least on a voluntary basis, across almost all branches of social insurance (except for e.g. jobseeker’s allowance), Germany aims for a high level of diversification within the individual branches of social insurance in order to extend protection to those who, in the eyes of the legislator, urgently need it, but who do not fall under the traditional concept of personally dependent employment. This applies to certain types of activities that have empirically shown to involve individuals typically in need of protection, as well as to the structure of the activity itself. In all three countries, there is the challenge regarding essentially self-employed individuals of measuring and achieving necessary minimum insurance periods or amounts, as required by a pay-as-you-go insurance system for its financial sustainability. This is difficult due to the often fluctuating work patterns and income of non-employees.

The dissertation shows that in the case of freelance workers, distinct challenges arise under social security law as compared to employment law. While employment

1661 Freedland and Prassl, “Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom,” 27.

law primarily struggles with the issue of freelance workers' lack of personal dependence or organizational subordination and the continuity of the working relationship plays a comparatively lesser role; in contrast, social security law faces greater difficulties stemming from the absence of (measurable) continuity and from often insufficient or irregular levels of remuneration. These factors complicate both eligibility and contribution assessment within systems that rely on stable, ongoing participation. Based on the research of *Schoukens* and *Bruynseraede*, the dissertation suggests breaking down qualifying and waiting periods into smaller time units, ensuring that the cumulative work or contributions add up to the equivalent requirements set for standard employees or smaller benefits in proportion to the contributions made. This adjustment would better accommodate the irregular work patterns of non-standard and self-employed workers while maintaining the overall integrity of the system¹⁶⁶². Qualifying periods, minimum work records, waiting periods, and similar eligibility conditions that establish time or income thresholds play a central role in work-related social protection schemes. These requirements are typically introduced with specific objectives in mind and are largely rooted in the insurance principles of pay-as-you-go systems that underpin many social protection systems for both employees and the self-employed. These eligibility conditions serve to ensure a balance between contributions and entitlements, promote insurance continuity, support the financial sustainability of the system¹⁶⁶³ and protect the solidarity community of contributors. This presents an additional challenge beyond those existing in employment law and the mere classification of legal relationships. However, these are challenges that can also occur to some extent in relationships under flexible employment contracts, such as project-based, fixed-term and temporary employment contracts. This illustrates that social security law faces further complexities when it comes to the treatment of freelance workers.

The *final* chapter of the dissertation provides conclusions regarding the legal situation of freelance workers in Lithuania and their access to employment law rights and social security guarantees. It evaluates the practical application of the legal instruments discussed throughout the dissertation to the Lithuanian context – identifying where changes are required or recommended – and offers proposals to the Lithuanian legislator, courts and authorities on how to better provide rights and social guarantees of freelance workers in line with higher-ranking laws while respecting Lithuania's own legal traditions. A central element of the dissertation is the functional and teleological interpretation of employment and social security law. By analyzing the underlying purposes of these legal regimes, the dissertation constructs a normative argument in favor of extending selected rights and guarantees to freelance workers in Lithuania.

The dissertation synthesizes the findings and formulates concrete *de lege ferenda* proposals for the Lithuanian legislator. These proposals aim to strike a balance between the flexibility demanded by the modern economy, Lithuanian legal tradition

1662 Schoukens and Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers*, 64 ff.

1663 *Ibid.*, 70.

and the legal protections required by higher-ranking law.

The dissertation makes an original contribution to the academic and policy debate on non-standard work. It not only clarifies the conceptual boundaries of employment status under Lithuanian, German, and UK law, but also offers a roadmap for reform that is sensitive to both international legal obligations and the Lithuanian legal tradition. In doing so, it seeks to promote a more inclusive and adaptive legal framework that recognizes the changing nature of work and safeguards basic rights and social guarantees of all working individuals – regardless of their formal contractual status.

CONCLUSIONS

1. Key challenges in defining the legal nature of freelance work and granting appropriate employment rights and social guarantees arise from the structural features of freelance arrangements. While freelance work shares some similarities with traditional employment, it diverges in crucial ways. The classification of employment relationships still relies heavily on formal criteria of personal dependence and organizational subordination to determine access to employment rights and social security – in particular in Lithuania. However, freelance work often dilutes these elements: formal autonomy over where, when, how, and whether to work masks subtle behavioral control through indirect mechanisms and obscures the actual dependence and vulnerability of freelance workers. Economic realities can entrench a form of subordination or dependence that is less visible or pronounced but can be equally impactful. This mismatch creates significant difficulties when applying traditional distinction criteria to such new forms of work. Nonetheless, the experiences of the UK and especially Germany illustrate that legal frameworks can adapt without altering their foundations. Social security law faces further distinct challenges. They stem from a purpose external to employment law – namely, to protect the solidarity community of contributors and ensure the financial sustainability of the system. Social security law faces difficulties resulting from the fragmented, intermittent nature of freelance work. The absence of stable continuity and predictable income complicates eligibility and contribution calculations. Even when freelance workers demonstrate dependence or subordination and could therefore be protected under employment law, integrating them into social security systems remains a complex legal and administrative challenge.
2. Lithuania's current framework, especially following the 2017 reform of the LR DK, retains a relatively narrow conception of employment, strictly tied to an organizational subordination based on a classic control/obeyance relationship which essentially stems from the contractually agreed rights and obligations. While this model promotes legal clarity, it reflects more the realities of the twentieth-century labor market rather than the diverse contemporary world of work. The dissertation has demonstrated that countries such as Germany and the UK extend certain employment rights and social protections to specific

self-employed groups, partly in response to higher-ranking law that also applies in Lithuania. However, the scope and methods differ: The UK's current trinary classification system – comprising employees, workers, and the self-employed – grants partial employment rights to workers despite the absence of formal organizational subordination (particularly mutual obligations), recognizing forms of soft control, including indirect sanction mechanisms and algorithmic management. By contrast, German law, which applies the typological method consistently and employs the most context-sensitive and case-by-case assessment among the jurisdictions examined in the dissertation, can classify individuals even as full employees where only soft forms of influence are present. These may include behavioral nudges or incentive structures that subtly guide the conduct of the working individual without exerting any formal or direct control. Before the 2017 reform, a more flexible understanding of subordination could have been also applied in Lithuania to some extent. However, the adoption of a strict definition and narrow concept of subordination under Art. 32 para. 2 LR DK – with its strong emphasis on formal control and obedience – has foreclosed this path. Moreover, German law provides an additional open catch-all provision – the employee-like person – across punctual areas of employment law. This open concept ensures protection for those falling outside the already broad German employee concept, either because higher-ranking law requires it or because national policy considerations demand it. The concept can be interpreted in varying degrees, depending on the legal context and regulatory purpose. Germany's contextual approach, rooted in the typological method, treats the defining criteria of the different concepts not as rigid thresholds but more as flexible guidance that can vary in relevance according to the diversity of real-world work arrangements. A method that the CJEU has, in principle, claimed for itself – although it is not always evident whether it consistently adheres to it. While German law attempts to reflect a similar methodology in social security law but using different terms, the UK system relies on a binary system. Lithuania, on the other hand, attempts to integrate at least certain predefined activities into individual branches of its social security law. As a result, the personal scopes of application in Lithuanian, German and UK employment and social security law differ both methodologically and substantively – a divergence unlikely ever to be fully harmonized.

3. Lithuania's narrower personal scope of application in employment law retains some justification in promoting legal clarity. The current concept properly serves a 'generalized justice' traditionally inherent in employment law. However, where higher-ranking law – such as the ECHR, RESC, EU law or constitutional law – directly mandates broader protection, Lithuania must act. Although definitive rulings from bodies like the CJEU are still pending, clear legal trends point towards an expanding understanding of workers, employment relationships, and employment contracts – trends Lithuania cannot ignore. The central issue is that there is no single purpose of employment and

social security protection, but rather a plurality of overlapping, nuanced purposes. This diversity is particularly reflected in the different regulatory aims of EU directives. Lithuania's rigid approach captures only a single, highly generalized justification for the existence of the employment status and, as a result, either falls short of meeting evolving legal and social standards or runs the risk of overextending its scope inappropriately. Gaps in compliance are most evident in the rights connected to trade union participation. Although freelance workers are generally permitted to form and join trade unions in Lithuania, significant limitations on full active membership rights and real representation render these rights largely illusory, potentially violating, i.a., Art. 11 ECHR. Further gaps exist in individual employment law, notably in the areas of non-discrimination and occupational health and safety. Here, reliance solely on the absence of an organizational subordination to exclude certain individuals from protection seems heavily inadequate. Only in relation to working time and annual leave – following the CJEU's *Yodel* judgment – does the matter seem, for now, relatively settled. Nevertheless, further detailed national analyses could urgently be needed to identify the EU law origins of various Lithuanian law provisions and to expand protection where necessary. This would not result in the emergence of hundreds of different personal scopes of application within Lithuanian law; rather, legal subject matters must be clustered in a way that reflects the broader diversity of purposes pursued by employment and social security law. But even at present, there is a risk that certain requirements derived from higher-ranking law may already be directly applicable in vertical freelance relationships between freelance workers and Lithuanian 'state' work providers – and even a horizontal application in certain areas cannot be entirely ruled out, given the unpredictability of CJEU jurisprudence in this domain.

4. There are several possible solutions to tackle these issues methodically. One would be to move away from a codified employment law system towards individual statutes with individual personal scopes of application better aligned with EU requirements which primarily stem from different directives pursuing distinct objectives. Another solution would be to retreat from the rigid 2017 definition of the employment contract to once again allow for a more flexible interpretation of the personal scope of Lithuanian employment law – one that fully reflects a genuine 'primacy of facts' principle and takes into account indeed all and any circumstances of the individual case. However, both approaches would conflict with Lithuania's tradition of structuring employment relationships in a clear and comprehensive manner. A solution more in line with this tradition could therefore be the introduction of one or several open intermediate statuses in only certain areas in addition to the existing concepts of 'employee' and 'employment contract'. However, the mere creation of another fixed 'employee-like' status would likely replicate existing distinction problems – as seen with the limb (b) status in the UK. A better alternative – partly based on the German model – would be instead a flexible catch-all provision, adaptable

to different regulatory areas. This catch-all provision should focus on three factors: employee-likeness, vulnerability and need for protection – the latter in each case derived from the former. Because all and any facts and circumstances of the individual case can be decisive and must be considered, all indicators discussed in the dissertation could be clustered under these factors if, in the individual case, they can appropriately indicate these factors considering the specific context. The relationship between employee-likeness, vulnerability, and the resulting need for protection must be evaluated contextually and teleologically according to the specific purpose of the law provision in question. Employee-likeness could be determined both by public perception and by the sociological typology typical for employees. This flexible, purpose-driven approach would ensure that protections remain really ‘future proof’ and resistant to deliberate or inadvertent circumvention. However, successful implementation would require that courts and administrative bodies apply the typological method dynamically – not mechanically through ‘checklists’, but thoughtfully, interrogating the purpose of a legal provision in question. The dissertation has shown that courts, including the CJEU, sometimes tend toward ontological interpretations, whereby nuanced legal concepts from previous decisions were reduced to mere keywords. Such an approach must be avoided in the implementation of fundamental rights, where teleological reasoning and transparency in judicial reasoning are essential. A similar concept could be adopted in the context of social security law, differentiated according to the various branches of the system and their respective objectives. However, since the challenges in social security law extend beyond mere issues of legal classification, a potential further approach would be to address the specific problems posed by the fragmented and intermittent nature of freelance work – including the lack of stable continuity and the irregularity or insufficiency of remuneration – by recalibrating qualifying and waiting periods to smaller units. This would allow for greater adaptability to non-standard work patterns and improve access to social protection for freelance workers – at least on a voluntary basis. In this way, cumulative work or contributions could be aggregated to meet the equivalent thresholds established for standard employees, or alternatively, proportionally smaller benefits be granted based on the contributions made.

LIST OF PUBLICATIONS

1. Hans Lauschke, “Lithuania’s Binary Worker Classification Vs. A Teleological Interpretation of the EU’s ‘Worker’ Concept by Germany and the UK,” *BJLP* 17, no. 2 (2024), 142-167, DOI: 10.2478/bjlp-2024-00019
2. Hans Lauschke, “Savarankiškai Dirbančių Asmenų Prašymų Nagrinėjimas Lietuvos Darbo Ginčų Komisijose ‘Sic-Non’ Bylose [The Examination of Applications from Self-Employed Persons by the Lithuanian Labour Dispute Commissions in ‘Sic-Non’ Cases],” *Jurisprudencija* 31, no. 2 (2024), 436-452, DOI: 10.13165/JUR-24-31-2-13
3. Hans Lauschke, “The Applicability of ILO’s Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally,” *Teisė* 135 (2025), 85-104, DOI: 10.15388/Teise.2025.135.5

PRESENTATIONS AT SCIENTIFIC RESEARCH EVENTS

1. “Interactions between Legal Orders in IG on International Economic Law” (Side-event to the ESIL 2024 Research Forum in Nicosia) organized by the European Society of International Law (ESIL) / IG on International Economic Law, 15 April 2024
2. C*LLaS Research Colloquium, organized by the European University Viadrina Frankfurt (Oder), 18 June 2024

CURRICULUM VITAE

Education

- Since 2021 Mykolas Romeris University, Vilnius (Lithuania), PhD in Law
- 2012 – 2014 Dresden University of Technology, Dresden (Germany), LL.M. in Business Law
- 2009 – 2012 Dresden University of Technology, Dresden (Germany), LL.B. in “Law in Context”

Professional experience

- Since 2019 LYNX Lithuania
- 2015 – 2019 RÖDL Lithuania

MYKOLO ROMERIO UNIVERSITETAS

Hans Lauschke

LAISVAI SAMDOMŲ DARBUOTOJŲ TEISĖS IR
SOCIALINĖS GARANTIJOS – STATUS QUO IR
TEISINIŲ INSTRUMENTŲ RAIDA LIETUVOJE,
LYGINANT SU KITOMIS EUROPOS ŠALIMIS

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Mokslinis vadovas:

prof. dr. Rytis Krasauskas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001)

Mokslo daktaro disertacija ginama Mykolo Romerio universiteto ir Vytauto Didžiojo universiteto teisės mokslo krypties taryboje:

Pirmininkė:

prof. dr. Salvija Mulevičienė (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001).

Nariai:

prof. dr. Tomas Davulis (Vilniaus universitetas, socialiniai mokslai, teisė, S 001);

prof. dr. Lina Mikalonienė (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001);

prof. dr. Raimundas Moisejevas (Mykolo Romerio universitetas, socialiniai mokslai, teisė, S 001);

dr. Tatiana Wrocławska (Lodzės universitetas, Lenkijos Respublika, socialiniai mokslai, teisė, S 001).

Mokslo daktaro disertacija bus ginama viešame Teisės mokslo krypties tarybos posėdyje 2026 m. balandžio 17 d. 9.30 val. Mykolo Romerio universitete, I-414 auditorijoje.

Adresas: Ateities g. 20, 08303 Vilnius, Lietuva.

