

The problem of persons having a similar legal status as employees (workers), and the absence of regulating this legal status in the Hungarian labour code: The “third estate” of the labour market

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The new Hungarian Labour Code (Act I of 2012 of the Labour Code) (hereinafter referred to as the “Current Labour Code”) was adopted by the Parliament in December 2011 and came into force on 1 July 2012. This code brought about a conceptual change in relation to the former regulation and obviously will induce many debates in the future. In this study the problem of the legal status of “persons having a similar status as employees” is analysed.¹ The new approach of the different legal status of employees (in a wider sense) and the employment relationship can be deemed as the basis of the reformation of the labour law. The clarification of this legal status can change the structure and personal scope of the labour law.² Although discussions of this phenomenon can be found in the labour law’s thinking in lots of countries, it is regrettable that in Hungary the above-mentioned legal status was not found worthy enough for attention. The early draft of the Current Labour Code contained provisions regarding the legal status of “persons

¹ In the English labour law they are called “workers,” in the German labour law “arbeitnehmerähnliche Personen,” and in the French labour law “travailleurs économiquement dépendant.” See Guy Davidov, Who is a worker? *Industrial Law Journal*, 2005, pp. 57–71; Nicole Neuvians, *Die arbeitnehmerähnliche Person*, Duncker & Humblot, Berlin, 2002; Paul-Henry Antomattei, Jean-Christophe Sciberras, Le travailleur économiquement dépendant: Quelle protection?, *Droit Social*, 2009, Vol. 2, pp. 221–233.

² The Comparative Labour Law & Policy Journal gave particular attention to this theme in a special edition in 1999. See, among others, Chris Engels, Subordinate employee or self-employed workers? An analysis of the employment situation of managers of management companies – An illustration, *Comparative Labour Law & Policy Journal*, 1999, Vol. 21, pp. 47–76; Paul Davies, Mark Freedland, Labour markets, welfare and the personal scope of employment law, *Comparative Labour Law & Policy Journal*, 1999, Vol. 21, pp. 231–248; Brian A. Langille, Guy Davidov, Beyond employees and independent contractors: A view from Canada, *Comparative Labour Law & Policy Journal*, 1999, Vol. 21, pp. 7–45; Kent Källström, Employment and contract work, *Comparative Labour Law & Policy Journal*, 1999, Vol. 21, pp. 157–185. See in addition Simon Deakin, *The Comparative Evolution of the Employment Relationship*, ESRC Centre for Business Research, Working Papers, 2005, No. 317; Luca Nogler, *The Concept of “Subordination” in European and Comparative Law*, University of Trento, 2009, pp. 1–20; Nicola Kountouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context*, Aldershot Ashgate, 2007, pp. 71–81; Nicole Neuvians, *Die arbeitnehmerähnliche Person*, Duncker & Humblot, Berlin, 2002, pp. 28–173; Luca Nogler, *The Concept of “Subordination” in European and Comparative Law*, University of Trento, 2009, pp. 151–156.

comparable to employees” but this draft regulation was refused by the social partners in the course of the negotiations.

In this study I will analyse, as a starting point, the substance of traditional employment (Section 1). After this I will try to show why this formula became unstable, with special regard to the change of the employer’s structure (Section 2). The next part deals with the differentiation of the legal status of employees (Section 3), and then the criteria of the legal status of persons having a similar status as employees are listed (Section 4). Finally I expound the legal status of persons having a similar status as employees (Section 5) and draw the conclusions.

1. The substance of traditional employment

1.1. Evaluation of the ‘Green Paper’

My starting point is the evaluation of the Green Paper, Labour law to meet the challenges of the 21st century, which was published in 2006.³ The document underlined that “the modernization of labour law constitutes a key element for the success of the adaptability of workers and enterprises.” The Green Paper referred to the Commission’s 2006 Annual Progress Report on Growth and Jobs, which emphasized that “increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity.”⁴ The Wim Kok report of 2003 analyzed the tension existing in the employment policy and labour regulation between the permanently employed (insiders) and the so-called peculiarly employed (outsiders).

The Green Paper described the situation of the European labour law as critical. The document emphasised that the original purpose of the labour law was to offset the inherent economic and social inequality within the employment relationship. This was the purpose behind the traditional structure and content of labour law concerning permanent and full-time employment, employment relationship between one employer and one employee, and the employment relationship being regulated exclusively by labour law. But very soon some cracks have appeared in this system. Nevertheless, the subject of labour law is dependent work (*abhängige Arbeit*)⁵ and the basis of the employment relationship is a contract. For this reason the labour law is part of the private autonomy. The contractual basis of labour law supposes many kinds of employment. Because of this differentiation of employment types it is necessary to elaborate the protection of the different kinds of employees. The Green Paper stated that “rapid technological progress, increased compe-

³ Green Paper: Modernising labour law to meet the challenges of the 21st century, Commission of the European Communities, Brussels, 22 November 2008 COM(2006) 608 Final.

⁴ See Time to move up a gear, *The European Commission’s 2006 Annual Progress Report on Growth and Jobs*, p. 6.

⁵ On the premise of labour law, see Richardi Reinhard, *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses*, München, C. H. Beck’sche Verlagsbuchhandlung, 1968, p. 1.

tition stemming from globalisation, changing consumer demand and significant growth of the services sector have shown the need for increased flexibility.”⁶ This statement can be interpreted so that the function of the traditional contract of employment and the structure of the European labour law did not manage to meet the market requirements, which are usually met in the case of other private law contracts.

1.2. Is there any alternative of the traditional employment?

However, the question is whether there is an alternative to traditional labour law? While the European Union incites flexibility and different kinds of employment, these flexible models have become fragile in an economic crisis. The ILO investigated the effects of the crisis in relation to work inequalities. The study stated that the crisis “was the variegated impact of employment adjustment imposed on the workforce.”⁷ In this context the Green Paper paid attention to the so-called “marginal flexibility.” According to the essence of this flexibility the protection against dismissal was decreased to promote the entry of newcomers and disadvantaged jobseekers to the labour market: “the outcome has given rise to an increasingly segmented labour market.”⁸

The document pays special attention to the discrepancy between the contracts of work and the actual status of the labour market. This situation is referred to by the Green Paper as “uncertainty with regard to the law.” It is a very important statement that it is no longer possible to maintain the traditional binary labour market with the “employee” and the independent “self-employed.” A third legal status has come into the picture, the so-called “grey zone,” namely “economically dependent workers.” In my opinion the Green Paper showed a very important approach in connection with these people. The document stated that these persons do not have a contract of employment. They may not be covered by the labour law. They are formally “self-employed” although their activity and their presence at the labour market depend exclusively on one client. It is important to emphasize that this legal status does not deal with bogus employment, in legal terms. It is a compulsory undertaking, but as such it does not have legal relevance.