Hans Lauschke

LAISVAI SAMDOMŲ DARBUOTOJŲ TEISĖS IR SOCIALINĖS GARANTIJOS – STATUS QUO IR TEISINIŲ INSTRUMENTŲ RAIDA LIETUVOJE, LYGINANT SU KITOMIS EUROPOS ŠALIMIS

SANTRAUKA

Daktaro disertacijoje pateikiama išsami teisinė laisvai samdomų darbuotojų teisių ir socialinių garantijų Lietuvoje analizė, Lietuvos situacija lyginama su teisinių priemonių plėtra Vokietijoje, Jungtinėje Karalystėje ir tarptautiniu mastu. Atsižvelgiant į besikeičiančias darbo rinkas ir vis labiau paplitusias nestandartines darbo formas, disertacijos tikslas yra nustatyti dabartinę laisvai samdomų darbuotojų užimtumo ir socialinės apsaugos reguliavimo padėtį Lietuvoje, įvertinti jos atitikimą tarptautiniams, Europos ir konstituciniams standartams bei pasiūlyti būtinus ar įmanomus patobulinimus, remiantis lyginamąja analize. Disertaciją paskatino augantis asmenų, dirbančių ne tradicinių darbo santykių pagrindu, skaičius Lietuvoje ir visoje Europoje. Šie asmenys dažnai dirba pilkojoje zonoje tarp savarankiško darbo ir darbo pagal darbo sutartį, dažnai neturėdami pakankamos teisinės apsaugos.

Tyrimo problema. Teisės aktų leidėjų pastangos neatsilikti nuo besikeičiančio darbo pasaulio yra akivaizdžios vadinamojo „laisvai samdomo darbo“ atveju. Kadangi gyvenimo būdas ir darbo struktūros nuolat keičiasi, vis daugiau žmonių atsiduria padėtyje, kuri nevisiškai atitinka tradicines teises klasifikacijas. Tai kelia esminius klausimus apie tai, kaip tradicinės darbo teisės ir socialinės garantijos turėtų ar privalo būti taikomos asmenims, kurie nepatenka į įprastas kategorijas.. Terminas „laisvai samdomas darbuotojas“ arba „laisvai samdomas specialistas“ nėra teisinis¹⁶⁶⁴, bet dažniausiai naudojamas apibūdinti savarankiškai dirbančius asmenis, kurie, remdamiesi laisvai samdomų darbuotojų (neorientuotų į rezultatą) paslaugų sutartimi arba (orientuotų į rezultatą) sutartimi atlikti konkretų darbą, savarankiškai ir asmeniškai atlieka užduotis, nelaikomi savo darbdavio darbuotojais. Tačiau laisvai samdomas darbuotojas nebūtinai reiškia tą patį, kas yra savarankiškai dirbantis asmuo¹⁶⁶⁵, nes ribos tarp savarankiško darbo ir darbo pagal darbo sutartį dažnai yra neryškios. Laisvai samdomas darbuotojas taip pat nebūtinai yra susijęs su sąvoka „darbuotojas“ pagal ES ar Jungtinės Karalystės teisę. Todėl disertacijoje „laisvai samdomas darbuotojas“ apibrėžiamas kaip fizinis asmuo, kuris atlieka darbą kitam fiziniam ar juridiniam asmeniui, neturėdamas savo darbuotojų, mainais už atlygį, bet nelaikomas kito fizinio ar

1664 Tačiau įvairiuose vertimuose ir jurisdikcijose šis terminas kartais vartojamas teisinėje srityje, pvz., Vokietijoje terminais „Freier“ ir „freier Mitarbeiter“.

1665 Iš dalies šis terminas prilyginamas savarankiškai dirbančiam akademiniam pasauliui, pvz., Martin Maties, „§ 37 Arbeitsrechtliche Bezüge“, *Handbuch IT- und Datenschutzrecht*, Astrid Auer-Reinsdorff ir Isabell Conrad (Miunchenas: C.H. Beck, 2019), 35 punktas.

juridinio asmens darbuotoju¹⁶⁶⁶. Tai neapsiriboja konkrečiu ekonomikos sektoriumi ar kvalifikacija¹⁶⁶⁷. Šis terminas gali apimti beveik visus sektorius, kuriuose individualios paslaugos gali būti perduodamos išorės rangovams, ir yra sąmoningai pasirinktas, nes jis perteikia konkrečią veiklos struktūros formą, nurodydamas jokios teisinės kvalifikacijos. Disertacijoje nagrinėjamos pagrindinės sąlygos, kuriomis nustatoma teisinė kvalifikacija. Tokia kvalifikacija paprastai nustatoma metodiškai, remiantis kriterijais, išvestais iš vieniems nuo kitų skiriamų teisinių santykių ypatybių¹⁶⁶⁸.

Tyrimo objektas. Disertacijoje nagrinėjama aktuali mokslinė problema: teisinis neapibrėžtumas ir reguliavimo spragos Lietuvoje, susijusios su laisvai samdomais darbuotojais dėl kintančio darbo pobūdžio socialinės rinkos ekonomikoje.

Objekto ir tyrimo problemos aktualumas. Tema yra aktuali tiek pasauliniu mastu, tiek Lietuvoje. Pirmoji priežastis yra ta, kad asmenų, dirbančių pagal tokias nestandartines darbo sąlygas, skaičius nebegali būti ignoruojamas. Laisvai samdomų darbuotojų reiškinys gali būti modeliuojamas statistiniu būdu, nagrinėjant savarankiškai dirbančių asmenų, t. y. savarankiškai dirbančių asmenų, neturinčių darbuotojų, skaičių. Remiantis Europos Komisijos ir Tarybos *Joint Employment Report 2024*, 2022 m. savarankiškai dirbantys asmenys Lietuvoje sudarė 10 % visų dirbančiųjų, o tai gerokai viršija ES vidurkį, tuo tarpu Vokietijoje šis skaičius buvo mažesnis nei 6 %¹⁶⁶⁹. Skirtumas yra akivaizdus. Kaip ir Lietuva, Vokietija yra ES valstybė narė, o tai reiškia, kad bendros užimtumo ir socialinės apsaugos sistemos turėtų būti panašios. Tuo pačiu metu Vokietija yra svarbiausia Lietuvos prekybos partnerė, kuri nėra kaimyninė šalis¹⁶⁷⁰. Be to, Vokietija yra pagrindinė Lietuvos paslaugų eksporto partnerė¹⁶⁷¹. Taigi, nepaisant tam tikro geografinio atstumo, abiejų šalių ekonomikos yra glaudžiai susijusios. Galima daryti prielaidą, kad abi šalys susiduria su panašiais struktūriniais iššūkiais. Kita vertus, 2022 m. Lietuvoje žemės ūkio sektoriaus dalis buvo palyginti didelė – 3,7 %, o Vokietijoje tuo pačiu laikotarpiu – tik 0,9 %¹⁶⁷². Pagal sektorius,

1666 Iš peržiūros aiškiai išskiriami: valstybės tarnautojai, reguliuojamų profesijų atstovai, pvz., advokatai ar antstoliai, ir kitų profesijų atstovai, kurie pagal teisinę apibrėžimą aiškiai laikomi savarankiškai dirbančiais asmenimis.

1667 Kadangi terminas „freelancers“ kartais vartojamas apibūdinti tik aukštos kvalifikacijos profesijų atstovus, kurie yra savarankiškai dirbančių asmenų pogrupis, pvz., „The Self-Employed Landscape 2022“, IPSE, žiūrėta 2025 m. kovo 1 d., <https://www.ipse.co.uk/campaigns/the-self-employed-landscape/self-employed-landscape-2022>.

1668 Ipolitas Nekrošius ir Daiva Petrylaitė, *Darbo teisė: vadovėlis* (Vilnius: Teisinės informacijos centras, 2008), 13 ff.

1669 Europos Komisija, *Joint Employment Report 2024: Commission Proposal*. (Liuksemburgas: Publications Office of the European Union, 2023), 71, <https://data.europa.eu/doi/10.2767/17157>.

1670 „Informaciniai Pranešimai“, *Oficialus statistikos portalas*, žiūrėta 2025 m. kovo 1 d., <https://osp.stat.gov.lt/informaciniai-pranesimai?articleId=13209829>.

1671 „International Trade in Services in Q1 2024“, *Lietuvos bankas*, žiūrėta 2025 m. kovo 1 d., <https://www.lb.lt/en/news/international-trade-in-services-in-q1-2024>.

1672 „Employment by Sector (%)“, *World Bank Gender Data Portal*, žiūrėta 2025 m. kovo 1 d., <https://genderdata.worldbank.org/en/indicator/sl-empl-zs?year=2022&employmentSector=Services>.

didžiausia savarankiškai dirbančių asmenų dalis tradiciškai yra šiame sektoriuje¹⁶⁷³. Iš pirmo žvilgsnio tai rodo, kad skirtumas yra susijęs su skirtinga abiejų šalių ekonomikos struktūra ir darbo jėgos pasiskirstymu tarp ekonomikos sektorių. Tačiau, atsižvelgiant į Jungtinės Karalystės duomenis, sektorių priežastys atrodo žymiai mažiau reikšmingos. Jungtinėje Karalystėje, turinčioje bendrosios teisės tradicijas, bent jau iki galutinio išstojimo iš ES 2021 m. sausio 1 d., buvo taikoma ta pati ES teisinė sistema. 2022 m. savarankiškai dirbančių asmenų skaičius buvo 12,5 %¹⁶⁷⁴, t. y. net didesnis nei Lietuvoje, tačiau žemės ūkio sektoriuje jų dalis buvo mažesnė nei Vokietijoje (0,6 %), nors paslaugų sektoriuje jų dalis buvo didesnė (Jungtinė Karalystė: 91,5 %, Vokietija: 85,4 %, Lietuva: 80,1 %)¹⁶⁷⁵.

Šie skaičiai rodo du dalykus: ši tema turi įtakos nemažam skaičiui dirbančių asmenų, o statistinių skirtumų priežastys negali būti siejamos vien su šalių ekonominėmis struktūromis. Teisinės sistemos ir reglamentavimas taip pat gali turėti didelę įtaką laisvai samdomų darbuotojų skaičiui. Pastarąją hipotezę patvirtina neseniai Vokietijoje ir Jungtinėje Karalystėje įvykę teisiniai pokyčiai, kurie pabrėžė besikeičiantį laisvai samdomų darbuotojų teisinį pripažinimą. Vokietijoje Bundesarbeitsgericht 2021 m. suteikė vadinamiesiems „crowdworkers“ visateisį „darbuotojo“ statusą¹⁶⁷⁶, o Jungtinės Karalystės Aukščiausiasis Teismas (UKSC) priėmė sprendimą „Uber“ vairuotojų naudai, pripažindamas juos „dirbančiais“¹⁶⁷⁷ ir suteikdamas jiems dalines darbo teises tais pačiais metais. Šis Jungtinės Karalystės sprendimas sulaukė dėmesio ir Lietuvoje¹⁶⁷⁸, ypač todėl, kad čia, kur veikia ta pati įmonė, panašūs sprendimai nebuvo priimti, o pagal įstatymą tokias transporto paslaugas privalo teikti savarankiškai dirbantys asmenys¹⁶⁷⁹. Šie pokyčiai rodo, kad būtina atlikti tarpjurisdikcinę analizę, nes jie pabrėžia vis didesnį laisvai samdomų darbuotojų, dirbančių pagal nestandartines darbo sutartis, pripažinimą.

Antra svarbi priežastis, dėl kurios ši disertacija yra aktuali, yra tai, kad vis dar

1673 Eurofound, *Psychosocial Risks to Workers' Well-Being: Lessons from the COVID 19 Pandemic* (Liuksemburgas: Publications Office of the European Union, 2023), 9, <https://data.europa.eu/doi/10.2806/350964>.

1674 Dėl Jungtinės Karalystės išstojimo iš ES, Jungtinė Karalystė nebėra įtraukta į ES statistinius duomenis. Remiantis IPSE ataskaita „The Self-Employed Landscape 2022“ Jungtinėje Karalystėje buvo apie 4,1 mln. savarankiškai dirbančių asmenų. Tuo pačiu laikotarpiu Jungtinėje Karalystėje dirbo apie 32,8 mln. žmonių. Tai reiškia, kad apie 12,5 % dirbančių gyventojų buvo savarankiškai dirbantys asmenys.

1675 „Employment by Sector (%)“.

1676 Bundesarbeitsgericht, Urteil vom 01.12.2020 – 9 AZR 102/20, *Neue Zeitschrift für Arbeitsrecht*, 2021, 552–62.

1677 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, 119 punktas.

1678 Vilija Mačiulskytė, „Gyventojai vis dažniau įdarbinami kaip laisvai samdomi: paaiškino, ką jie praranda ir kuo tai gresia“, *TV3*, žiūrėta 2021 m. vasario 28 d., <https://www.tv3.lt/naujiena/verslas/gyventojai-vis-dazniau-idarbinami-kaip-laisvai-samdomi-paaiskino-ka-jie-praranda-ir-kuo-tai-gresia-n1083285>.

1679 Lietuvos Respublikos kelių transporto kodeksas, *e-TAR*, 18–1 straipsnis, žiūrėta 2025 m. kovo 22 d., <https://e-tar.lt/portal/lt/legalAct/TAR.65AD818F5F9C/asr>.

egzistuoja reguliavimo spragos, ypač atsižvelgiant į skaitmeninių platformų darbo augimą. Nuo 1990-ųjų ES vykdo politiką, skatinančią didesnę darbo sutarčių įvairovę. Trijose direktyvose dėl laikinųjų darbo susitarimų¹⁶⁸⁰ tai tampa itin akivaizdu¹⁶⁸¹. Neseniai 2024 m. direktyvoje dėl platformų darbuotojų (kurie gali būti laikomi laisvai samdomų darbuotojų pogrupiu) darbo sąlygų gerinimo pripažintos teisinės ir socialinės problemos, kylančios dėl netinkamo darbo statuso klasifikavimo, kuris riboja galimybę naudotis svarbiomis darbo teisėmis ir socialine apsauga. Šios problemos reikalauja skubiausių veikslių šioje srityje¹⁶⁸², tačiau jos neapsiriboja platformų darbuotojais, nes vis labiau nestabilios sąlygos atsiranda ir kitose nestandartinėse darbo formose¹⁶⁸³. Europos Komisijos Žaliojoje knygoje jau 2006 m. buvo pabrėžtas didėjantis neapibrėžtumas ir neaiškios ribos dėl tam tikrų savarankiškai dirbančių asmenų teisinio statuso, ypač dėl didėjančios ekonomiškai priklausomų savarankiškai dirbančių asmenų grupės¹⁶⁸⁴. Be to, tarptautiniame (ES) kontekste yra spragų dėl akivaizdžiai skirtingų ES valstybių narių teisinės klasifikacijos sąvokų. Įvedant Rašytinio pareiškimo direktyvą 91/533/EEB, Europos Komisija vadinamajame *REFIT* vertinime pažymėjo, kad dėl skirtingų „darbuotojo“, „darbo santykių“ ir „darbo sutarties“ sąvokų skirtingose valstybėse narėse kyla teisinis neapibrėžtumas dėl naujų ir netipinių darbo formų aprėpties, o požiūrių įvairovė tampa kliūtimi visiškai veiksmingam ES teisės aktų taikymui¹⁶⁸⁵. Be to, kyla klausimas, ar tam tikriems asmenims, dirbantiems akivaizdžiuose tarpininkavimo santykiuose, kurie tradiciškai priskiriami nepriklausomai sričiai,

1680 Council Directive 97/81/EC of 15 December 1997 Concerning the Framework Agreement on Part-Time Work Concluded by UNICE, CEEP and the ETUC - Annex : Framework Agreement on Part-Time Work, *EUR-Lex*, žiūrėta 2021 m. rugpjūčio 16 d., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01997L0081-19980525>; Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, *EUR-Lex*, žiūrėta 2025 m. kovo 16 d., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01999L0070-19990710>; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work, *EUR-Lex*, žiūrėta 2021 m. rugpjūčio 16 d., <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0104>.

1681 Simon Deakin, „New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014“, *Nova School of Law*, žiūrėta 2021 m. rugpjūčio 16 d., https://www.fd.unl.pt/docentes_docs/ma/jja_MA_24419.pdf.

1682 Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on Improving Working Conditions in Platform Work, *EUR-Lex*, žiūrėta 2025 m. kovo 15 d., <https://eur-lex.europa.eu/eli/dir/2024/2831/oj/eng>, 6 punktas.

1683 „First Phase Consultation of Social Partners under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 1127 Final“, žiūrėta 2025 m. kovo 15 d., <http://ec.europa.eu/social/BlobServlet?docId=23655&langId=en>.

1684 „GREEN PAPER Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 Final“ (Briuselis: Europos Komisija, 2006 m. lapkričio 22 d.), 10, [https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2006\)0708_com_com\(2006\)0708_en.pdf](https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0708_com_com(2006)0708_en.pdf).

1685 „REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC)“ (Briuselis: Europos Komisija, 2017 m. balandžio 26 d.), 25, <https://ec.europa.eu/social/BlobServlet?docId=17615&langId=en>.

turėtų būti suteiktos panašios teisės kaip darbuotojams. Jau 1999 m. vadinamoji *Supiot komisija* ataskaitoje rekomendavo sukurti tarpininkavimo statusą priklausomiems savarankiškai dirbantiems asmenims ES¹⁶⁸⁶. Remdamasi tuo, 2003 m. Europos Komisijos užsakyta ekspertų ataskaita pasisakė už pagrindinių socialinių teisių, kurios būtų taikomos visiems darbuotojams, t. y. ne tik tradiciniams darbuotojams, bet ir ekonomiškai priklausomiems dirbantiems asmenims, sukūrimą ES lygmeniu¹⁶⁸⁷. Po tam tikro laiko pertraukos šis klausimas vėl įgavo pagreitį, atsižvelgiant į naujausius teisinius pokyčius, susijusius su platforminiu darbu¹⁶⁸⁸. Be to, 2022 m. Europos Komisija išleido gaires, kuriose siūloma taikyti ES konkurencijos teisės apribojimų išimtis kolektyvinėms sutartims, sudarytoms su savarankiškai dirbančiais asmenimis, jei jie yra „padėtyje, sulyginamoje su darbuotojų padėtimi“¹⁶⁸⁹. Tai rodo, kad vis labiau pripažįstama, jog bent jau tam tikri savarankiškai dirbantys laisvai samdomi darbuotojai turi būti apsaugoti taip pat kaip ir samdomi darbuotojai. Šios diskusijos yra labai svarbios, ypač kai nestandartinis darbas yra netinkamai naudojamas siekiant sumažinti darbo sąnaudas laisvai samdomų darbuotojų teisių sąskaita, nes tai kelia socialinio dempingo riziką¹⁶⁹⁰. Kalbant konkrečiai apie teisių ir socialinių garantijų užtikrinimą ES, svarstomos priemonės, kurios rodo, kad šis klausimas yra aktualus¹⁶⁹¹. Be to, ES institucijų ataskaitose pabrėžiamos savarankiškai dirbančių asmenų mažesnės socialinės apsaugos problemos¹⁶⁹². Įvairios ES institucijų ataskaitos bent jau leidžia manyti, kad tikslas galbūt nėra atitolinti ar uždrausti tokius netipinius darbo santykius (ir ypač platforminį darbą), o juos reguliuojamai plėsti¹⁶⁹³. Be šių visos ES masto problemų,

1686 Žr. Alain Supiot ir Pamela Meadows, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oksfordas/Niujorkas: Oxford University Press, 2001).

1687 Žr. Adalberto Perulli, *Wirtschaftlich abhängige Beschäftigungsverhältnisse/arbeitnehmerähnliche Selbständige: rechtliche, soziale und wirtschaftliche Aspekte* (Briuselis: Europos Komisija, 2003), https://www.labourline.org/GED_CUY/118355793653/D2398.PDF.

1688 Žr. Directive (EU) 2024/2831.

1689 Europos Komisija, „Communication from the Commission - Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons 2022/C 374/02“, *EUR-Lex*, 20 punktas, žiūrėta 2025 m. kovo 17 d., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2022_374_R_0002.

1690 TDO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (Ženeva: International Labour Office, 2016 m.).

1691 „Draft Report on Fair Working Conditions, Rights and Social Protection for Platform Workers - New Forms of Employment Linked to Digital Development (2019/2186(INI))“ (Legislative Observatory), žiūrėta 2021 m. rugpjūčio 16 d., https://www.europarl.europa.eu/doceo/document/EMPL-PR-657498_EN.pdf.

1692 Europos Komisija, *Access to Social Protection for Workers and the Self-Employed: Best Practice Examples from EU member states* (Liuksemburgas: Publications Office, 2018), <https://data.europa.eu/doi/10.2767/70549>.

1693 Alex J. Wood, „Algorithmic Management Consequences for Work Organisation and Working Conditions,“ JRC Working Papers Series on Labour, Education and Technology (Sevilija: Europos Komisija, Joint Research Centre (JRC), 2021), <https://www.econstor.eu/bitstream/10419/233886/1/1757203559.pdf>.

praktinė patirtis valstybėse narėse pabrėžia šio klausimo aktualumą¹⁶⁹⁴.

Tai ne tik rodo dabartinę aktualumą, bet ir sudėtingą įvairių reglamentavimų, susijusių su disertacijos tema, sąveiką. Atsiranda naujos reglamentavimo spragos, kurias galima užpildyti tik palaiapsniui. Dėl šių priežasčių disertacijoje išsamiai nagrinėjamas klausimas, kokia reglamentų sistema apima dirbančius asmenis, esančius „darbuotojo“ ir „savarankiškai dirbančio asmens“ sąvokų ribose, ir kokios priemonės buvo neseniai priimtose nacionaliniu ir tarptautiniu mastu. Disertacijoje išsamiai analizuojama dabartinė laisvai samdomų darbuotojų reglamentų sistema apskritai ir skirtingose jurisdikcijose, siekiant nustatyti galimas spragas Lietuvoje ir rasti sprendimus, kurie užtikrintų tinkamą pusiausvyrą tarp užsakomųjų paslaugų ekonomikos poreikio lanksčių darbo sąlygų ir laisvai samdomų darbuotojų teisių bei socialinių garantijų.

Tyrimo tikslas. Disertacijos tikslas – nustatyti dabartinę laisvai samdomų darbuotojų užimtumo ir socialinės apsaugos reglamentavimo padėtį Lietuvoje, įvertinti jos atitiktį tarptautiniams, Europos bei konstituciniams standartams ir, remiantis lyginamąja analize su Vokietija ir Jungtine Karalyste, pateikti būtinas ar galimas tobulinimo rekomendacijas.

Tyrimo uždaviniai. Siekiant tikslo, keliami šie uždaviniai:

1. Išanalizuoti laisvai samdomų darbuotojų darbo santykių tikslaus klasifikavimo iššūkius, susijusius su tipinėmis darbo teisėmis ir socialinėmis garantijomis;
2. Identifikuoti Vokietijos ir (arba) Jungtinės Karalystės teisinius instrumentus, kurie galėtų formuoti arba pagerinti Lietuvos požiūrį į laisvai samdomų darbuotojų darbą;
3. Įvertinti, ar Lietuvos teisinė sistema, reglamentuojanti laisvai samdomų darbuotojų veiklą, atitinka aukštesnės galios teisės aktus (ES, tarptautinę ir konstitucinę teisę);
4. Parengti pasiūlymą dėl priemonių, kurios galėtų užpildyti nustatytas spragas Lietuvoje, atsižvelgiant į Lietuvos teisinę tradiciją.

Tyrimų apžvalga. Disertacijos tema yra daugialypė, joje remiamasi įvairių šalių mokslininkų atliktais tyrimais. Dauguma šių tyrimų nagrinėja nuolatinio darbo ir nuolatinio užimtumo temą iš platesnės perspektyvos¹⁶⁹⁵ arba sutelkia dėmesį tik į dalinius aspektus. Išsamiausių ir naujausių tarptautinių tyrimų šioje srityje apžvalgą pateikia *Kocher*. Savo darbe „*Digital Work Platforms at the Interface of Labour Law*“ autorė analizuoja, kokių mastu formaliai savarankiškai dirbantys asmenys turėtų turėti teisę į tradicines darbo teises pagal galiojančius įstatymus arba ar būtinas esminis darbo teisės pagrindinių principų paradigmos poslinkis. Savo analizėje ji taip pat nagrinėja

1694 Žr. Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz (Arbeitsschutzkontrollgesetz), *Bundesgesetzblatt Online*, 2 straipsnis, žiūrėta 2025 m. kovo 1 d., https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl120s3334.pdf.

1695 Žr. Eurofound, *New Forms of Employment: 2020 Update* (Liuksemburgas: Publications Office of the European Union, 2020), <https://data.europa.eu/doi/10.2806/278670>; Valeria Pulignano ir kt., „Creative Labour in the Era of Covid-19: The Case of Freelancers“, Working Paper (Briuselis: ETUI aisbl, 2021), <https://www.etui.org/sites/default/files/2021-03/Creative%20labour%20in%20the%20era%20of%20Covid-19%20the%20case%20of%20freelancers-2021-web.pdf>.

darbo teisės tikslus¹⁶⁹⁶. Disertacija tam tikrais aspektais sutampa su jos tyrimais, tačiau *Kocher* dėmesys sutelktas išskirtinai į platforminį darbą ir ji taiko labiau tarpdisciplininį požiūrį. Mokslininkė pateikia bendrą apžvalgą, neatlikdama išsamios atskirų jurisdikcijų lyginamosios analizės, kaip tai daroma disertacijoje. Be to, *Kocher* aptardama darbo teisės tikslus tarsi daro prielaidą, kad darbo teisė iš esmės tarnauja vienam ar keliems konkrečioms tikslams. Disertacijoje, priešingai, taikoma pagrįsta teorijos metodologija ir kontekstualus teisinis analizės požiūris, sąmoningai paliekant atvirą klausimą, ar darbo teisės ir socialinės apsaugos teisės aspektai ar apsauginės nuostatos gali tarnauti skirtingiems tikslams, kurie sutampa tik iš dalies.

Skirtingi (istoriniai) konkrečių darbo ir socialinės apsaugos teisės aspektų tikslai buvo nagrinėjami *Kendzia*¹⁶⁹⁷ ir *Rebhahn*¹⁶⁹⁸, tačiau tyrimai apie šiuos individualius tikslus tebėra riboti¹⁶⁹⁹. Savo analizėje *Kendzia* remiasi tokių mokslininkų kaip *Nipperdey*, *Sinzheimer*, *Mückenberger* ir *Schmuhl* darbais. Nors *Kendzia* pirmiausia nagrinėja darbo ir socialinės apsaugos teisės tikslus ir pagrindimus iš Vokietijos istorinės perspektyvos, jo išvados yra aktualios ne tik Vokietijai. Jo tyrimai apima pokyčius nuo XVI a. ir identifikuoja XIX a. pabaigą kaip pagrindinį lūžio tašką, kai atsirado struktūros, panašios į šiandienines. Tuo metu Vokietija buvo darbo ir socialinės apsaugos teisės pionierė, pirmaujanti Europoje teisės aktų tobulinimo srityje, kuri tapo pavyzdžiu kitoms Europos šalims.

Kalbant apie Jungtinę Karalystę, ypač reikšmingi yra *Freedland* ir *Adams-Prassl* darbai¹⁷⁰⁰. Jų analizė, skirta darbo statuso ir savarankiško darbo skirtumams, labai padeda suprasti ir komentuoti Jungtinės Karalystės teismų praktiką. Jų išvalgos yra būtinos norint atskirti laisvai samdomus darbuotojus, o *Adams-Prassl* ypač išsamiai

1696 Eva Kocher, *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers* (Oksfordas/NIujorkas: Hart, 2022), 129–34.

1697 Michael J. Kendzia, „Herausbildung erster Wesenszüge des Normalarbeitsverhältnisses in Deutschland“, Discussion Paper (Institute of Labor Economics (IZA), 2010 m. rugpjūtis), <https://docs.iza.org/dp5107.pdf>; Michael J. Kendzia, „Der Institutionalisierungsprozess des Lohnarbeitsverhältnisses vom Ersten bis zum Zweiten Weltkrieg in Deutschland“ Discussion Paper (Institute of Labor Economics (IZA), 2010 m. spalio), <https://docs.iza.org/dp5231.pdf>.

1698 Žr. Robert Rebhahn, „Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive“, *Recht der Arbeit*, 2009, 236–53.

1699 *Ibid.*, 242.

1700 Mark Freedland ir Jeremias Prassl, „Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom“, *Spanish Labour Law and Employment Relations Journal* 6, Nr. 1–2 (2017 m. lapkričio 6 d.): 16–29, doi:10.20318/sllerj.2017.3922; Guy Davidov, Mark Freedland ir Nicola Countouris, „The Subjects of Labor Law: ‘Employees’ and Other Workers“, *Forthcoming in Research Handbuch in Research Handbooks in Comparative Law*, red. Matthew Finkin ir Guy Mundlak, Hebrew University of Jerusalem Legal Research Paper, Nr. 15-15, 2015 m., <https://ssrn.com/abstract=2561752>; Jeremias Adams-Prassl ir Martin Gruber-Risak, „Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork“, *Comparative Labor Law & Policy Journal*, *Forthcoming* 37, Nr. 3 (2016): 619–51.

išnagrinėjo klausimus, susijusius su algoritminiu darbo valdymu¹⁷⁰¹. Be to, svarbu paminėti *Countouris*, kuris netgi apsvarstė, kaip galėtų atrodyti ateities darbo statusas Jungtinės Karalystės kontekste – toks, kuris pakankamai atsižvelgtų į šiuolaikinio darbo pasaulio iššūkius¹⁷⁰².