As a consequence, a global/total revision/renewal of the labour codes (in general) became necessary. But this statement or requirement, i.e., the revision of the labour law can result in ambiguity. It is clear that the legal status of these workers is out of the scope of traditional labour law, but they have the same characteristic as employees do,

⁶ *Green Paper*, p. 5.

⁷ Daniel Vaughan-Whitehead (ed.), *Work Inequalities in the Crisis: Evidence from Europe*, ILO, Geneva, 2012.

⁸ *Green Paper*, p. 5. In the context of the Danish labour market, see Madsen Kongshøj, *The Danish Model of “Flexicurity:” A Paradise with Some Snakes*, Department of Political Science, University of Copenhagen, Brussels, 2002.

namely they demand social protection.⁹ For this reason it is possible to extend certain elements of the labour law to this relationship and to these persons having such status. They will not be employees, but the inequality or discrepancy between their legal status and their real situation on the market can be reduced.

2. The change of the employer's structure

2.1. Employer as subject of employer relationship and employer as network of different interests

The technological development, the concentration of goods and the rationalisation of investments and risks indicate important changes in the culture of undertakings and employment. In many cases the employers – as organisations – appear as a national or an international association of risk and investment. It can be concluded that “just-in-time” management and various lean-management structures¹⁰ have influenced the traditional employment relationship. These kinds of management systems want to decrease the losses, therefore it is in their interest to employ cheap employees and to apply inexpensive forms of employment. With time, just-in-time management has elaborated a new system, namely just-in-time employment, and just-in-time employees have appeared.¹¹ Just-in-time employment can exist in various forms, and certain types thereof exist in the frame of the labour law. Also the phenomenon of outsourcing the employees from/out of traditional labour law appears to be more and more frequent. This process is inconsistent with the traditional model of employment and it presumes a new kind of legal status besides the traditional schema.

2.2. Labour law versus corporate law

In addition to the above, the employer's structure and scope of interest have changed. A new model has been established which is beyond the relations of owner/undertaker/

⁹ See what Wank wrote in connection with the purpose of the labour law: Rolf Wank, *Eine der grundlegenden Rechtsfolgen der Arbeitsrechts ist der erhöhte Bestandsschutz. Arbeitnehmer und Selbständige*, München, 1988, C. H. Beck'sche Verlagsbuchhandlung, p. 113.

¹⁰ James Womack, Daniel Jones, *Thinking Lean: Banish Waste and Create Wealth in Your Corporation*, Simon Schuster, U.K. Ltd., 2003; Larry Kerschberg, Hanjo Jeong, *Just in Time Knowledge Management*, E-Center for E-Business, Department of Information and Software Engineering, George Mason University, MSN 4A4, Fairfax, Virginia, pp. 22030–4444, <http://eceb.gmu.edu/>.

¹¹ Rosemary Owens, The future of the law of work, *Adelaide Law Review*, 2002, pp. 345–373; Patricia Leighton, Problems continue for zero-hour workers, *Industrial Law Journal*, 2002, pp. 71–78; Peter Capelli, Nikolay Rogowsky, New work system and skill requirements, *International Labour Review*, 1994, pp. 205–220.

employer and has merged in other participants having important influence.¹² The change of corporate governance and the continuous modification of the legal status of employees induce a different approach by the labour law and the corporate law.¹³ This new development means new requirements and a new approach for the trade unions and the work's councils.¹⁴ While the tendency of opening towards peculiar workers or persons having similar legal status as employees can be observed in the United States or Western European countries, the trade unions turned towards the traditional employees.

3. The differentiation of the legal status of employees

3.1. : Definition of employee: Community law versus law of Member States

Prior to presenting the differentiation of this legal status it is necessary to clarify the criteria for the definition of the employee. It is a difficult task because, despite the semblance, no unified dogmatic basis of this definition exists. Various elements of the definition are based on concrete cases, and they can only be interpreted in a given context, at least in the community law, or, in other words, these definitions are teleological.¹⁵ Until now, the determination of this definition in the community law was important in the context of free movement¹⁶ and equal treatment,¹⁷ and might also have relevance in relation to tax law.¹⁸

Regarding the definition of “employees,” the relation of the community law and the sweep of the member states was ambiguous. The starting point was Articles 58–81 of the Treaty of Rome, which regulated the free movement of employees. The ECJ stated in an early decision that the definition of “worker” “does not (therefore) relate to national law, but to community law.”¹⁹ The ECJ has underlined that “if the definition of this term

¹² About the employment of stake holding systems, see Sally Wheeler, Labour and the corporation, *Journal of Corporate Law Studies*, 2006, pp. 361–396.

¹³ Kent Greenfeld, The place of workers in corporate law, *Boston College Law Journal*, 1998, p. 283; Sanfor Jacoby, Employee representation and corporate governance: A missing link, *University of Pennsylvania Journal of Labour Employment law*, Vol. 3, 2000–2001, pp. 454–456.

¹⁴ Kate Bronfenbrenner, Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, Ronald L. Seeber, *Organizing to Win: New Research on Union Strategies*, Cornell University Press, 1998, Ithaca and London; John Erik Dølvik, Jeremy Waddington, *Private Sector Services: Challenges to European Trade Unions*, Transfer (ETUI), 2002, pp. 356–376; Carola Frege, John Kelly (eds.), *Varieties of Unionism*, Oxford, Oxford University Press, 2004; Susanne Pernicka, Organising the self-employed: Theoretical considerations and empirical findings, *European Journal of Industrial Relations*, 2006, pp. 125–142.

¹⁵ Robert Rebhahn, Die Arbeitnehmerbegriffe des Unionsrechts in der neueren Judikatur des EuGH, *Europäische Zeitschrift für Arbeitsrecht*, 2012/1, p. 5.

¹⁶ *Deborah Lawrie-Blum v. Land Baden Württemberg* [C-66/85].

¹⁷ *Debra Allonby v. Accrington Rosendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [C-256/01].

¹⁸ *J. A. van Steen v. Inspecteur van de Belastingdienst Utrecht-Gooi/kantor Utrecht* [C-355/06].

¹⁹ *Mrs. M. K. H. Hoekstra (née Unger) v. Bestuur Bedrijvereiniging voor Detailhandel en Ambachten* [C-75/63].

(“worker”) were a matter within competence of national law, it would therefore be possible for each member state to modify the meaning of the concept of migrant worker and to eliminate at will of protection afforded by the treaty to certain categories of person.” Finally the ECJ stated that the legislator interprets this definition as broadly as necessary.