Vokietijoje diskusijos dėl darbo santykių ir savarankiško darbo skirtumo yra nevienareikšmės. *Preis* pasisako už griežtą skirtumą tarp skirtingų užimtumo statusų¹⁷⁰³, o kiti mokslininkai, tokie kaip *Juncker* ir *Rebhahn*, siūlo labiau niuansuotas perspektyvas, teigdami, kad nacionaliniai apibrėžimai, taikomi teismų praktikoje, turėtų leisti lankstesnį požiūrį, ypač atsižvelgiant į nestandartinius darbo santykius¹⁷⁰⁴. Be to, *Wank* daugiau nei 30 metų pasisako už „verslumo galimybių trūkumo“ koncepciją, kuri taip pat vaidina svarbų vaidmenį disertacijoje ir yra pripažinta ne tik Vokietijoje¹⁷⁰⁵. *Wank* idėja tebėra labai aktuali sprendžiant naujų darbo modelių klasifikavimo problemas¹⁷⁰⁶. Visi šie vokiečių autoriai, įskaitant *Preis*, savo analizėse neapsiriboja standartinio darbo teisine kvalifikacija, bet taip pat tiria nestandartinį darbą – tai akivaizdu vien iš to, kad Vokietijos darbo teisė pripažįsta hibridinę padėtį tarp tradicinių darbuotojų ir savarankiškai dirbančių asmenų, žinomą kaip „į darbuotojus panašūs asmenys“.

Kalbant apie Lietuvą, kuri yra disertacijos dėmesio centre, tyrimai apie nestandartinį užimtumą tebėra palyginti nereikšmingi. Tik keletas mokslininkų, pavyzdžiui,

1701 Žr. Jeremias Adams-Prassl, Reuben Binns ir Aislinn Kelly-Lyth, „Directly Discriminatory Algorithms“, *Modern Law Review* 86, nr. 1 (2023 m. sausio mėn.): 144–75, doi:10.1111/1468-2230.12759; Jeremias Adams-Prassl ir kt., „Regulating Algorithmic Management: A Blueprint“, *European Labour Law Journal* 14, nr. 2 (2023 m. birželis): 124–51, doi:10.1177/20319525231167299.

1702 Nicola Countouris, „Waiting for Godot – The Employment Rights Bill 2024 and the ‘Single Status of Worker’ Omission“, *Institute of Employment Rights*, 2025 m. kovo 11 d., <https://www.ier.org.uk/comments/waiting-for-godot-the-employment-rights-bill-2024-and-the-single-status-of-worker-omission/>.

1703 Ulrich Preis, „§ 611a BGB – Potenziale des Arbeitnehmerbegriffes“, *Neue Zeitschrift für Arbeitsrecht*, 2018, 817 ff.

1704 Abbo Junker, „Die Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes – Der Arbeitnehmerbegriff in der Rechtsprechung des Europäischen Gerichtshofs“, *Europäische Zeitschrift für Arbeitsrecht*, 2016, 184–206; Rebhahn, „Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive“.

1705 Europos Komisija, red., *Transformation of Labour and Future of Labour Law in Europe: Final Report*, Employment & Social Affairs (Liuksemburgas: Office for Official Publications of the European Communities, 1999), 7 ff.

1706 Žr. Rolf Wank, „Von Honorarärzten und Piloten – der ‘Beschäftigte’ in der BSG-Rechtsprechung“, *Recht der Arbeit*, 2020, 115.

*Globytė*¹⁷⁰⁷ ir *Davulis*¹⁷⁰⁸, neseniai savo publikacijose nagrinėjo laisvai samdomą darbą. Iki šiol tyrimai daugiausia buvo skirti didesnio lankstumo įvedimui į standartinį užimtumą, įskaitant naujų, lankstesnių darbo sutarčių tipų kūrimą¹⁷⁰⁹. Be to, nors standartinio užimtumo ir savarankiško darbo skirtumas buvo pagrindinė tema, dauguma tyrimų tik klasifikuoja ir apibūdina Lietuvos teisinio reguliavimo apimtį, o ne iš esmės kvestionuoja jo atitiktį aukštesnės galios teisės aktams. Keletas publikacijų aptaria kriterijus, pagal kuriuos vertinama, ar darbo santykiai yra darbo santykiai, ar savarankiškas darbas, įskaitant šių autorių publikacijas: *Dambrauskienė, Nekrošius, Tiažkijus, Davulis, Martišienė* ir *Vaičiaitis*¹⁷¹⁰. Klausimas dėl konkrečios tarpinės kategorijos tarp tradicinių darbuotojų ir savarankiškai dirbančių asmenų įvedimo į Lietuvos teisę iki šiol buvo vertinamas labiau kaip galimybė, o ne kaip būtinas atsakas į teisinius pokyčius¹⁷¹¹.

Verta paminėti *Martišienės* apgintą daktaro disertaciją „*Darbo santykių reguliavimo civiliniai teisiniai aspektai*“¹⁷¹². Joje skiriamas dėmesys Lietuvos darbo ir civilinės teisės atskirumui, civilinės teisės normų taikymui darbo santykiams ir priklausomo bei nepriklausomo darbo atskirumui. Be to, *Povilaitienė* savo apgintoje daktaro

1707 Apie Lietuvos pavaldumo sąvoką, susijusią su platforminiu darbu: Rūta Globytė, „The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania“, *Baltic Journal of Law & Politics* 17, nr. 2 (2024): 61–76, doi:10.2478/bjlp-2024-00015.

1708 Apie teisinį Uber veiklos Lietuvoje reguliavimą žr. Tomas Davulis, „Uber and taxis: a comparative law study in Lithuania“, *Uber and Taxis: Comparative Law Studies*, red. Rozen Noguellou ir David Renders (Briuselis: Bruylant, 2018), 293–307; Tomas Davulis, „Ar legalus yra maisto išvežiotųjų „streikas“?“, 2020 m. liepos 15 d., <https://www.teise.pro/index.php/2020/07/15/t-davulis-ar-legalus-yra-maisto-isveziotuju-streikas/>; apie savarankiškai dirbančių asmenų teisę į kolektyvines derybas ir streiką Lietuvoje, žr. Tomas Davulis, „Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką“, *Darbo teisės iššūkiai besikeičiančiame pasaulyje*, red. Ingrida Mačernytė-Panomariovienė (Vilnius: Mykolo Romerio universitetas, 2020).

1709 Justinas Usonis ir Tomas Bagdanskis, „Problems of Introduction of Flexibility into Lithuanian Labour Law“, *Jurisprudencija* 18, Nr. 2 (2011): 595–612; Ingrida Mačernytė-Panomariovienė ir kt., „Some Aspects of Improving the Legal Regulation of Labour Relations: Thirty Years of Experience in the Baltic States“, *International Social Science Journal* 72, nr. 246 (2022 m. gruodis): 1237–53, doi:10.1111/issj.12385.

1710 Žr. Genovaitė Dambrauskienė, „Civilinių ir darbo sutarčių sąveika“, *Jurisprudencija* 28, nr. 20 (2002): 7–16; Genovaitė Dambrauskienė, „Lanksčių užimtumo formų taikymas Lietuvoje“, *Jurisprudencija* 25, nr. 17 (2002): 19–25; Genovaitė Dambrauskienė, „Darbo teisės modernizavimo bei tobulinimo problemos“, *Jurisprudencija* 8, nr. 110 (2008): 7–12; Ipolitas Nekrošius, „Lietuvos Respublikos darbo kodekso rengimo problemos“, *Teisė* 33, nr. 1 (1999): 25–41; Viktoras Tiažkijus, „Darbo teisė ir valstybės tarnyba: panašumai ir skirtumai“, *Justitia* 1, nr. 49 (2004): 46–56; Beata Martišienė, „Kriterijų, atskiriančių skirtingas darbo organizavimo formas analizė“, *Verslo ir teisės aktualijos* 5, nr. 2 (2010): 405–18; Tomas Bagdanskis ir Justinas Usonis, „Problems of Qualifying an Employment Relationship and Undeclared Work in Lithuania“, *Jurisprudencija* 18, nr. 3 (2011): 1101–22.

1711 Žr. Tomas Davulis, „Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.“, *Teisė* 104 (2017): 13, doi:10.15388/Teise.2017.104.10842.

1712 Beata Martišienė, *Darbo santykių reguliavimo civiliniai teisiniai aspektai* (Vilnius: Vilniaus Universiteto leidykla, 2012).

disertacijoje „*Darbo sutartis ir kitos teisinės darbo panaudojimo formos*“¹⁷¹³ siekia rasti universalias darbo sutarties egzistavimo charakteristikas ar kriterijus, kad ją būtų galima atskirti nuo kitų Lietuvos teisės aktų reglamentuojamų sutarčių rūšių, pavyzdžiui, Lietuvos autorinės sutarties. Šiame kontekste *Martišienė* ir *Davulis* į diskusiją įtraukė „finansinės rizikos“ elementą¹⁷¹⁴, kuris tam tikru mastu sutampa su *Wank* koncepcija „verslumo galimybių trūkumas“.

Tarptautiniu mastu tyrimai, skirti atskirti įvairias užimtumo formas nuo savarankiško darbo, sparčiai išplito 1990-ųjų pabaigoje ir 2000-ųjų pradžioje, sutapdami su TDO diskusijomis apie „sutartinį darbą“ ir ES tyrimais apie naujas darbo formas. *Supiot* padarė reikšmingą indėlį šioje srityje¹⁷¹⁵, remdamasis taip pat šalių ataskaitomis ir TDO leidiniais iš 1997–1998 m. diskusijų apie sutartinį darbą iki TDO rekomendacijos Nr. 198 priėmimo 2006 m. Daugybė mokslininkų iš įvairių šalių nagrinėjo galimus kriterijus, pagal kuriuos galima nustatyti darbo santykius, tarp jų ir *Risak*, kuris nagrinėjo savarankiško darbo iššūkius tiek pasaulinės, tiek Europos reguliavimo perspektyvos¹⁷¹⁶.

Kalbant apie įvairių pagrindinių teisinių dokumentų, pavyzdžiui, Europos žmogaus teisių konvencijos (EŽTK) ir Europos socialinės chartijos (pataisytos), aiškinimą, ypač vertingi yra Vokietijos komentarai¹⁷¹⁷, nes juose pateikiama išsami analizė, visų pirma dėl individualių nuostatų taikymo asmenų ratui ir, kai kuriais atvejais, dėl galimo apsaugos taikymo išplėtimo, kad ji apimtų ne tik tradicinius darbuotojus, bet ir kitus dirbančius asmenis.

Be to, *De Stefano* konkrečiai ištyrė TDO priemonių asmeninį taikymo sritį ir jų teisinę sąveiką¹⁷¹⁸. *Wank* daug prisidėjo prie teleologinės ES darbuotojo sąvokos interpretacijos¹⁷¹⁹, o *Risak* taip pat pateikė išsamią šios sąvokos analizę, pasisakydamas

1713 Ieva Povilaitienė, *Darbo sutartis ir kitos teisinės darbo panaudojimo formos* (Vilnius: Vilniaus Universiteto leidykla, 2012).

1714 Beata Martišienė, „Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai“, *Teisė* 80 (2011): 138–45, doi:10.15388/Teise.2011.0.156; Tomas Davulis, *Lietuvos Respublikos darbo kodekso komentaras* (Vilnius: VĮ Registrų centras, 2018), 134; Davulis, „Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.“, 13.

1715 Supiot ir Meadows, *Beyond Employment*.

1716 TDO, red., *Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198* (Ženeva: TDO, 2013).

1717 Žr. Christian Callies ir kt., *EUV/AEUV* (Miunchenas: C.H. Beck, 2022); Dirk Ehlers, red., *Europäische Grundrechte und Grundfreiheiten* (Berlynas: De Gruyter, 2014), doi:10.1515/9783110363166; Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* (Miunchenas: C.H. Beck, 2021).

1718 Valerio De Stefano, „Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards“, *International Labour Review*, forthcoming (2021 m.), <https://ssrn.com/abstract=3790766>.

1719 Pvz. Rolf Wank, „Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen“, *Europäische Zeitschrift für Arbeitsrecht*, 2018, 327–45; Rolf Wank, „Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff“, *Europäische Zeitschrift für Arbeitsrecht*, 2023, 22–49.

už panašų teleologinį požiūrį¹⁷²⁰. Ziegler padėjo pagrindą dabartiniam Vokietijos mokslininkų sutarimui¹⁷²¹, kad ES darbo teisė apima keletą ES darbuotojo sąvokų¹⁷²². Pottschmidt nusipelno pripažinimo už savo novatorišką darbą dėl „darbuotojams priylgstančių asmenų“ teisinio statuso Europoje, kuris yra reikšmingas indėlis į šią sritį¹⁷²³.

Disertacija remiasi esamais tyrimais, kuriuose naujos užimtumo formos buvo nagrinėjamos iš įvairių mokslinių perspektyvų arba buvo aptariami daliniai disertacijos temos aspektai¹⁷²⁴. Kaip priešinga sąvoka, „standartiniai darbo santykiai“ (SER) buvo aprašyti įvairių mokslininkų ir iš dalies naudoti darant išvadas apie nestandartinę užimtumą¹⁷²⁵. Be to, fiktyvus savarankiškas darbas lieka nuolatine problema teismų praktikoje, literatūroje ir teisės taikyme¹⁷²⁶.

Tyrimo naujumas. Disertacijoje siekiama atverti naujas perspektyvas, nagrinėjant šiuos klausimus iš plačios, bet griežtai teisinės perspektyvos. Be to, dėl sparčios šios teisės srities plėtros ir technologinių pažangų, kurios palengvino naujų darbo formų plitimą, daugelis šio klausimo aspektų reikalauja bent jau pakartotinio įvertinimo. 2017 m. Lietuvos Respublikos darbo kodekso (DK) įsigaliojimas žymi posūkį Lietuvos darbo teisės srityje. Nors komentatoriai, tokie kaip Davulis¹⁷²⁷ ir Bagdanskis¹⁷²⁸, analizuavo skirtumą tarp darbuotojo ir savarankiškai dirbančio asmens statuso, jų komentaruose pirmiausia aprašoma teisinė situacija jos nekritikuojant. Nors yra daug leidinių,

1720 Martin Gruber-Risak ir Thomas Dullinger, *The Concept of „Worker“ in EU Law: Status Quo and Potential for Change*, 140 (Briuselis: ETUI, 2018).

1721 Bent jau Vokietijoje.

1722 Katharina Ziegler, *Arbeitnehmerbegriffe im Europäischen Arbeitsrecht* (Baden-Baden: Nomos, 2011); remiantis šiuo darbu, žr. Thomas Hohe, *Arbeitnehmerbegriffe im Recht der Europäischen Union: Ein Plädoyer für eine funktionale Begriffsbildung* (Baden-Baden: Nomos, 2022), doi:10.5771/9783748935377.

1723 Daniela Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten* (Baden-Baden: Nomos, 2006).

1724 TDO, *Non-Standard Employment around the World*.

1725 Simon Deakin, „New Forms of Employment: Implications for EU-law – The Law as It Stands, European Labour Law Network – 7th Annual Legal Seminar, 2014“, *Nova School of Law*, 1, žiūrėta 2021 m. rugpjūčio 16 d., https://www.fd.unl.pt/docentes_docs/ma/jja_MA_24419.pdf.

1726 Joachim Holthausen, „Statusfeststellung und Scheinselbstständigkeit – Ein Praxisbefund über Etikettenschwindel, Umgehungs-, Schein- sowie verdeckte Rechtsgeschäfte und ihre Folgen“, *Recht der Arbeit*, 2020, 92.

1727 Davulis, *Lietuvos Respublikos darbo kodekso komentaras*.

1728 Tomas Bagdanskis, Vilius Mačiulaitis ir Mantas Mikalopas, *Lietuvos Respublikos darbo kodekso komentaras: individualieji darbo santykiai* (Vilnius: Rito projects, 2018), 52 ff.

kuriuose bandoma paaiškinti ir pagrįsti „darbo statuso“ egzistavimą ir paskirtį¹⁷²⁹, tik nedaugelis jų sutelkia dėmesį į atskiras sudedamąsias dalis ir konkrečias darbo ir socialinės apsaugos teisės normas¹⁷³⁰. Disertacijoje įdarbinimo ir socialinio draudimo teisė atskirta į atskiras dalis, kad suteiktų išsamesnių įžvalgų.

Kalbant apie socialinės apsaugos teisę, keliuose leidiniuose buvo nagrinėjamas savarankiškai dirbančių asmenų socialinės apsaugos klausimas. Schoukens pateikia išsamią tarptautinę lyginamąją analizę¹⁷³¹. Tačiau ši analizė yra tik bendra kelių šalių apžvalga, kurioje nesigilinama į konkrečių šalių sistemos sąlygas, kurios galėtų paaiškinti pastebėtus panašumus ir skirtumus.

Nepaisant akademinio pripažinimo, kad yra įvairių savarankiško darbo formų, kurios yra suskirstytos į įvairias grupes, kurioms reikalingi skirtingi reguliavimo metodai¹⁷³², iki šiol trūksta visų šių atskirų klausimų apibendrinimo ir konsolidavimo, kad būtų galima rasti universalius metodus, kurie apimtų ne tik tam tikras konkrečias formas, pvz., „platforminį darbą“.

Kadangi disertacijoje pateikiama grynai teisinė analizė, jos rezultatams neturi įtakos tai, ar visiems ar tik tam tikriems laisvai samdomiems darbuotojams dėl subjektyvių ar politinių priežasčių turėtų būti suteikta didesnė apsauga. Disertacijoje daugiausia dėmesio skiriama tam, ar esami ar nauji teisiniai pokyčiai reikalauja reguliavimo aplinkos Lietuvoje pakeitimų. Be to, disertacijoje pateikiamos naujos įžvalgos, nes joje daugiausia dėmesio skiriama Lietuvai ir jos reguliavimo aplinka lyginama su Vokietijos ir Jungtinės Karalystės reguliavimo aplinka. Esami moksliniai tyrimai ir politinės diskusijos dažniausiai sutelkia dėmesį į Vakarų ir Rytų Europos modelius atskirai. Išplečiant lyginamąją sistemą, įtraukiant struktūrinę ir istorinę įvairovę, disertacijoje pateikiamas subtilesnis supratimas apie tai, kaip Lietuvos teisinė sistema gali prisitaikyti prie laisvai samdomų darbuotojų darbo. Be to, disertacijoje unikaliai integruojama doktrininė teisinė analizė su funkcionalistiniu požiūriu į klasifikaciją. Jos tikslas – išsiaiškinti, kokie teisiniai mechanizmai yra būtini, kad būtų galima veiksmingai reguliuoti laisvai samdomą darbą, suderinant lankstumo poreikį su teisinės apsaugos ir

1729 Žr. pvz. Kocher, „Digital Work Platforms at the Interface of Labour Law“, 129–34; Simon Deakin ir Frank Wilkinson, „Labour Law and Economic Theory: A Reappraisal“, *The Legal Regulation of the Employment Relation*, Hugh Collins, Paul Davies ir Roger Rideout (Londonas: Kluwer Law International, 2000), 29–62; Simon Deakin, „The Comparative Evolution of the Employment Relationship“, Guy Davidov, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (London: Bloomsbury Publishing PLC, 2006), 101; Hugh Collins, „Justifications and Techniques of Legal Regulation of the Employment Relation“, *The Legal Regulation of the Employment Relation*, Hugh Collins, Paul Davies ir Roger Rideout (London: Kluwer Law International, 2000), 7 ff.; Alain Supiot, „Was ist ein Arbeitnehmer?“, *Das europäische Sozialmodell: auf dem Weg zum transnationalen Sozialstaat*, red. Hartmut Kaelble ir Günther Schmid (Berlynas: edition sigma, 2006), 423 ff.

1730 Rebhahn, „Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive“, 242.

1731 Paul Schoukens ir Charlotte Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers: An Analysis Based upon the EU Recommendation on Access to Social Protection* (Leuven: Acco, 2021).

1732 Žr. Katharina Uffmann, „Aktuelle Fragen der Solo-Selbständigkeit“, *Recht der Arbeit*, 2019: 360–71.

tikrumo būtinybe, taip pat atsižvelgiant į unikalią Lietuvos teisinę tradiciją.

Tyrimo metodika. Disertacijos pavadinimas yra sąmoningai nekonkretus ir neleidžia jos tiesiogiai apibendrinti. Vietoj to, kad iš pat pradžių būtų nustatytos griežtos teisinės apibrėžtys, joje taikomas tiriamasis ir į kontekstą atsižvelgiantis požiūris. Vietoj to, kad terminai „laisvai samdomas darbuotojas“, „teisės“ ir „socialinės garantijos“ būtų traktuojami kaip griežtai apibrėžtos sąvokos, jų reikšmės atsiskleidžia ir netgi gali pasikeisti per teisės aktų peržiūrą, lyginamąją teisinę analizę ir politikos diskursą disertacijoje. Šis požiūris suderina pagrįstą teorijos metodiką ir kontekstinę teisinę analizę, kurios abi pabrėžia koncepcinių sistemų plėtros svarbą reaguojant į empirinius ir lyginamuosius rezultatus.

Tikslas – ištirti, kaip ir kokiomis sąlygomis laisvai samdomas darbuotojas, kuris yra kažkur tarp tradicinio darbuotojo ir visiškai savarankiškai dirbančio asmens, turėtų arba privalėtų patekti į atitinkamą darbo teisės ir (visapusiškos) socialinės apsaugos teisės taikymo sritį. Remiantis šia kategorizacija, pagrindinis klausimas yra, ar ir kokiomis aplinkybėmis toks dirbantis asmuo Lietuvoje ir pasirinktose palyginimui šalyse Vokietijoje ir Jungtinėje Karalystėje galėtų ar privalėtų turėti teises ir socialines garantijas, kurios įprastai yra skirtos darbuotojams, dirbantiems pagal darbo sutartį. Žodis „įprastai“ šiame kontekste vartojamas sąmoningai, nes terminai „darbuotojas“, „darbo santykiai“ ar „darbo sutartis“ tiek mokslininkams, tiek ir ne specialistams iš karto kelia tam tikras asociacijas. Tačiau šios sąvokos savaime nesudaro universalių teisių klasifikacijų, neatsižvelgiant į konkretų teisinį kontekstą, kuriame jos nagrinėjamos. Todėl disertacijoje tyrimas atliekamas laikantis teisinio pliuralizmo perspektyvos, pripažįstant, kad laisvai samdomų darbuotojų teisinį statusą formuoja keletas tarpusavyje persipinančių teisių šaltinių – tarptautinė teisė, ES teisė, nacionalinė teisė ir teismų praktika. Taikydama iteracinį conceptualų požiūrį, disertacija užtikrina, kad jos analizė išlieka lanksti ir reaguoja į teisinius sudėtingumus, o ne apribojama per ankstyvu kategorizavimu. Šis požiūris leidžia tiksliau ir kontekstualiai aptarti laisvai samdomų darbuotojų teises ir socialines garantijas.

Tyrimo šaltiniai. Atsižvelgiant į disertacijos temą, ji grindžiama kokybiniu tyrimu. Todėl visas tyrimo procesas yra sutelktas į teisės aktų, teismų praktikos, aiškinamųjų memorandumų, įstatymų projektų, teisių komentarų, statistikos, išvadų ataskaitų ir mokslinės literatūros analizę. Disertacijoje naudojami teisiniai tyrimo metodai, įskaitant dokumentų ir informacijos analizę, lyginamąjį ir analoginį mąstymą, taip pat sisteminį, teleologinį ir apibendrinimo metodus.

Disertacijoje remiamasi įvairiais teisiniais ir akademiniais šaltiniais, kurių, atsižvelgiant į temos aktualumą, vis daugėja. Ji daugiausia grindžiama senesiomis ir dabartinėmis tarptautinių ir nacionalinių teisės aktų (tarptautinių įstatymų ir teisės aktų, ES, Lietuvos, Vokietijos ir Jungtinės Karalystės įstatymų ir teisės aktų) versijomis, taip pat tarptautinių, ES ir nacionalinių teismų bei institucijų sprendimais. Be to, disertacijoje taip pat nagrinėjami teisiniai komentarai ir aiškinamieji memorandumai. Trečia, disertacijoje remiamasi akademiniais leidiniais, straipsniais ir mokslo mokslinė literatūra (ypač susijusiai su disertacijos temos dalimis).

Surinkta informacija apdorojama sistematizavimo proceso metu, kurio rezultatas

– apibendrinimai ir išvados apie veiksmingas priemones, skirtas laisvai samdomų darbuotojų teisių ir socialinių garantijų apsaugai.

Disertacijos struktūra. Disertacijoje pirmiausia nagrinėjama priešara tarp „sutarties laisvės“ principo ir konkrečių teisių bei apsaugos tam tikroms dirbančių asmenų grupėms. Nors „sutarties laisvė“ yra pagrindinis principas, pripažįstamas Lietuvos, Vokietijos, Jungtinės Karalystės ir ES teisėje, darbo santykių kontekste ji yra ribojama dėl įgimto galios disbalanso tarp darbdavių ir darbuotojų.

Pirmoje dalyje trumpai apibūdinama, kaip šie apribojimai gali būti teisiškai pagrįsti, ir pateikiamas pagrindas tolesnėms dalims. Be to, šioje dalyje analizuojami galimi tikslai ir paskirtis, kuriais remiantis tam tikrai dirbančių asmenų grupei (paprastai darbuotojams) suteikiamos tam tikros teisės (darbo teisės aktais) ir socialinės garantijos (socialinės apsaugos teisės aktais), taip sudarant sąlygas vėlesniame etape teleologiškai interpretuoti esamas teises normas. Šiame skyriuje taip pat minimas standartinių darbo santykių (SER) sąvoka kaip potenciali darbo ir socialinės apsaugos teisės pagrindinė sąvoka ir nagrinėjama, koku mastu jos plėtojimas leidžia daryti išvadas apie tai, kurie asmenys (be tradicinių darbuotojų) turėtų ar privalo turėti teisę į tam tikras teises ir socialines garantijas. SER raida Lietuvoje, Vokietijoje ir Jungtinėje Karalystėje yra išsamiai aprašyta, pabrėžiant kiekvienos šalies istorinių, institucinių ir teisinių tradicijų vaidmenį formuojant atitinkamas teises sistemas. Tyrimas atskleidžia, kad tipinio SER modelio samprata gali labai skirtis šalyse, kaip tai rodo nagrinėjamų šalių pavyzdys. Pateikiama hipotezė, kad jei SER pati savaime yra tik fikcija, kuri iš skirtingų perspektyvų gali būti įvairių formų, tai galbūt visi kiti klausimai, kurie tariamai susiję su tam tikromis SER formomis, taip pat yra pagrįsti tik fikcinėmis prielaidomis. Remiantis tuo, nagrinėjami skirtingi darbo teisės ir socialinės apsaugos teisės tikslai, suskirstyti į individualią darbo teisę, kolektyvinę darbo teisę, ES darbo ir socialinę teisę bei socialinės apsaugos teisę. Tyrimas atskleidžia, kad nors šių skirtingų reguliavimo sričių tikslai daugeliu atveju sutampa, tai nereiškia, kad jos yra lygiavertės, ir bet koks sisteminis bei tipologinis šių teisių šaltinių aiškinimas turi atsižvelgti į šiuos skirtumus.

Antrajame skyriuje aptariamos įvairios sąvokos ir terminai, kurie atsiranda diskutuojant apie laisvai samdomų darbuotojų teises ir socialines garantijas. Sąvokos, kurios yra iš esmės susijusios su dirbančio asmens teisiniu statusu. Be to, skyriuje nagrinėjamos unikaliomis laisvai samdomų darbuotojų savybės, kurios apsunkina tikslaus jų teisinio statuso nustatymą, siekiant užtikrinti, kad jie gautų pakankamas teises ir socialines garantijas, išsamiai nagrinėjant bendras priešingas klasifikacijas. Tampa akivaizdu, kad tipinės savybės, kuriomis grindžiami tradiciniai skirstymo kriterijai, egzistuoja laisvai samdomame darbe, nors ir žymiai mažiau nei klasikiniuose darbo santykiuose. Vis dėlto būtent šios savybės paprastai yra pagrindas nustatant darbo teisės taikymo asmenų ratą.

Trečiajame skyriuje pateikiama Lietuvos, Vokietijos ir Jungtinės Karalystės teisės aktų bei Europos Sąjungos Teisingumo Teismo (ESTT) taikomų konkrečių kriterijų, skirtų dirbančių asmenų teisinio statuso vertinimui, analizė. Kalbant apie Jungtinę Karalystę, disertacijoje papildomai aptariami, be kita ko, valdančiosios *Labour Party*

ir *Countouris* siūlymai, atsižvelgiant į dabartines diskusijas dėl esamų nacionalinių užimtumo statusų reformos, ir jie kritiškai įvertinami. Be to, jame nagrinėjama vadina- moji „bendroji“ ES darbuotojo sąvoka ir su ja susijusios kontroversijos. Lietuvos darbo teisėje darbo statusas pasižymi Lietuvos kodifikavimo metodu ir dvejopu požiūriu, skiriančiu darbuotojus ir savarankiškai dirbančius asmenis. Lietuvos darbo teisė iš es- mės sistemingai laikosi „viskas arba nieko“ principo, būdingo dvejopoms sistemoms¹⁷³³, t. y. jei sutartis klasifikuojama kaip darbo sutartis, jai taikomos darbo teisės normos. Jeigu, kita vertus, sutartis klasifikuojama kaip civilinė sutartis, jai netaikoma nė viena darbo teisės norma. Lietuvos darbo teisės nuostatos kai kuriais atvejais taikomos ne tik darbo santykiams, pagrįstiems darbo sutartimi, bet ir asmenims, dirbantiems pagal teisinius santykius, kurie laikomi lygiaverčiais darbo santykiams, tačiau dėl specialaus statuso nėra laikomi darbo santykiais¹⁷³⁴. Jie išsamiai išvardyti įstatyme¹⁷³⁵. Be to, kai kuriais atvejais jos taikomos netgi asmenims, atliekantiems tam tikrą neatlygintą darbą, kuris taip pat išsamiai išvardytas įstatyme¹⁷³⁶. Tačiau nėra atviros viską apiman- čios nuostatos ar tarpinės darbo statuso kategorijos, t. y. svarstymo, ar tam tikromis aplinkybėmis platesnė adresatų grupė, nedirbanti pagal kontrolės ir paklusnumu pa- grįstą organizacinį pavaldumą, turėtų būti panašiai ar net vienodai apsaugota pagal individualią normą ar bent jau normų reguliavimo sritį – kaip yra Jungtinėje Karalys- tėje ir Vokietijoje.