Apart from the broad interpretation it was necessary to determine certain elements of the employee definition. The community law gave its definition in the Levin case for the first time.²⁰ The ECJ expounded that the basis of this definition is the free movement of employees. As the definition of “worker” (in this context, “employee”) and the “activity as an employed person” are not expressly defined in any of the provisions on the subject, it is necessary to recourse to the generally recognised principles of interpretation, “beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty.”²¹ In the ECJ’s opinion the fact that the income of an employed person is lower than what is considered as the minimum requirement for subsistence in the host state, it is not the sole determination factor. This person can supplement his/her income by other activities as an employed person, or he/she can resort to some kind of support “provided that he pursues an activity as an employed person which is effective and genuine.”²²

3.2. Definition of employee in a wide sense

Later the formula of “the activity is effective and genuine” was repeated in many decisions.²³ The next step, and the breakthrough, in the development of the definition of the employee was the Lawrie-Blum decision.²⁴ This decision is important because of two factors: on the one hand, the definition of “employee” is circumscribed, and on the other hand, it is distinguished from the definition of “the self-employed.” The ECJ decided that the legal status of the employee “must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the person concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration” (the so-called Lawrie-Blum formula).²⁵ Under this definition the same rights are guaranteed to persons who are employed in the above-mentioned way, but only within the context of free movement.

Two problems derive from the Lawrie-Blum formula. One of them is the too broad interpretation of the employee definition by the community law, as the principle of the free movement of employees needed to be assured. Therefore, lots of activities are im-

²⁰ *D. M. Levin v. Staatssecretaris van Justitie* [C-53/81].

²¹ *D. M. Levin v. Staatssecretaris van Justitie* [C-53/81], Point 9.

²² *D. M. Levin v. Staatssecretaris van Justitie* [C-53/81], Point 18.

²³ See, among others, *R. H. Kempf v. Staatssecretaris van Justitie* [139/85].

²⁴ *Deborah Lawrie-Blum v. Baden Württemberg* [C-66/85].

²⁵ *Deborah Lawrie-Blum v. Baden Württemberg* [C-66/85], Point 17.

plemented into the employee definition, which do not belong there. The Raccanelli case is a good example for this.²⁶ The EJC stated in this case that “a researcher preparing a doctoral thesis on the basis of a grant contract concluded with an association operating in the public interest which manages scientific research institutes and which is established under the private law of a Member State must be regarded as a worker within the meaning of Article 39 EC only if these activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration...” It is very important to note that “in that regard, the concept of worker within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly.”²⁷

The other problem arises in connection with the above-mentioned broad interpretation of the legal status of the employee. The ECJ’s definition created such a vague/broad determination that the employee definition can be deemed as genus definition. As mentioned above, several kinds of employment can be implemented into this definition. It is still a question whether the differentiation of employment disrupts a unified employee definition. Nowadays several new forms of employment are developed and these are pushing the boundaries of the labour law as we know it today. Therefore the problem of the floor of rights or the different levels of these rights cannot be evaded.²⁸

3.3. Atypical employment: fractures on the unified structure of labour law

The co-existence of traditional and atypical (or alternative) forms of employment changed the order and the principles of the labour law. The system and elements of the protection of the employees are relatively simple in the case of traditional employment. One part of this is the protection of the employees’ status (e.g., prohibition against dismissals, obligation of justifying the dismissal, severance pay, etc.), others are regulated by procedural rules (e.g., information and consultation obligation). However, this traditional system cannot really be used for atypical employment.²⁹ Some names of atypical employment reflect dangers. For instance, “marginal employment” is often linked to employment for low wage.³⁰ Or, “peripheral work” refers to the fact that “this kind of employment has a place border of an economical and normative protection of subordinate employment.”³¹

²⁶ *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [C-94/07].

²⁷ *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [C-94/07], Point 1.

²⁸ Simon Deakin, The floor of rights in European labour law, *New Zealand Journal of Industrial Relations*, 1990, pp. 219–240; Olivia Homolatsch, *Flexicurity in Austria and Germany: Is a “floor of rights” for agency workers necessary?*, Amsterdam, Universiteit van Amsterdam, 2007.

²⁹ Zoltán Bankó, *Atypical Employments*, Budapest–Pécs, Dialóg Campus–PTE ÁJK, 2010.

³⁰ Werner Eichhorst, Paul Marx, Eric Thode, *Atypische Beschäftigung und Niederlohnarbeit*, Gütersloh, 2010, Bertelsmann Stiftung.

³¹ Matthew Bidwell, Do peripheral workers do peripheral work? Comparing the use of highly skilled contractors and regular employees, *Industrial and Labour Relations Review*, 2009, Vol. 1, pp. 200–225;

“Casual work” has similar content, referring to a non-continuous, accidental employment. “Contingent work” is a prevalent phrase/structure in the U.S.A. This is a genus definition, referring to the dual direct dependence of these employees: legal-dogmatic and economic-labour market dependence.³²

A specific dichotomy can be observed as regards the assessment of atypical employment. While the member states do their best to spread and promote atypical employment on their labour markets, the community labour law tries to maintain these kinds of employment inside the scope of the labour law and tries to increase their protection level.³³ A good example of this dichotomy is the history and the circumstances of creating part-time³⁴ and fixed-term employment³⁵ directives. Basically both directives consist of regulations regarding the requirements of equal treatment. Nevertheless, they could not skip the problems of the “floor of rights” and “justified unequal treatment.” The application of the above-mentioned directives is difficult due to the different regulations of the member states regarding the regulation of termination, severance pay, social security matters, etc.³⁶ These directives sought compromise, and the community law intended to put/keep the part-time and the fixed-term employment in the frame of the labour law by determining minimal requirements – so far, it has been successful.

However, a specific form of employment exists, which urged community legislators to more radical changes after the years of liberalisation. This form is the “temporary agency employment,” which is a “triangular employment relationship.” This legal structure consists of two legal relationships which are essentially different from each other. One relationship belongs to the traditional private law and exists between the temporary work agency – as the employer – and the user undertaking. Inasmuch as this relationship is regulated by the private law, its content is determined by the free will of the parties to this contract. Otherwise, the assessment of the legal nature of this relationship is unclear in the European labour law.³⁷ The other relationship exists between the temporary work agency – as the employer – and the worker/employee. This is an employment relationship whose content is determined by several cogent rules. It is clear that this employment

Roger Blanpain, Marco Biagi (eds.), *Non-Standard Work and Industrial Relations*, The Hague/London/Boston, Kluwer, 1999.

³² Anne E. Polivka, Contingent and alternative work arrangement, defined, *Monthly Labour Review*, 1996, Vol. 10, pp. 3–9; Anne E. Polivka, Thomas Nardone, On definition of “contingent work,” *Monthly Labour Review*, 1989, Vol. 12, pp. 9–16.