Disertacijoje pabrėžiama, kad 2017 m. priėmus LR DK, buvo iš dalies paaiškinta, kas yra darbo sutartis, kuri sudaro Lietuvos darbuotojo sąvokos pagrindą. Siekiant šio tikslo, su anksčiau taikoma darbo sutarties sąvoka susijusi teismų praktika, kuri vis dar buvo daugiausia grindžiama Lietuvos Tarybų Socialistinės Respublikos darbo įstaty- mų kodeksu (LTSR DĮK), buvo kodifikuota rašytinėje teisės normoje. Disertacijoje šis procesas nagrinėjamas nuo LTSR DĮK įvedimo 1972 m. iki šių dienų. Tačiau analizė rodo, kad 2017 m. kodifikavimas dabar pateikia potencialiai siauresnes apibrėžtis nei anksčiau, panaikindamas galimybę sukurti lankstumą ateityje. Darbo sutartis apibūdi- nama kaip darbas, atliekamas už atlygį. Šis darbas atliekamas kito asmens naudai ir yra nuolatinio, o ne į rezultatą orientuoto pobūdžio¹⁷³⁷. Tai jau skiria Lietuvos koncepciją nuo Vokietijos ir Jungtinės Karalystės koncepcijų, kur darbo statusas gali atsirasti net ir atliekant į rezultatą orientuotą darbą (Vokietijoje, bent jau į darbuotojus panašių asmenų atveju). Pagrindinis kriterijus, skiriantis nuo savarankiškai dirbančių asmenų,

1733 Žr. Miriam Kullmann, „‘Platformisation’ of Work: An EU Perspective on Introducing a Legal Presumption“, *European Labour Law Journal* 13, nr. 1 (2022 m. kovo mėn.): 71, doi:10.1177/20319525211063112.

1734 Lietuvos Respublikos užimtumo įstatymas, *e-TAR*, 4 straipsnio 1 dalis, žiūrėta 2025 m. kovo 16 d., <https://www.e-tar.lt/portal/lt/legalAct/422c8b5042b811e6a8ae9e1795984391/asr>.

1735 *Ibid.*, 4 straipsnio 3 dalis.

1736 *Ibid.*, 9 straipsnis.

1737 Lietuvos Respublikos darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Lietuvos Respublikos darbo kodeksas, *e-TAR*, 32 straipsnio 1 dalis, žiūrėta 2025 m. balandžio 17 d., 2025, <https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89/asr>.

yra pavaldumo forma, kuri vienoje pusėje akcentuoja darbo teikėjo teisę kontroliuoti ar prižiūrėti bent dalį darbo, duodant nurodymus ar taikant vidaus taisykles, o kitoje pusėje – pareigą jų laikytis¹⁷³⁸. Šis pavaldumo veiksnys iš esmės atitinka Jungtinėje Karalystėje taikomą kontrolės testą arba Vokietijos teisės aktų sąvoką „būti saistomam nurodymų“, nors jo taikymo sritis yra siauresnė nei kontrolės testo, o pastarojo samprata siauresnė nei Vokietijos teisės aktų nustatymo kriterijaus. Disertacijoje teigiama, kad būtų visiškai pagrįsta Lietuvos organizacinio pavaldumo sąvoką taikyti visų rūšių *de facto* pareigoms laikytis instrukcijų, pvz., kylančioms iš galimybės bet kuriuo metu atleisti iš darbo valdymo organų narius¹⁷³⁹. Tačiau kai kuriuose neseniai priimtose platformų ar minios darbo sprendimuose Vokietijoje ir Jungtinėje Karalystėje buvo nustatyta, kad tiek Jungtinės Karalystės teisės kontrolės testu, tiek Vokietijos teisės nustatymo kriterijumi tam tikrais atvejais gali būti pakankami ne tik tradicinės prasmės nurodymai, bet ir valdymas ar skatinimas per reitingų sistemas ar paskatas. Toks platus aiškinimas tikriausiai nebūtų įmanomas pagal Lietuvoje egzistuojančią pavaldumo sąvoką¹⁷⁴⁰, nes ji kaip esminio elemento reikalauja, pareigos laikytis nurodymų, vidaus taisyklių arba dirbti bent jau prižiūrint, o netiesioginė įtaka tikriausiai nebūtų pakankama¹⁷⁴¹. Todėl Lietuvos darbuotojo sąvokos išplėtimas įtraukiant minios arba platformos darbuotojus, kaip matyti Vokietijoje ar Jungtinėje Karalystėje, tikriausiai nebūtų įmanomas. Todėl disertacijoje daroma išvada, kad Lietuvos darbuotojo statuso sąvoka yra žymiai siauresnė ir mažiau lanksti nei Vokietijos ir Jungtinės Karalystės. Vokietijoje „darbuotojo“ statusas apima ne tik kontrolę ar priežiūrą ir pareigą laikytis nurodymų, bet ir žymiai platesnį ir lankstesnį darbo atlikimo įtakos supratimą. Be to, Vokietija ir Jungtinė Karalystė pripažįsta visapusiškas nuostatas arba tarpinį statusą, kad tam tikroms pažeidžiamoms dirbančių asmenų grupėms būtų suteikta kontekstinė apsauga, kurios joms reikia pagal tam tikrų darbo teisės nuostatų tikslą. Lietuvos teisinėje sąvokoje neaptariama, ar tam tikros nuostatos reikalauja platesnio aiškinimo konkrečiose srityse, priklausomai nuo jų pagrindinio tikslo.

Disertacijoje atskleidžiama, kad visose trijose jurisdikcijose „primacy of facts“ principas yra viršesnis už viską ir užtikrina, kad netikros savarankiškos veiklos klausimas yra tik teisinės pasekmės klausimas, nes netikri savarankiškai dirbantys asmenys *de facto* turi darbo statusą. Tačiau yra niuansų, pvz., Vokietijos teismų praktika paaikškina, kad sutartiniai darbo santykiai gali būti nustatyti vien tik nuosekliu, numanomu elgesiu, jei abi šalys keičiasi paslaugomis ir mokėjimais per teisiškai reikšmingą laikotarpį, kuris savaime gali išreikšti jų abipusį ketinimą būti saistomais darbo sutartimi

1738 Lietuvos Respublikos darbo kodeksas, 32 straipsnio 2 dalis.

1739 Žr. ESTT, 2010 m. lapkričio 11 d. sprendimą *Danosa*, C-232/09, EU:C:2010:674.

1740 Žr. Globytė, „The Concept of Subordination as an Element of Employment for Digital Platform Workers in the Republic of Lithuania“, 72.

1741 Žr. Lietuvos Aukščiausiojo Teismo 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023.

dėl faktiškai teikiamų paslaugų¹⁷⁴². Lietuvoje taip pat būtų būtina, kad abi šalys bent jau laikytųsi nuostatos, jog būtina laikytis darbo užsakovo nurodymų ar juos vykdyti¹⁷⁴³. Disertacijoje pabrėžiama labai kontekstuali „primacy of facts“ principo interpretacija, kuri, priešingai nei Lietuvos teisėje, apima ne tik šalių sutartinius ketinimus.

Lietuvos teisinė sistema iš esmės grindžiama ES reikalavimais¹⁷⁴⁴. Naujausi ES teisės aktų pokyčiai rodo tendenciją suvienodinti „darbuotojo“ sąvoką ES teisėje¹⁷⁴⁵. ES Teisingumo Teismas taip pat prisidėjo prie šio suvokimo¹⁷⁴⁶. Šiuo tikslu disertacijoje išsamiai nagrinėjama ES Teisingumo Teismo praktika, siekiant išsiaiškinti šią sąvoką ir jos principus, ir atskleidžiama, kad ES Teisingumo Teismo argumentai dažnai keičiasi tarp paradigmu, susidaro nenuoseklumo įspūdis.. Šis suvokimas daugiausia kyla dėl to, kad ESTT dažnai neatskleidžia pagrindinių aplinkybių, dėl kurių įtraukė arba neįtraukė konkrečius kriterijus į savo darbuotojo sąvokos aiškinimą. Tačiau disertacijoje įrodoma, kad ES „darbuotojo“ sąvoka (-os) teoriškai gali būti gana lanksti, t. y. apibrėžtis gali skirtis priklausomai nuo atitinkamo ES teisės akto tikslo ir konteksto¹⁷⁴⁷. Kita vertus, „darbuotojo“ sąvoka ES teisinėje sistemoje paprastai turi savarankišką ir autonomišką reikšmę¹⁷⁴⁸. Tai reiškia, kad „darbuotojo“ sąvoka turi būti aiškinama vienodai visose valstybėse narėse. Kitaip tariant, asmuo, dirbantis tam tikromis sąlygomis ir pagal tam tikrą darbo struktūrą Vokietijoje, turi būti traktuojamas taip pat kaip asmuo, esantis identiškoje situacijoje Lietuvoje. Disertacijoje teigiama, kad ES Teisingumo Teismo „darbuotojo“ sąvoka yra kontekstualiai lanksti – pritaikoma prie konkretaus teisės akto tikslo – tačiau vis dėlto nuosekli ir identiška visose valstybėse narėse. Priešingai, darbo sutarties sąvoka Lietuvoje daugiausia koncentruojasi į konteksto nepriklausomą ir siaurą organizacinį pavaldumą, reikalaujantį tam tikros darbo asmens pareigos laikytis darbo vietoje galiojančių nurodymų ar taisyklių. Ši siaura sąvoka, grindžiama Darbo kodekso 32 straipsnio 2 dalimi, palieka mažai erdvės naujoms interpretacijoms. Tai kelia ypatingų iššūkių asmenims, veikiantiems „pilkojoje zonoje“ tarp darbuotojo ir savarankiškai dirbančio asmens statuso, ypač tokiose jurisdikcijose kaip Lietuva, kur darbo teisė pripažįsta tik dvejybinių klasifikaciją. Disertacijoje minimas pavojus, kad šie asmenys gali visiškai nepatekti į darbo apsaugos taikymo sritį arba kad ši sritis gali būti netinkamai išplėsta. Kol taikoma ES „darbuotojo“ sąvoka iš esmės atitinka ES Teisingumo Teismo *Lawrie-Blum* formulę, jos įtaka nacionalinėms

1742 Bundesarbeitsgericht, Urteil vom 9.4.2014 – 10 AZR 590/13, 26 punktas; Urteil vom 17.04.2013 – 10 AZR 272/12, 13 punktas.

1743 Cf. Lietuvos Aukščiausiojo Teismo 2023 m. balandžio 4 d. nutartis civilinėje byloje Nr. e3K-3-109-684/2023, 67 punktas.

1744 Žr. Davulis, „Darbo teisės rekodifikavimas Lietuvoje 2016–2017 m.“, 13.

1745 Žr. Directive (EU) 2019/1152, 1 straipsnio 2 dalį ir 8 konstatuojamąją dalį.

1746 Pvz., ESTT, 2011 m. balandžio 7 d. nutartis, *May*, C-519/09, EU:C:2011:221, 21 punktas.

1747 ESTT, 1998 m. gegužės 12 d. sprendimas, *Martínez Sala*, C-85/96, EU:C:1998:217, 31 punktas; ESTT, 2004 m. sausio 13 d. sprendimas, *Allonby*, C-256/01, ECLI:EU:C:2004:18, 63 punktas; ESTT, 2005 m. birželio 7 d. sprendimas, *Dodl ir Oberhollenzer*, C-543/03, EU:C:2005:364, 27 punktas.

1748 ESTT, 2015 m. liepos 9 d. sprendimas, *Balkaya*, C-229/14, EU:C:2015:455, 33 punktas.

interpretacijoms gali likti ribota. Tačiau jei ES Teisingumo Teismas konkrečiu atveju nukryptų nuo *Lawrie-Blum* požiūrio, tai galėtų turėti toli siekiančių pasekmių Lietuvos darbo teisei, nes ji veikia pagal griežtą „viskas arba nieko“ klasifikavimo sistemą. Disertacijoje analizuojami ir aptariami įvairūs galimi Lietuvos atsakai, pavyzdžiui, tarpinės kategorijos arba visapusiškos nuostatos įvedimas tam tikrose teisės srityse – panašiai kaip Vokietijoje ar Jungtinėje Karalystėje – ir galimas perėjimas prie dviejų ar daugiau lygių reguliavimo sistemos¹⁷⁴⁹; arba šios problemos sprendimas priimant įvairias pavaldumo sąvokos interpretacijas Lietuvos nacionalinėje darbo teisėje.

Ketvirtame skyriuje remiantis šiuo nustatymu vertinamos jo praktinės pasekmės, pateikiant Lietuvos darbo teisės normų hierarchijos apžvalgą ir sudarant pagrindą sistemingam esamų teisinių normų aiškinimui. Remiantis pačiu Lietuvos Respublikos darbo kodeksu nustatyta hierarchija, pirmenybė teikiama ES teisei ir konstitucinei teisei. Tačiau taip pat reikia išnagrinėti, ar yra tarptautinių sutarčių, kurioms taip pat teikiama pirmenybė. Remiantis prielaida, kad šie dokumentai, dėl riboto dalyvaujančių šalių skaičiaus arba dėl to, kad jie yra orientuoti į disertacijoje nagrinėjamas temas, teikia konkrečiausias gaires šiuo klausimu, disertacijoje analizuojant tarptautinę teisę daugiausia dėmesio skiriama EŽTK, RESC ir įvairiems TDO dokumentams. Disertacijoje analizuojami aukštesnės galios teisės šaltinių (tokie kaip EŽTK, RESC, TDO dokumentai, ES teisė ir Lietuvos Konstitucija) nustatyti reikalavimai, jų aiškinimas, tarpusavio sąsajos ir įvairūs įtakos laipsniai. Ypač aptariama galima įtaka horizontaliems ir vertikaliniams teisiniams santykiams. Remiantis šia analize, vertinama, ar Lietuvos kriterijai, kuriais nustatomas darbo statusas, pakankamai įtraukia tokius aukštesnio lygmens reikalavimus, kai kalbama apie laisvai samdomų darbuotojų teisinį traktavimą, arba koku mastu šios aukštesnės galios teisės normos jau gali būti tiesiogiai taikomos dėl jų galimo tiesioginio horizontalaus ir (arba) vertikalios poveikio. Nors tokios institucijos kaip ES Teisingumo Teismas (ESTT) ar Europos žmogaus teisių teismas (ECtHR) dar nėra priėmusios galutinių sprendimų, atsiranda aiškios teisinės tendencijos, dėl kurių gali prireikti ribotai įtraukti tam tikrus laisvai samdomus darbuotojus į darbo teisės reglamentus. ECtHR šiuo atžvilgiu pabrėžė, kad besikeičiančios tarptautinės ir nacionalinės normos, atsispindinčios daugumos Europos Tarybos valstybių narių ir tarptautinių institucijų praktikoje, turėtų daryti įtaką darbo teisių, įskaitant profesinių sąjungų laisves, aiškinimui. Tai sustiprina idėją, kad darbo teisės, įskaitant profesinių sąjungų laisves, turi būti aiškinamos atsižvelgiant į besikeičiančius tarptautinius ir nacionalinius teisinius standartus¹⁷⁵⁰. Be to, RESC laikoma „gyvu dokumentu“, o tai reiškia, kad jos aiškinimas gali keistis kartu su socialine realybe ir

1749 Rekomenduojama naudoti tarpinį statusą, žr. Rolf Wank, „Workers’ Protection National Study for Germany for the ILO“ (TDO), žiūrėta 2025 m. balandžio 15 d. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/ed_dialogue/@dialogue/documents/genericdocument/wcms_205364.pdf; Emanuele Menegatti, „The Evolving Concept of ‘Worker’ in EU Law“, *Italian Labour Law E-Journal* 12 (2019 m. liepos 23 d.): 82, doi:10.6092/ISSN.1561-8048/9699.