³³ I refer in this context to the Document of Economic and Social Committee, which analyzed the situation of atypical employment [OJ C (1980) 40/5].

³⁴ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

³⁵ Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

³⁶ See Mark Jeffrey, The Commission proposals on “atypical work:” Back to the drawing board... again?, *Industrial Law Journal*, 1995, Vol. 3, pp. 296–299.

³⁷ See Bruno Siau, *Le travail temporaire en droit comparé européen et international*, Paris, LGDJ, 1996; Gábor Kártyás, *Munkaerő-kölcsönzés Magyarországon és az Európai Unióban [Temporary Agency Work in the European Union and in Hungary]*, PhD Dissertation (Manuscript), Budapest, 2011.

relationship influences the *de facto* relationship between the user undertaking and the employee. It is evident that if the legislator remains silent, and so this structure operates during a deregulation period, the power/will of the temporary work agency and the user undertaking are dominating. Under these circumstances the original function of the temporary employment changes, and his/her employment gradually loses a substantial element, namely the temporary assignment. In my opinion the aim of the Directive 2008/104/EC on temporary agency work is at least doubtful. While Articles 1–3 regulate provisions regarding the strengthening/tightening of the rules of temporary agency employment, Article 5, Sub 2–4 grants a wide scope for potential deviation, considering particularly the equal treatment. The regulation of temporary agency work also highlights the extended interpretation of the floor of rights.³⁸ If the possibility of this deviation is recognised and therefore the application of justified unequal treatment is also recognised, the differentiation of rights will no longer be made between employees with certain features/characteristics, but between the different employment groups, i.e., the typical and atypical employment groups. So the level above the rights pertaining to every employee is strongly differentiated. The directive regarding temporary agency working was the first which set out the extended interpretation of the floor of rights, among the previous directives regulating atypical employment, which approach clearly presumes multilevel employment and therefore several/different levels of the legal status of an employee.

The different legal status of employees, which is influenced by the temporary agency work, also leads to the problem of “worker” or “persons having similar legal status as employees.” I would like to give some additional remarks to the approach and an estimation of the legal status of persons who work in the “grey zone.” Self-employed persons, as subjects of temporary agency work, made hard lobbying in the course of elaborating the regulations regarding temporary agency working. Insofar as a self-employed person is deemed as an undertaker, it is not necessary to make use of agencies. However, if this person could not be deemed as an undertaker, it is necessary to justify the extension of the scope of temporary agency employment. Nevertheless, the above-mentioned aim highlighted the instability of the legal status of the people working in the grey zone.

4. The criteria of persons having a similar legal status as employees

4.1. False self-employed as economical dependent worker

First of all it is necessary to clarify whether the definitions of the self-employed (Selbstständige) and persons having a similar legal status as employees (arbeitnehmerähnliche

³⁸ Simon Deakin, The floor of rights in European labour law, *New Zealand Journal of Industrial Relations*, 1990, pp. 219–240; Olivia Homolatsch, *Flexicurity in Austria and Germany: Is a “Floor of Rights” for Agency Workers Necessary?*, Amsterdam, Universiteit van Amsterdam, 2007.

Person) are the same or not. In order for us to answer this question, the criteria for both definitions need to be examined. This is not a simple task because the criteria for the self-employed are ambiguous, and the term “worker” does not have an exact catalogue of criteria. The definition of being “self-employed” is in a close connection with the classification of employment (i.e., of the status of those who perform work). The ILO resolution of 1993 defined the self-employed as follows: “Self-employment jobs are those jobs where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods and services produced (where own consumption is considered to be part of profits). The incumbents make the operational decisions affecting the enterprise, or delegate such decisions while retaining responsibility for the welfare of the enterprise. (In this context “enterprise” includes one-person operations.)”³⁹ This document underlined that self-employed people work on their own account or with one/few partners, whereas an employee has a stable and continuous legal contract and relationship.

In my opinion an important difference between the self-employed and the economically dependent workers (persons having similar legal status as employees) is lost in the above-mentioned definition of the ILO. The most important task is to clarify this difference, which is characterized by Perulli in such a way that the status of “worker” appears to be a self-employed person at the first sight, but, in reality, it is a subordinate employment.⁴⁰ This employment is called “false self-employed” (Scheinselbständige). However, the name or designation of “false self-employed” does not mean that this relationship is invalid. This is emphasized by Perulli as well. In his opinion the economically dependent worker belongs to the category of self-employed *de iure* and this legal status is not similar to the legal status of the “false self-employed,” who perform work on the basis of civil law contracts, but this relationship (i.e., the one relative to economically dependent workers) is characterised by subordination and the power of direction of the other party.⁴¹ Therefore, this legal construction contradicts the compulsion of the contract type and the freedom of choice between contracts.⁴² When there is some kind of important interest to establish the content of a legal relationship by the legislator, as an ultimate/indirect solution, they may use a compulsion of regarding the type of the contract. When the legislator regulates certain activities by a certain contract type, and the parties deviate from this, the result is clear. Namely, this contract is a bogus contract and for this reason it is null and void. This regulation – apart from marginal exceptions

³⁹ Resolution concerning the International Classification of Status in Employment (ICSE), adopted by the 15th International Conference of Labour Statisticians (January 1993), The 15th International Conference of Labour Statisticians, 1993.

⁴⁰ Adalberto Perulli, *Economically Dependent/Quasi-Subordinate (Parasubordinate) Employment: Legal, Social and Economic Aspects*, Committee on Employment and Social Affairs of the European Parliament and DG Employment and Employment and Social Affairs, Brussels, 2003, pp. 14–16.

⁴¹ Perulli, 2003, p. 15.

⁴² See Frank Maschmann, *Arbeitsverträge und Verträge mit Selbständigen: Rechtliche Qualifizierung von Dienstleistungsverhältnissen als Abgrenzungs- und Einordnungsproblem*, Duncker & Humblot, Berlin, 2001, pp. 221–238.

– cannot be found in the “contract of work” in wide sense. For this reason the freedom of choice of the parties between contracts may not be disputed in the absence of the above-mentioned regulation. However, in such cases it is necessary to investigate not only the content of the contract, but also the elements and effects of the legal relationship (die tatsächliche Durchführung des Vertrages).

To draw a conclusion, it is confirmed that contracts of economically dependent workers are not null and void, legal subordination cannot be verified in these relationships, but there is a discrepancy between the contracts and their effects because of the economic subordination. This fact may be the key to extend certain elements of labour law to these persons.

4.2. Characteristics of some regulations

The legal status of an economically dependent person (“worker”) is regulated in detail in only three member states;⁴³ cf. Section 409, Sub 3 of the Code of Civil Procedure of Italy. This rule is important because the scope of the labour judge covers the legal disputes of “co.co.co.” workers.⁴⁴ Article 2113 of the Italian Civil Code is similarly remarkable. This article regulates the waiver and transaction of employees but it is applied to “workers” alike. It is emphasised that during a pension reform in 1995, a special pension fund was created to cover these so-called “collaboration contracts.” The legal basis of the status of the “co.co.co.” workers is Decreto Legislativo No. 276.⁴⁵ Articles 61–69 of this decree regulate the “project work contract and occasional work.” The aim of this regulation was to take measures “to combat the fraudulent use of these contracts and relationships.”⁴⁶ The economically dependent work (lavoro parasubordinato) has three criteria. The first is continuity, which means that the work is “intended to meet a long-term requirement of the other party and that it will take time to complete.”⁴⁷ In other words, it is a permanent connection between the parties. The second criterion is coordination. Perulli has underlined that coordination means a functional relationship, a *de facto* connection. This coordination supposes subordination, but this is not as strong

⁴³ Similar definitions can be found in other countries, but the regulation cannot be considered as general.

⁴⁴ The rule is as follows: “Si osservano le disposizioni del presente capo nelle controversie relative a: ... 3) rapporti di agenzia, di rappresentanza commerciale e altri rapporti di collaborazione che si concretino in una prestazione di opera continuativa e coordinata, prevalentemente personale, anche se non a carattere subordinato...”

⁴⁵ Michele Tiraboschi, The Italian labour market after the Biagi Reform, www.csmb.unimo.it (last accessed on 10 August 2012); Michele Tiraboschi, The reform of the Italian labour market over the past ten years: A process of liberalization?, *Comparative Labour Law & Policy Journal*, 2008, pp. 427–458; Michele Tiraboschi, Maurizio Del Conte, Recent changes in the Italian labour law, in: *The Mechanism for Establishing and Changing Terms and Conditions of Employment: The Scope of Labor Law and the Notion of Employees*, JILPT Comparative Labor Law Seminar, the Japan Institute for Labour Policy and Training, 2004.

⁴⁶ Tiraboschi, 2008, p. 448.

⁴⁷ Perulli, 2003, p. 80.

as in the case of an employment relationship. In other words, this is not a legal but an effective subordination, which is located between market necessity and legally based subordination. The final criterion is the “mainly personal” nature of the work. The personal scope of economically dependent workers covers the following groups: commercial agents, natural persons who do not perform their work under contracts of employment and who are parts of projects as cooperating partners. Apart from the support of the individual labour law the legal institutions of collective labour law are remarkably alike. Perulli refers to the initiative of big/powerful trade unions to secure a representation of economically dependent workers in their organisations. This can be the basis for the enlargement/extension of the scope of the collective agreements to these economically dependent workers, concluded by these trade unions.⁴⁸

The German Collective Agreement Act (*Tarifvertragsgesetz*) extends the scope of this act to “*arbeitnehmerähnliche Person*.” For the purpose of this act the term “workers” has the following meanings.

1. Persons who have economically dependent status and necessity for social protection like employees.
2. Persons who perform work personally or basically without the involvement of employees on the basis of contracts for employment or assignment.
3. Persons who perform work to the same person preponderantly.
4. Persons if more than half part of their income is earned from this activity (i.e., from one person).

The above-mentioned legal definition can be estimated not as a general, but as a so-called “frame definition.”⁴⁹ For this reason, some other acts comment on the different legal consequences to this legal status,⁵⁰ such as annual paid leave, unfair dismissal, etc.

The differentiation between “employee” and “worker” is also important in the English labour law. I refer to, amongst others, Section 54 of the National Minimum Wage Act of 1998, to Section 230 of the Employment Rights Act of 1996, to Section 2 of the Working Time Regulations of 1998, to Sections 10–13 of the Employment Relations Act of 1999, etc. Davies raised the following question regarding these acts: Who is protected by employment law?⁵¹ Davies underlines that the workforce, as whole, is not protected at the same level by employment law. The definition of “employee” was adopted by the legislation in a traditional sense and an “employee” – as such – must enjoy all rights which are disposable at a certain time. On the other side is the legal status of the “self-employed.” The category of the self-employed is regarded in such a way that he/she can provide for himself/herself what he/she needs, and therefore this category is

⁴⁸ Perulli, 2003, pp. 81–82.

⁴⁹ Nicole Neuvians, *Die arbeitnehmerähnliche Person*, Duncker & Humblot, Berlin, 2002, pp. 22–27.

⁵⁰ *Arbeitsgerichtsgesetz*, Paragraph 5; *Bundesurlaubsgesetz*, Paragraph 2; *Heimarbeitsgesetz*, Paragraph 29.

⁵¹ Anne C. L. Davies, *Perspectives on Labour Law*, Cambridge University Press, Cambridge, 2004, pp. 75–94.

excluded from the “employment” or social protection; i.e., self-employed people shall solve such issues on their own. “Worker” is a “middle category between employee and self-employed.”⁵² It is important that the worker is not regarded as an employee, but this category also enjoys certain employment rights.

4.3. Paradigm shifts in an employment relationship and its effects

What is the reason for the above-mentioned differentiated regulations? Collins answered this question by stating that employment protection rights were based on traditional employment, and that, because of a paradigm change in the employment policy and in the labour law, it was necessary to establish a new protection system.⁵³ This system deals with the equalization of these rights in relation to traditional and atypical employment relationships – so to say in a framework of the labour law. The extension of employee rights as such to the workers would have led to absurd solutions.⁵⁴ Tiraboschi also emphasised the influence of the change of the labour market, of the strengthening of services, and of the so-called project work. The aim of the Biagi reform was to regulate as many segments of the labour market as possible.⁵⁵ The aim of the German regulation of “arbeitnehmerähnliche Person” is also connected to the necessity of social protection. The personal subordination plays an important part as a criterion for defining the legal status of employees in the German labour law. Personal subordination has a significant symptom, namely the integration of the employee into the organisation of the employer in a wide sense (Eingliederungstheorie).⁵⁶ But this theory is disputable because there are lots of activities performed by an employee, during the performance of which the employee cannot integrate into the employer’s organisation because the employer does not have an organisation.⁵⁷ The idea of personal subordination traditionally belongs to the dogma of labour law, and this subordination is not characteristic of the legal status of “arbeitnehmerähnliche Person” in this sense. However, the expression “economic dependence” is replaceable with “personal subordination,” and for this reason it is necessary to provide protection for these persons even if they do not classify as employees.

⁵² Davies, 2004, p. 87.