1750 ECtHR, Judgment of 9 July 2013, *Sindicatul ‘Păstorul Cel Bun’ v. Romania* (No. 2330/09), 131 punktas.

teisinėmis sistemomis¹⁷⁵¹. Nepaisant to, kad daugelis TDO dokumentų buvo logiškai parengti atsižvelgiant į XX a. darbo struktūras, nes jų priėmimo metu nebuvo galima numatyti šiuolaikinių darbo formų, pvz., platforminio darbo. Tačiau būtų protinga išplėsti jų taikymą šiems naujiems darbo modeliams. Priešingu atveju, naujoms darbo formoms plintant, TDO dokumentų aktualumas galėtų sumažėti būtent tose šalyse, kuriose vyksta šie pokyčiai¹⁷⁵². Disertacijoje aptariamos šios tendencijos ir jos susiejamamos su Lietuvos Konstitucija.

Penktajame skyriuje pateikiama Vokietijos ir Jungtinės Karalystės teisės palyginamoji analizė, kiek ji taikoma tam tikriems dirbantiems asmenims, kuriems, remiantis jų teisiniu statusu Lietuvoje, nebūtų suteikta Lietuvos darbo teisės apsauga. Kaip ir Lietuvoje, Vokietijoje individualios darbo teisės nuostatos paprastai taikomos tik darbuotojams. Tačiau taip pat dėl to, kad darbo teisė Vokietijoje nėra kodifikuota, kai kurie įstatymai taikymo sritį punktualiai išplečia ir asmenims, kurie iš esmės yra savarankiškai dirbantys asmenys – anksčiau apibūdintiems kaip į darbuotojus panašūs asmenys („arbeitnehmerähnliche Personen“), kurie aiškiai negali būti kvalifikuojami kaip darbuotojai teisine prasme, todėl darbo teisė jiems iš esmės netaikoma¹⁷⁵³. Kaip į darbuotojus panašūs asmenys Vokietijoje, Jungtinės Karalystės b punkto darbuotojai, palyginti su darbuotojais arba a punkto darbuotojais, turi „tik ribotą pagrindinių teisių rinkinį“¹⁷⁵⁴. Analizė rodo, kad tiek Vokietija, tiek Jungtinė Karalystė reaguoja į poreikį apsaugoti asmenis, kurie, nors ir nėra klasifikuojami kaip darbuotojai griežta prasme, vis dėlto yra ekonomiškai ar kitaip pažeidžiami. Tai pasiekama dėl tokių išplėstų apsaugotų grupių egzistavimo. Šios tarpinės grupės įvairiu mastu naudojasi atrinktomis darbo teisės apsaugos priemonėmis, kurios iš dalies kyla iš platesnio ES teisės aktų aiškinimo ar iš nepriklausomų nacionalinių aplinkybių. Ši diferencijuota apsaugos logika pirmiausia grindžiama ne formaliais sutartiniais santykiais, o faktine asmenų ekonomine priklausomybe ar pažeidžiamumu. Ji atspindi funkcinę užimtumo sąvoką, kuri labiau orientuota į minimalių socialinių standartų veiksmingą įgyvendinimą netipiniuose darbo santykiuose. Nagrinėjama, ar ir kaip šių jurisdikcijų teisiniai instrumentai galėtų ar turėtų būti perimti į Lietuvos teisę.

Šeštame skyriuje remiantis ankstesnių skyrių išvadomis analizuojama, ar socialinės apsaugos klausimai dirbantiems asmenims gali tiesiog atspindėti darbo teisės klausimus, ar reikia taikyti skirtingus požiūrius. Toliau nagrinėjama, kaip Vokietija, Jungtinė Karalystė ir Lietuva sprendžia šiuos klausimus ir ar šios jurisdikcijos taiko tam tikras

1751 ECSR, Decision on the Merits: *Transgender Europe and ILGA-Europe v. the Czech Republic*: Complaint No. 117/2015, 75 punktas.

1752 Žr. De Stefano, „Not as Simple as It Seems: The ILO and the Personal Scope of International Labour Standards“, 2.

1753 Frank Hohmeister, „BUrlG §2 Geltungsbereich“, *Bundesurlaubsgesetz: BUrlG, BEEG, ArbSchG, MuSchG, SGB IX*; *Handkommentar*, autoriai Frank Hohmeister ir Angelika Oppermann (Baden-Baden: Nomos, 2013), 14 punktas.

1754 Freedland ir Prassl, „Employees, Workers and the ‘Sharing Economy’: Changing Practices and Changing Concepts in the United Kingdom“, 27.

socialinės apsaugos priemonės laisvai samdomiems darbuotojams. Lyginant Vokietijos, Jungtinės Karalystės ir Lietuvos požiūrį, galima pastebėti tiek panašumų, tiek esminių skirtumų, ypač bandant išgryninti reglamentų esmę. Neabejotinai visos trys šalys siekia apriboti visapusišką privalomą socialinį draudimą visose srityse iš esmės tik tradiciniams darbuotojams. Galima pastebėti, kad darbo teisės požiūriu „darbuotojo“ santykiai paprastai visada yra socialinės apsaugos teisės požiūriu darbo santykiai, bet nebūtinai *atvirkščiai*. Tačiau čia panašumai ir baigiasi. Jungtinėje Karalystėje sistema yra glaudžiai suderinta su mokesčių teise ir siūlo apsaugą, bent jau savanorišką, beveik visose socialinio draudimo šakose (išskyrus, pvz., bedarbio pašalpą), o Vokietija siekia didelio diversifikavimo atskirose socialinio draudimo šakose, kad apsauga būtų išplėsta tiems, kuriems, teisės aktų leidėjo nuomone, jos skubiai reikia, bet kurie nepatenka į tradicinę asmeniškai priklausomo darbo sąvoką. Tai taikoma tam tikroms veiklos rūšims, kurios, kaip rodo patirtis, paprastai apima asmenis, kuriems reikia apsaugos, taip pat pačios veiklos struktūrai. Visose trijose šalyse iškyla iššūkis, susijęs su iš esmės savarankiškai dirbančiais asmenimis, kaip įvertinti ir pasiekti būtinus minimalius draudimo laikotarpius ar sumas, kaip to reikalauja finansinio tvarumo principu grindžiama einamųjų įmokų draudimo sistema. Tai sunku padaryti dėl dažnai kintančių ne samdomų darbuotojų darbo modelių ir pajamų.

Disertacijoje parodoma, kad laisvai samdomų darbuotojų atveju socialinės apsaugos teisėje kyla kitokios problemos nei darbo teisėje. Darbo teisėje daugiausia sprendžiama laisvai samdomų darbuotojų asmeninės priklausomybės ar organizacinio pavaldumo trūkumo problema, o darbo santykių tęstinumas vaidina palyginti mažesni vaidmenį; tuo tarpu socialinės apsaugos teisėje kyla didesnių sunkumų dėl (išmatuojamo) tęstinumo trūkumo ir dažnai nepakankamo ar nereguliaraus atlyginimo dydžio. Šie veiksniai apsunkina tiek teisę į išmokas, tiek įmokų vertinimą sistemose, kurios remiasi stabilium, nuolatinium dalyvavimu. Remiantis *Schoukens* ir *Bruynseraede* tyrimais, disertacijoje siūloma suskirstyti kvalifikacinius ir laukimo laikotarpius į mažesnius laiko vienetus, užtikrinant, kad sukauptas darbas arba įmokos atitiktų standartiniams darbuotojams nustatytus reikalavimus arba mažesnes išmokas, proporcingas sumokėtomis įmokoms. Šis pakeitimas geriau atitiktų nestandartinių ir savarankiškai dirbančių darbuotojų nereguliarus darbo modelius, tuo pačiu išlaikant bendrą sistemos vientisumą¹⁷⁵⁵. Teisės į išmokas laikotarpiai, minimalūs darbo stažai, laukimo laikotarpiai ir panašios teisės į išmokas sąlygos, nustatančios laiko ar pajamų ribas, atlieka pagrindinį vaidmenį su darbu susijusiose socialinės apsaugos sistemose. Šie reikalavimai paprastai įvedami siekiant konkrečių tikslų ir daugiausia grindžiami draudimo principais, taikomais einamųjų įmokų sistemose, kurios yra daugelio socialinės apsaugos sistemų, skirtų tiek darbuotojams, tiek savarankiškai dirbantiems asmenims, pagrindas. Šios tinkamumo sąlygos padeda užtikrinti įmokų ir teisių į išmokas pusiausvyrą, skatina draudimo tęstinumą, remia sistemos finansinį tvarumą¹⁷⁵⁶ ir saugo įmokų mokėtojų

1755 Schoukens ir Bruynseraede, *Access to Social Protection for Self-Employed and Non-Standard Workers: An Analysis Based upon the EU Recommendation on Access to Social Protection*, 64 ff.

1756 Ibid., 70.

solidarumo bendruomenę. Tai kelia papildomą iššūkį, kuris viršija darbo teisės ir teisinių santykių klasifikavimo iššūkius. Tačiau šie iššūkiai tam tikru mastu gali kilti ir lanksčių darbo sutarčių, pavyzdžiui, projektų, terminuotų ir laikino darbo sutarčių, atveju. Tai rodo, kad socialinės apsaugos teisė susiduria su dar didesniais sunkumais, kai kalbama apie laisvai samdomų darbuotojų traktavimą.

Disertacijos *paskutinis* skyrius pateikia išvadas dėl laisvai samdomų darbuotojų teisinės padėties Lietuvoje ir jų galimybių naudotis darbo teisės teisėmis bei socialinės apsaugos garantijomis. Jame vertinamas praktinis visoje disertacijoje aptartų teisinių priemonių taikymas Lietuvos kontekste – nurodant, kur reikalingi ar rekomenduojami pokyčiai – ir pateikiami pasiūlymai Lietuvos įstatymų leidėjams, teismams ir valdžios institucijoms, kaip geriau užtikrinti laisvai samdomų darbuotojų teises ir socialines garantijas, laikantis aukštesnės galios teisės aktų ir gerbiant Lietuvos teises tradicijas. Pagrindinis disertacijos elementas yra funkcinis ir teleologinis darbo ir socialinės apsaugos teisės aiškinimas. Analizuojant šių teisinių režimų pagrindinius tikslus, disertacijoje pateikiamas normatyvinis argumentas, kuriuo remiantis siūloma išplėsti tam tikras teises ir garantijas laisvai samdomiems darbuotojams Lietuvoje.

Disertacijoje apibendrinami tyrimo rezultatai ir pateikiami konkretūs *de lege ferenda* pasiūlymai Lietuvos įstatymų leidėjams. Šių pasiūlymų tikslas – rasti pusiausvyrą tarp šiuolaikinės ekonomikos reikalaujamo lankstumo, Lietuvos teisės tradicijų ir aukštesnės galios teisės aktų reikalaujamos teisinės apsaugos.

Disertacija yra originalus indėlis į akademinę ir politinę diskusiją apie nestandartinį darbą. Joje ne tik paaiškinamos darbo statuso sąvokos ribos pagal Lietuvos, Vokietijos ir Jungtinės Karalystės teisę, bet ir pateikiamas reformos planas, atsižvelgiantis į tarptautinius teisinius išipareigojimus ir Lietuvos teisinę tradiciją. Taip siekiama skatinti labiau įtraukią ir prisitaikančią teisinę sistemą, kuri pripažintų kintantį darbo pobūdį ir užtikrintų pagrindines teises bei socialines garantijas visiems dirbantiems asmenims, neatsižvelgiant į jų oficialų sutartinį statusą.

IŠVADOS

1. Pagrindiniai iššūkiai apibrėžiant laisvai samdomo darbo teisinį statusą bei užtikrinant tinkamas darbo teises ir socialines garantijas kyla iš pačios šių santykių struktūros. Nors laisvai samdomam darbui būdingi tam tikri panašumai su tradiciniais darbo santykiais, esminiais aspektais jis nuo jų skiriasi. Darbo santykių klasifikacija vis dar daugiausia grindžiama formaliais asmeninės priklausomybės ir organizacinio pavaldumo kriterijais, siekiant nustatyti prieigą prie darbo teisių ir socialinės apsaugos, ypač Lietuvoje. Tačiau laisvai samdomam darbui būdingi elementai dažnai nėra akivaizdūs: formalus savarankiškumas sprendžiant, kur, kada, kaip ir ar dirbti, užmaskuota netiesioginė elgesio kontrolė ir slepiama tikroji laisvai samdomų darbuotojų priklausomybė bei pažeidžiamumas. Ekonominė realybė gali įtvirtinti ne taip aiškiai matomą, tačiau taip pat reikšmingą pavaldumo ar priklausomybės formą. Šis neatitiktis kelia didelių sunkumų taikant tradicinius skirties kriterijus naujoms darbo

formoms. Vis dėlto Jungtinės Karalystės ir Vokietijos patirtis rodo, kad teisinės sistemos gali prisitaikyti nekeisdamos savo pagrindų. Socialinės apsaugos teisė susiduria su atskirais iššūkiais, kylančiais dėl išorinio uždavinio – saugoti solidarumo principu paremtą įmokų bendruomenę ir užtikrinti sistemos finansinį tvarumą. Laisvai samdomo darbo fragmentiškumas ir nenuoseklumas apsunkina socialinės apsaugos taikymą: nenuspėjamos pajamos ir stabilios tęstinės veiklos stoka komplikuoja įmokų skaičiavimus bei teisės į apsaugą nustatymą. Net jei laisvai samdomi darbuotojai įrodo priklausomybę ar pavaldumą ir galėtų būti saugomi pagal darbo teisės normas, jų integracija į socialinės apsaugos sistemas išlieka sudėtingu teisiniu ir administraciniu uždaviniu.