⁵³ Hugh Collins, Independent contractors and the challenge of vertical disintegration to employment protection laws, *Oxford Journal of Legal Studies*, 1990, Vol. 10, p. 354.

⁵⁴ Collins, pp. 355–356. Also see Simon Honeyball, The conceptual integrity of employment, *Cambrian Law Review*, 2005, Vol. 1, pp. 1–15.

⁵⁵ Tiraboschi, www.csmb.unimo.it, pp. 19–25.

⁵⁶ Arthur Nikisch, *Die Grundformen des Arbeitsvertrags und der Anstellungsvertrag*. Berlin, Hobbing, 1926; Arthur Nikisch, *Die Eingliederung und ihre Bedeutung für das Arbeitsrecht, Recht der Arbeit*, 1960, Vol. 1, pp. 1–5.

⁵⁷ See decision BAG 15. 3. 1978 AP No. 28, Paragraph 611 BGB-Abhängigkeit.

5. The regulation of “worker” in an early draft of the Current Labour Code: Reasons for why these rules are absent

5.1. Reasons of ain of regulation

Several reasons were considered when the regulation of the legal status of the economically dependent worker was developed in the Current Labour Code. One of them belongs to the legal circumstances. The definitions of persons who perform work for others are stated clearly, and therefore it was difficult to compare the legal status of workers. The Former Labour Code did not contain a “one-sentence” definition of the employee. Nevertheless, the Former Labour Code regulated the method to define the employment relationship. Under Section 75/A of the Former Labour Code, “Sub 1. The type of contract underlying an employment relationship may not be chosen with a view to restricting or violating the provisions that provide for the protection of the employee’s rightful interests.” In addition, “Sub 2. The type of contract, irrespective of the name, shall be chosen so as to best accommodate all applicable circumstances, such as the parties’ prior negotiations and their statements made at the time of contracting or during the performance of work, the nature of the work to be performed, and the rights and obligations set out under Sections 102–104.”

Sections 102–104 contained the rights and duties of the parties to an employment relationship. Section 102 says that the employer shall employ their employees in accordance with the rules and regulations pertaining to contracts of employment, labour relations and the provisions of other legal regulations. The employer shall ensure proper conditions for occupational safety and health, organize work so as to allow the employees to exercise their rights and fulfil the obligations arising from the employment relationship, provide the employees with the information and guidance necessary for the performance of work and ensure the acquisition of knowledge required for the performance of work. Therefore, the “obligation of employment,” i.e., the conclusion of the above elements, is an important arrangement of the employment relationship on the employers’ side. And of course, the employer shall pay the employees’ wages – this is an essential obligation of the employer.

Sections 103–104 say that the employee shall appear at the workplace and at the time specified, in a condition fit for work and shall spend the working hours performing work, or be at the employer’s disposal for the purpose of performing work during this time, etc. The employee shall perform his/her work in accordance with the employer’s instructions.

The criteria of the legal status of the “employee” were stated on the basis of the above-mentioned elements in the Common Directive of the Hungarian Ministry of Labour and the Hungarian Ministry of Finance.⁵⁸ In this directive general, primary and secondary

⁵⁸ The Common Directive regarding the determination of the different labour contracts (contract of employment, contract for employment, and contract of agency) was published in 2005 by the Ministry of

criteria are determined. One of the general criteria is the kind of work, which means the independence or the dependence of the worker. It is emphasised that different contracts of labour must be qualified on the basis of their content and not by the title of the contract.

The primary criteria are as follows: obligation to perform work in person (employee), obligation of employment (employer), integration into the business organisation, arrangement of the employer (in other words: it is impossible to perform certain work without the employer) – subordination as such.

The secondary criteria are as follows: the right of direction (employer), determination of the duration of work and the schedule of working time, determination of place of employment/work, payment in kind (protection of wages), performing the work with the employer's infrastructure (means of production), ensuring the conditions for occupational safety and health, contract in writing.

Therefore, it can be stated that the former legislator tried to summarize the criteria of an employment relationship, and by this, to define the legal status of the employee. The new regulation is similar but, in its content, it is simpler.⁵⁹ Nevertheless, the new Labour Code regulates the definition of the employee and the legal consequences of the contract of employment beyond the rules of an employment relationship. Under Section 34 of the Current Labour Code "employee" means any natural person who works under an employment contract. Section 42, Sub 1 states that under a contract of employment the employee is required to work as instructed by the employer, and the employer is required to provide work for the employee and to pay wages. On the basis of the above-mentioned three factors the definition of the employee can be delineated.

5.2. The instable definition of 'individual entrepreneur' and 'individual firm'

I have to emphasize that this definition can only be elaborated in light of all circumstances. For this reason highlighting only some elements can result in false consequences. In order to make the delineation clearer, it is important to make a comparison with other types of work performances. It would be self-evident to make a comparison between the legal status of the employee and of the self-employed. This would be the second step on the way to determining the legal status of the economically dependent worker. This approach is hindered due to the lack of regulation in relation to the self-employed. Instead, the definition of "individual entrepreneurs" is regulated. Under the former regulation "individual entrepreneur" meant a natural person who is engaged in economic activities. "Economic activity" meant for-profit production and service operations performed in exchange for a fee on a regular basis.⁶⁰ It was underlined that individual entrepreneurs may employ employees, out-workers, family members and students of vocational schools.

Labour and the Ministry of Finance [7001/2005 (MK 170)].

⁵⁹ See Sections 51–51 of the Current Labour Code.

⁶⁰ Section 2, Sub 1 of Act V of 1990 on individual entrepreneurs.

The recent regulation is similar to the above-cited rules. Act CXV of 2009 deals with an individual entrepreneur and an “individual firm.” This differentiation is important with respect to the responsibility for damages in a business relationship. The limited liability of the individual firm is similar to the liability of limited liability companies. This regulation also shows that the legal status of an individual entrepreneur is closer to the legal status of a company than to a self-employed person. Finally, individual entrepreneurs have a specific characteristic: they are not obliged to perform work personally. The relevant rules (cf. Section 16, Sub 2 of Act CXV of 2009) are as follows: “Where an activity is subject to professional qualification, the individual entrepreneur may engage in such activity if able to meet such qualification requirements. If the individual entrepreneur fails to meet the qualification requirements, he may pursue such activities if there is at least one person among his employees participating in the activity in question under contract for an unfixed duration, who satisfies the qualification requirements.”

In conclusion it can be stated that the definitions of “individual entrepreneur” and “individual firm” do not overlap with the formula of the self-employed persons.⁶¹

5.3. The content of the draft

In the context of the legal status of economically dependent workers, it is necessary to make two remarks. First, it can be stated that the Hungarian approach regarding the legal status of an individual entrepreneur supports the fact that this person is out of the scope of the labour law. Second, in most cases the contracts of an individual entrepreneur cannot be qualified as false contracts of employment.

The subjects of the draft of the Current Labour Code were persons who work on the legal basis of real contracts for employment (*Werkvertrag*) or commission (*Auftrag*), therefore legal subordination cannot be traced between the parties. Nevertheless, the basis of their cooperation is legal dependency, which indicates the necessity of social protection on one side and the power of the client on the other side. This real arrangement of the relationship between the individual entrepreneur and her/his client is similar to a legal relationship between an employee and an employer.

Starting from these considerations, as a first step, the elements of social protection were laid down. These were as follows: leave, notice period, severance pay, liability of damages, and the provisions relating to the mandatory minimum wage.⁶² These areas are in direct connection with how the work is performed. An individual entrepreneur works

⁶¹ Gyulavári presents a similar opinion. Cf. Tamás Gyulavári, National report, Hungary, in: Tamás Gyulavári, Sylvaine Laulom, Miguel Rodríguez-Piñero, Christophe Teissier, Claude-Emmanuel Triomphe, Christophe Vigneau, Ricardo Rodríguez Contreras, *The Impact of New Forms of Labour on Industrial Relations and the Evolution of Labour Law in the European Union. Final Report*. External study for the European Parliament DG Internal Policies of the Union, Directorate on Economic and Scientific Policies, Labour Asociados–Université Européenne du Travail, 2008, p. 10.

⁶² Section 3, Sub 1 in the Draft of the Labour Code.

for another person – mostly or exclusively – in person, regularly and on a long-term basis, against consideration.⁶³ These criteria characterise an employment relationship too, but in the above-mentioned relationship the right to direct/order the client cannot be found, and the client or customer does not organise the work of the individual entrepreneur. It shall be noted that the individual entrepreneur performs work with its own tools, but with reference to the rules of the Current Labour Code it can occur in the case of an employment relationship.

The most important element of this regulation is describing the symptom of economical dependence, the limitation of the latitude of the undertaking. If the individual entrepreneur is against the background of the fulfilment of the given contract, it cannot be expected to engage in any other regularly gainful activity. It is a limitation similar to the restricted opportunity of the employee. In my opinion, this rule is significant because it creates equivalence between legal and economic dependence, which is a basis of the necessity of social protection.

In addition to the above-mentioned rules the draft contains explanatory regulation to hinder accidental abuses. For this reason the draft states definitions of “personally performed” work and “same person.” The regulation goes like this: “For the purposes of subsection (2), a) work performed on behalf of a business organisation owned in majority by the person concerned or his relative shall qualify as work performed in person; b) the relatives of the recipient of the service/work and those engaged in a regular business relationship with the recipient of the service/work as well as those qualifying as associated businesses under the rules of taxation shall be regarded as a single person or entity.”⁶⁴

Finally, the legislator paid attention to the social consideration. As social necessity is the basis of the regulation of the legal status of a “person with a status similar to an employee,” provisions of subsections (1) to (3) are not applicable if the regular monthly income derived from this contract exceeds five times the mandatory minimum wage in force at the time of the fulfilment of the contract.⁶⁵ It can be remarked that the self-employed commercial agents would have made an exception. The preamble of Act CXVII of 2000 on the Commercial Representation Contracts of Self-employed Commercial Agents, which is in harmony with 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, emphasised that it is necessary to create rules in order to protect self-employed commercial agents – starting from taking into consideration the economically weaker situation of the agent.

⁶³ Section 3, Sub 2 in the Draft of the Labour Code.

⁶⁴ Section 3, Sub 3 in the Draft of the Labour Code.

⁶⁵ Section 3, Sub 4 in the Draft of the Labour Code.

5.4. Reasons of refusal of the draft

This draft was refused by both employers and trade unions. The official or detailed explanation is not known, we can only rely on suppositions. It was clear that the above-mentioned regulation was not in the employers' interest, as this is just one of the reasons for the increase of costs. The protection of economically dependent persons would have removed an unbound employment, without limitations. Apart from this, the employers were afraid of the consequences of the collective labour law – with special regard to the extension of the scope of the collective bargaining to these persons. Finally, this rule might have led to paying more attention to association opportunities.

Understanding the reasons of the refusal by the trade unions is more difficult. One of the reasons of the refusal may be found in the arrangement of the Current Labour Code itself. It must be acknowledged that the trade unions have significantly lost from their position compared to their previous status. Most of the power of the trade unions originated from a political agreement with the former political decision-maker. This agreement gave a latent identity to the trade unions: they played the role of a legislator, cf. Section 17 of the Former Labour Code. Under this Section the government, with the agreement of the National Council for the Reconciliation of Interests, shall establish the provisions, in derogation from this Act, concerning the termination of employment due to economic reasons affecting large numbers of employees, in the interests of preserving jobs, it shall decree the provisions for the mandatory minimum wage and the guaranteed wage minimum established in accordance with the level of education and/or vocational training of the employee required for a particular job or position, and it shall submit recommendations to define the maximum duration of daily working time and to determine official holidays.

This regulation was repealed by the Hungarian Constitutional Court.⁶⁶ The decision gave importance to the legal nature of “the right to agree.” Under the Constitutional Court's decision the “right to agree” is more than the “right to consult.” This right is equivalent to “common decision making.” The Constitutional Court emphasised that the “right to agree” is not an original/independent decision. As the social partners exercise a part of the legislation power, this shares the perception of the legislative power. The “right to agree” is deemed to exercise the public power itself in this context. The Constitution has a closed system for the legislation: the legislative organs, the rule of law and the hierarchy of several rules are set. The organisations of the social dialogue cannot be recognised as legislative organs in the Hungarian Constitution. Under its final conclusion, the Constitutional Court pointed out that the “right to agree” is unconstitutional for these legal circumstances. In other words, members of the National Council for the Reconciliation of Interests are private persons. This judgement came hard on the trade unions. The decision of the Constitutional Court also had an effect regarding the benefits provided to trade unions. Under Section 25 of the Former Labour Code, employers shall

⁶⁶ See 124/2008. (X. 24.) AB.

provide work time allowance for trade unions officials. For all trade union officials, the total work time allowance for every three trade union members employed by the employer shall be two hours per month, unless there is an agreement to the contrary. If so requested by the trade union, the employer shall provide reimbursement for any unused portion of work time allowance which does not exceed half of the total allowance. The amount of reimbursement shall be determined on the basis of the average earnings during the previous calendar year of the trade union officials affected, and it shall be paid in the gross amount to the trade union subsequently on a monthly basis. The trade union must use such funds solely for the purposes of employee interest representation activities. This regulation was discussed and now the Current Labour Code does not contain it.