2. Lietuvos teisinė sistema, ypač po 2017 m. LR DK reformos, išlaiko gana siaurą darbo santykių sampratą, griežtai susietą su organizaciniu pavaldumu, paremtu klasikiniu valdžios ir pavaldumo santykiu, kylančiu iš sutartinių teisių ir pareigų. Šis modelis skatina teisinį aiškumą, tačiau labiau atspindi XX a. darbo rinkos realijas nei šiandieninį sparčiai kintantį darbo pasaulį. Šiame darbe parodyta, kad tokios šalys kaip Vokietija ir Jungtinė Karalystė suteikia tam tikras darbo teises bei socialines garantijas laisvai samdomų asmenų grupėms, reaguodamos į viršesnės galios teisės aktus, galiojančius ir Lietuvai. Tačiau mastas ir taikomi metodai skiriasi: Jungtinėje Karalystėje galioja trinarė klasifikavimo sistema (samdomas darbuotojas (angl. employee), dirbantysis (angl. worker) ir savarankiškai dirbantis asmuo (angl. self-employed)), kuri suteikia dalines darbo teises dirbantiesiems bei nesant formalaus organizacinio pavaldumo, pripažįstant ir švelnias įtakos formas, įskaitant netiesioginių nuobaudų sistemas bei algoritmais grįstą darbo valdymą. Tuo tarpu Vokietijos teisėje, kuri nuosekliai taiko tipologinį metodą ir iš visų šioje disertacijoje nagrinėtų jurisdikcijų labiausiai atsižvelgia į aplinkybes ir kiekvieną atvejį vertina atskirai, asmenys gali būti priskirti prie visateisių darbuotojų net ir tais atvejais, kai egzistuoja tik švelnios įtakos formos. Tai gali būti elgesio skatinimas arba skatinimo struktūros, kuriomis subtiliai vadovaujama dirbančiojo asmens elgesiui, nevykdant jokios oficialios ar tiesioginės kontrolės. Iki 2017 m. reformos Lietuvoje taip pat galėjo būti taikomas lankstesnis pavaldumo supratimas. Tačiau DK 32 str. 2 d. įtvirtinta siaura pavaldumo samprata, pabrėžianti formalų pavaldumą, neleido pasukti šiuo keliu. Be to, Vokietijos teisėje egzistuoja atvira „darbuotojui artimo asmens“ sąvoka, užtikrinanti apsaugą tiems, kurie nepatenka į bendrąją darbuotojo sąvoką. Ši sąvoka gali būti aiškinama skirtingai – atsižvelgiant į teisinį kontekstą ir reguliavimo tikslą. Vokietijos kontekstinis požiūris, kurio šaknys glūdi tipologiniame metode, įvairių sąvokų apibrėžiančius kriterijus traktuoja ne kaip griežtas ribas, o labiau kaip lanksčias gaires, kurių svarba gali kisti priklausomai nuo darbo santykių ir aplinkybių įvairovės. Tai metodas, kurį ESTT iš esmės pats sau pritaikė, nors ne visada aišku, ar nuosekliai jo laikosi. Vokietijoje panašus požiūris taikomas ir socialinės apsaugos teisėje, nors čia vartojami kiti terminai, o Jungtinėje Karalystėje remiamasi dvinare sistema. Kita vertus, Lietuva į atskiras savo socialinės apsaugos teisės šakas bando integruoti bent

jau tam tikras iš anksto apibrėžtas veiklas. Todėl Lietuvos, Vokietijos ir Jungtinės Karalystės darbo ir socialinės apsaugos teisės asmeninės taikymo sritys skiriasi tiek metodologine, tiek turinio prasme – vargu, ar kada nors pavyks skirtumus visiškai panaikinti.

3. Siauresnė Lietuvos darbo teisės asmeninio taikymo apimtis iš dalies pateisinama teisinio aiškumo užtikrinimu. Dabartinė samprata tarnauja „apibendrintam teisingumui“, tradiciškai būdingam darbo teisei. Tačiau srityse, kur viršesnės galios teisė (EŽTK, Europos socialinė chartija, ES teisė, konstitucinė teisė) numato platesnę apsaugą, Lietuva privalo imtis atitinkamų priemonių. Nors galutinių sprendimų iš ESTT dar laukiama, teisinės tendencijos rodo plečiamą darbo santykių ir darbo sutarties sampratą. Lietuva negali šių tendencijų ignoruoti. Darbo ir socialinės apsaugos tikslai yra daugialypiai ir persidengiantys, o dabartinis griežtas Lietuvos požiūris atspindi tik vieną, apibendrintą darbo santykių egzistavimo pagrindą, todėl nebeatitinka kintančių standartų arba rizikuoja netinkamai išplėsti savo taikymo ribas. Akivaizdžiausi neatitikimai matyti profesinių sąjungų teisėse – nors laisvai samdomiems darbuotojams leidžiama jungtis į profesines sąjungas, aktyvaus nario teisės ir atstovavimas išlieka riboti, o tai gali pažeisti, pvz., EŽTK 11 straipsnį. Panašių spragų esama ir individualioje darbo teisėje (nediskriminacija, darbuotojų sauga ir sveikata). Būtų neadekvatu neskirti šioms grupėms teisinės apsaugos vien dėl organizacinio pavaldumo nebuvimo. Šiuo metu tik darbo laiko ir kasmetinių atostogų klausimu – pagal ESTT sprendimą Yodel byloje – situacija, regis, yra santykinai nusistovėjusi. Nepaisant to, reikia atlikti išsamias nacionalines analizes, siekiant identifikuoti įvairių Lietuvos teisės normų ištakas ES teisėje bei, esant poreikiui, išplėsti teisinę apsaugą. Tai nereikštų šimtų skirtingų asmeninio taikymo nuostatų atsiradimo Lietuvos teisėje – veikiau teisinės sritys turėtų būti grupuojamos pagal platesnę darbo bei socialinės apsaugos teisės tikslų ir uždavinių sistemą. Tačiau net ir šiuo metu yra rizika, kad tam tikri reikalavimai, kylantys iš viršesnės galios teisės aktų, jau gali būti tiesiogiai taikomi vertikaliuose laisvai samdomų darbuotojų ir Lietuvos valstybinių darbo paslaugų teikėjų santykiuose, ir net horizontalus taikymas tam tikrose srityse negali būti visiškai atmestas, atsižvelgiant į ESTT praktikos šioje srityje nenusipėjamumą.
4. Yra galimi keli metodiški sprendimai šioms problemoms spręsti. Vienas galimų būdų būtų pereiti nuo kodifikuotos darbo teisės prie atskirų įstatymų su individualiomis taikymo sritimis, labiau suderintomis su ES direktyvų reikalavimais. Kitas – grįžti prie lankstesnio darbo sutarties sampratos aiškinimo, kuris atspindėtų tikrąjį „primacy of facts“ principą ir įvertintų visas individualios situacijos aplinkybes. Abiem atvejais kiltų konfliktas su Lietuvos darbo teisės tradicija siekti aiškios ir visapusiškos darbo santykių struktūros. Todėl tradiciją labiau atitiktų tarpinės atviros kategorijos įvedimas tik tam tikrose srityse, greta esamų „darbuotojo“ ir „darbo sutarties“ sąvokų. Tačiau vien naujos nekontamos sąvokos sukūrimas galėtų atkartoti esamas skirties problemas – kaip matyti iš Jungtinės Karalystės „limb (b) worker“ statuso. Geresnė alternatyva,

iš dalies pagrįsta Vokietijos modeliu, būtų lanksti bendra nuostata, pritaikoma įvairioms reguliavimo sritims. Ši universali nuostata turėtų būti grindžiama trimis veiksniais: panašumu į darbuotoją, pažeidžiamumu ir apsaugos poreikiu. Kadangi visi atskiro atvejo faktai ir aplinkybės gali būti lemiami ir į juos būtina atsižvelgti, visi šioje disertacijoje aptarti rodikliai gali būti priskirti šiems veiksniams, jei konkrečiu atveju jie gali tinkamai parodyti šiuos veiksnius atsižvelgiant į konkretų kontekstą. Panašumo į darbuotoją, pažeidžiamumo ir dėl to kylancio apsaugos poreikio santykis turi būti vertinamas kontekstiškai ir tikslingai pagal konkrečios teisės normos tikslą. Panašumas į darbuotoją galėtų būti nustatomas tiek pagal visuomenės suvokimą, tiek pagal darbuotojams būdingą sociologinę tipologiją. Šis lankstus, į tikslą orientuotas požiūris užtikrintų, kad apsaugos išliktų tikrai „atsparios ateičiai“ ir atsparios tyčiniam ar netyčiniam vengimui. Tačiau sėkmingam įgyvendinimui būtina, kad teismai ir administracinės institucijos tipologinį metodą taikytų dinamiškai: ne mechanškai per „kontrolinius sąrašus“, o apgalvotai, analizuodami nagrinėjamos teisės normos tikslą. Šiame darbe parodyta, kad teismai, įskaitant ESTT, kartais linkę į ontologinius aiškinimus, kai ankstesnių sprendimų subtilios teisinės sąvokos buvo sumažintos iki paprastų raktinių žodžių. Tokio požiūrio būtina vengti įgyvendinant pagrindines teises, kur būtinas tikslingas aiškinimas ir skaidrumas teismų motyvavime. Panaši koncepcija galėtų būti taikoma socialinės apsaugos teisės kontekste, diferencijuota pagal įvairias sistemos šakas ir jų tikslus. Tačiau, kadangi socialinės apsaugos teisėje kyla ne tik teisinio klasifikavimo problemų, būtų galima toliau spręsti konkrečias problemas, kylančias dėl laisvai samdomo darbo fragmentiškumo ir periodiškumo, įskaitant pastovaus tęstinumo nebuvimą ir atlygio nereguliarumą ar nepakankamumą, pertvarkant kvalifikacinius ir laukimo reikalavimus į mažesnius vienetus. Tai leistų geriau prisitaikyti prie nestandartinių darbo modelių ir pagerintų laisvai samdomų darbuotojų galimybes gauti socialinę apsaugą – bent jau savanoriškai. Tai sudarytų sąlygas sumuoti sukauptą darbo stažą ar įmokas, kad būtų pasiektos standartiniams darbuotojams nustatytos lygiavertės ribos, arba skirti proporcingai mažesnes išmokas, atsižvelgiant į sumokėtas įmokas.

AUTORIAUS PUBLIKACIJOS DISERTACIJOS TEMA

1. Hans Lauschke, “Lithuania’s Binary Worker Classification Vs. A Teleological Interpretation of the EU’s ‘Worker’ Concept by Germany and the UK,” *BJLP* 17, nr. 2 (2024), 142-167, DOI: 10.2478/bjlp-2024-00019
2. Hans Lauschke, “Savarankiškai Dirbančių Asmenų Prašymų Nagrinėjimas Lietuvos Darbo Ginčų Komisijose ‘Sic-Non’ Bylose,” *Jurisprudencija* 31, nr. 2 (2024), 436-452, DOI: 10.13165/JUR-24-31-2-13
3. Hans Lauschke, “The Applicability of ILO’s Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally [TDO rekomendacijos Nr. 198 dėl darbo santykių taikymas, kuriant universalų požiūrį į darbo santykių atskyrimą Lietuvoje ir tarptautiniu mastu],” *Teisė* 135 (2025), 85-104, DOI: 10.15388/Teise.2025.135.5

PRANEŠIMAI MOKSLINIŲ TYRIMŲ RENGINIUOSE

1. “Interactions between Legal Orders in IG on International Economic Law” (papildomas ESIL 2024 Research Forum Nikosijoje renginys), European Society of International Law (ESIL) / IG on International Economic Law, 2024 m. balandžio 15 d.
2. C*LLaS Research Colloquium, European University Viadrina Frankfurt (Oder), 2024 m. birželio 18 d.

GYVENIMO APRAŠYMAS

Išsilavinimas

- Nuo 2021 Mykolo Romerio universitetas, Vilnius (Lietuva), Teisės doktorantūros studijos
- 2012 – 2014 Dreseno technologijos universitetas, Dresdenas (Vokietija), LL.M. (Verslo teisė)
- 2009 – 2012 Dreseno technologijos universitetas, Dresdenas (Vokietija), LL.B. („Law in Context“)

Profesinė patirtis

- Nuo 2019 LYNX Lietuva
- 2015 – 2019 RÖDL Lietuva

Lauschke, Hans

RIGHTS AND SOCIAL GUARANTEES FOR FREELANCE WORKERS – STATUS QUO AND DEVELOPMENTS OF LEGAL INSTRUMENTS IN LITHUANIA IN COMPARISON WITH OTHER EUROPEAN COUNTRIES: daktaro disertacija. – Vilnius: Mykolo Romerio universitetas, 2026. P. 390.

Bibliogr. 283-324 p.

Disertacijoje nagrinėjamas laisvai samdomų darbuotojų teisinis statusas, teisės ir socialinės garantijos Lietuvoje, atliekant lyginamąją analizę su Vokietija ir Jungtine Karalyste. Atsižvelgiant į kintančias darbo rinkas ir nestandartinių darbo formų plėtrą, tyrime analizuojamos reguliavimo spragos ir struktūrinis teisinis neapibrėžtumas, kylantis iš Lietuvos taikomos binarinės darbuotojo ir savarankiškai dirbančio asmens atskirties.

Tyrimė plėtojama funkcinė ir teleologinė sistema, skirta vertinti tam tikrų darbo teisės teisių ir socialinės apsaugos garantijų taikymo išplėtimą ekonomiškai priklausomiems ar kitaip pažeidžiamiems dirbantiems asmenims. Metodologiškai disertacijoje taikoma pagrįstosios teorijos metodika ir kontekstinė teisinė analizė, daugiausia dėmesio skiriant darbo santykių statuso nustatymui ir galimybei naudotis apsaugos mechanizmais.

Tyrimo rezultatai rodo, kad Lietuvos teisinio reguliavimo modelis nevisiškai atspindi šiuolaikinius viršnacionalinius teisės raidos procesus. Disertacijos originalus indėlis pasireiškia sisteminiu darbo ir socialinio draudimo teisės peraiškinimu bei de lege ferenda rekomendacijų suformulavimu, siekiant didinti teisinį aiškumą, nuoseklumą ir veiksmingą socialinę apsaugą, kartu išlaikant darbo rinkos lankstumą ir gerbiant Lietuvos teisingą tradiciją.

The dissertation examines the legal status, rights, and social guarantees of freelance workers in Lithuania through a comparative analysis with Germany and the United Kingdom. In light of evolving labor markets and the expansion of non-standard work, the study addresses regulatory gaps and structural legal uncertainty arising from Lithuania's binary distinction between employee and self-employed person.

The research develops a functional and teleological framework for assessing the extension of selected employment rights and social protection guarantees to economically dependent or otherwise vulnerable working individuals. Methodologically, the dissertation employs grounded theory and contextual legal analysis, focusing on employment status determination and access to protections.

The findings indicate that the Lithuanian regulatory model does not fully reflect contemporary supranational legal developments. The dissertation's original contribution lies in its systematic reinterpretation of employment and social security law and the formulation of de lege ferenda recommendations aimed at enhancing legal clarity, coherence, and effective social protection, while preserving labor market flexibility and respecting Lithuania's legal tradition.

Hans Lauschke

RIGHTS AND SOCIAL GUARANTEES FOR FREELANCE WORKERS – STATUS
QUO AND DEVELOPMENTS OF LEGAL INSTRUMENTS IN LITHUANIA IN
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Socialiniai mokslai, teisė (S 001)

Mykolo Romerio universitetas
Ateities g. 20, Vilnius
Puslapis internete www.mruni.eu
El. paštas roffice@mruni.eu
Tiražas 20 egz.

Parengė spaudai Martynas Švarcas

Spausdino UAB „Ciklonas“
Žirmūnų g. 68, LT-09124, Vilnius
El. p. info@ciklonas.lt
<https://ciklonas.lt/>