The most important change is the new condition on how trade unions will be able to conclude a collective agreement (the recognition of a trade union, *Tarifffähigkeit*). Under the rules of the Former Labour Code a trade union was entitled to conclude a collective agreement with the employer if its candidates received a certain percent of the votes at the works council election.⁶⁷ This regulation created a mutual dependence between the trade union and the works council. Namely, under Section 65, Sub 1 of the Former Labour Code, works councils had the right of co-determination with regard to the appropriation of welfare funds, and the utilization of welfare institutions and real estate property of such nature as specified in the collective agreement. Because of this construction the existence of the trade union depended on the composition of the works council and the most important rights of the works council depended on the content of the collective agreement. The origin of this construction can be derived from the compromise just after the political change. As the unified trade union crashed down, the trade unions and the government agreed in an interim solution with regard to the recognition of trade unions. But the big trade unions insisted on keeping up this status quo. The new regulation defeats a taboo. Under the Current Labour Code a trade union shall be entitled to conclude a collective agreement if its membership reaches ten percent of all workers employed by the employer, or of the number of workers covered by the collective agreement concluded by the employer's association.⁶⁸

⁶⁷ Act XXII of 1992 on Section 33, Sub 2 of the Labour Code: Subject to the exceptions set out in Subsections 3–5, a trade union shall be entitled to conclude a collective agreement with the employer if its candidates have received more than half of the votes in the works council ballot. Sub 3: If more than one trade union operates a local branch at an employer the collective agreement may be concluded jointly by all the trade unions, provided that the candidates of such trade unions have jointly received more than half of the votes in the works council ballot.

⁶⁸ The original text has become softer in the meantime. Under the new text it is possible to conclude a collective agreement by the confederation/association of trade unions. The decision of the legislator is as follows: "Confederation of trade unions shall be entitled to conclude a collective agreement if at least one of its member-organizations has membership that reaches ten per cent at one employer and the member-organization empowers the confederation to conclude a collective agreement." In this case it is not sure that the employee membership of this confederation reaches ten percent. In my opinion this rule is dubious. The legislator wants to incite increasing the contractual sources of the labour law. For this, however, the parties would need approximately equal positions. This balance cannot be confirmed without the high-level support of the employees.

For the above-mentioned reasons the trade unions try to look for new positions and they insist on keeping up the traditional structures. Therefore and in this context, the potential possibility of economically dependent persons falls out of the interest of the trade unions.

6. Conclusion

Does the development analysed above mean a deadlock, or is it a way to a new structure? Although the regulation of economically dependent persons can only be found in three member states, the discussions are coming in the forefront in several countries.⁶⁹ Regarding the reaction of the Hungarian social partners, what I see is that their further steps depend on how they evaluate the long-term trends of the transformation of the labour market, on their momentary interest, and on the opportunity of how they can apply their weight in the course of the negotiations. The Hungarian labour research began to pay attention to this issue only not too long ago.⁷⁰

The direction/orientation of the recent European labour law researches and of the efforts of the employment policy confirms that the legal status of economically dependent persons cannot be evaded. If the content and structure (scope) of the labour law will remain unchanged, the labour law will not be capable to give answers to the requirements of processes/trends of the labour market. It seems to me that the elaboration of the legal dogma and a new legal policy in the labour law could show the way forward. It is not disputable that the subject of the labour law is subordinated work. While in the past the nature of subordination was analysed, nowadays its content (i.e., what can be included in subordination) is coming to the forefront. In other words, the question is: Does subordination constitute a legal unit, or is it interpreted as a frame to which more legal relationships with different contents belong to. Let me refer to Freedland's conception in this context. Freedland recommended elaborating a new contract of work, namely, a personal employment contract instead of the traditional contract of employment.⁷¹ He gave reasons for his conception by two mistaken approaches. There is a "false unity of the law of the contract of employment" on the one hand, and there is a "false duality between the contract of employment and other personal work of employment contract" on the other hand.⁷²

⁶⁹ Perulli, 2003, pp. 87–97.

⁷⁰ The MTA–PTE Research Group of Comparative and European Employment Policy and Labour Law was established to analyse this theme, among others. The first Constitutive Meeting of this Research Group was held on 25–26 October 2012 at the University of Pécs. Apart from this research, also see Tamás Gyulavári, *A "Grey Matter": Legal Relationships between Employment and Self-Employment in Europe and in Hungary*, Manuscript, Budapest, 2010; Tamás Gyulavári, Employment, self-employment and the "grey zone," *Esély*, 2009, Vol. 20, No. 6, pp. 76–106.

⁷¹ Mark Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003.

⁷² Freedland, pp. 15–28.

The concept of a personal employment contract presumes a definition broader than that of the contract of employment. We have to be aware of the fact that the present legal order/rule of law is unsuitable for the changes invoked by this theory. For the implementation/establishment of the regulation of the legal status of economically dependent people, it would probably be necessary to change the social security and tax law order alike.

The above-mentioned analysis leads us to two conclusions. First, it shall be underlined that the criteria of the legal status of economically dependent people must be based on a stable employee definition. The community law operates with a definition, consisting of too broad and too loose elements, which serves the interest of free movement, but which is not suitable for the circumscription of this definition from the legal status of the economically dependent people. For this reason the kind and the basis of the subordination of employees has to be elaborated by the jurisprudence at an international level – independently from the community law's employee definition.⁷³ The elements of subordination of the economically dependent people have to be analysed depending on the legal subordination of the employees, emphasizing the equivalent/similar elements. Second, it can be proved that the freedom of contract, or in other words the opportunity to choose the type of the contract, is more and more limited. This development may be evaluated as an indirect compulsion regarding the choice of the contract type.⁷⁴ But the substantial change is still to come: we need to start establishing the dogmatic basis for a new employment law.

⁷³ In connection with them see the first Research Project of the European Labour Law Network: *Identifying an Employment Relationship*, Vols. I–II, European Labour Law Network, Study Group on a Restatement of European Labour Law, November 2009; *The Identification of an Employment Relationship*, Vol. I, Study Group on a Restatement of Labour Law in Europe, November 2011.

⁷⁴ The compulsion to choose the type of contract is expressly stated in Brendan Burchell, Simon Deakin, Sheila Honey, *The Employment Status of Individuals in Non-standard Employment*, EMAR paper, No. 6, London, DTI, 1999, pp. 12–13. On Mittelbare Rechtsformszwang in German labour law, see *Wank*, pp. 235–274; Franz Gamillscheg, *Zivilistische Denkformen und die Entwicklung des Individualarbeitsrechts*, *AcP*, Vol. 176, 1976, pp. 197–206.