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LITHUANIA'S BINARY WORKER CLASSIFICATION VS. A TELEOLOGICAL INTERPRETATION OF THE EU'S 'WORKER' CONCEPT BY GERMANY AND THE UK

Hans Lauschke

PhD student

Mykolas Romeris University, Lithuania

Contact information

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

Phone: +37064175252

E-mail address: halauschke@stud.mruni.eu

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ABSTRACT

The article explores whether Lithuania's concept of *darbuotojas* (employee) and its rigid binary classification of work relationships is challenged by an evolving European employment law landscape, shaped by a rise of unconventional work relationships that blur the lines between employees and self-employed persons. This issue is examined in light of varying interpretations of the EU's 'worker' concept(s) in the United Kingdom (UK) and Germany, where courts increasingly extend protections to individuals in atypical employment forms by broadly (re-)interpreting traditional terms. Additionally, their domestic systems recognize intermediate categories between employees and self-employed persons, such as *arbeitnehmerähnliche Personen* (employee-like persons) in Germany or the UK's 'limb (b) workers', aiming to provide certain protection for a wider group of working individuals. These approaches influence both countries' understanding of an autonomous EU 'worker' concept, particularly evident in connection with Council Directive 89/391/EEC, which introduced measures to enhance the safety and health of workers at work and was adopted more than 30 years ago.

KEYWORDS

Worker, Employee, Employment contract, Employee-like person.

INTRODUCTION

Using the *Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work* (i.e. the so-called Framework Directive) as the basis for the analysis, the following article examines how differently individual (ex-)Member States treat the EU's concept of a 'worker'. The article focuses on the conclusions that can be drawn for Lithuania's case within this context.

What at first glance appears to be a purely legal-technical question has enormous social implications in practice, as its answer leads to whether or not working individuals receive needed protection due to their vulnerability – especially but not solely against the background of the emergence of new forms of work, commonly labelled 'work on demand', 'crowd work' or 'platform work'. These forms can be difficult to categorize because typical characteristics of the traditional common understanding of employment relationships, such as subordination or dependency, might be absent or much less pronounced.

It is essential to establish an understanding of how Lithuanian law understands its national concept of 'employee' and 'employment contract' and on which assumptions it is based. On one hand, the Lithuanian concept, which is determined by the Labour Code of the Republic of Lithuania (hereinafter LC-LT), is characterized by a purely binary division into employees and self-employed persons and an 'all or nothing' approach. This means that Lithuanian law appears to be based on a single basic concept of 'employee', which extends not only to Lithuanian core employment regulations but also to other areas. A working person who falls into one of these two categories is subject to either all employment law or no employment law at all. Due to common legal history and codification, binary systems such as found here in Lithuanian law are prevalent in many countries of the former Eastern bloc.¹ This Lithuanian 'employee' concept follows the case law developed by the European Court of Justice (hereinafter CJEU) for the area of freedom of movement – the basis for this is the so-called *Lawrie-Blum* formula. Lithuanian law seems to assume that there is a single, general concept of 'worker' in EU law.

The article is not intended to answer the question of whether there is indeed a single general EU 'worker' concept. For the purposes of this article, it is sufficient to consider how differently (ex-)Member States apparently answer this essential question and thus arrive at different results. For the purpose of the article, the transposition of the Framework Directive in Lithuania, Germany and the UK, and how its personal scope of application has been transposed into national law, will be analyzed and conclusions will be drawn for Lithuania. For this, methods specific to legal research will be used, i.e., document and information analysis, comparative and analogical reasoning, as well as systematic, teleological, and generalization methods.

Particularly for working persons who operate in the grey area between employee and self-employed person, but for whom Lithuanian employment law only provides for assignment to one of the two categories, there is a risk that they could erroneously fall outside the scope of application of employment law or be assigned to this scope of application unnecessarily or inappropriately.

One indication that a new understanding or even an adaptation of Lithuania's 'employee' concept might be required is the interpretation of the EU's 'worker' concept

¹ E.g., in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland and Slovakia.

in the area of health and safety at work by Germany and the UK (the latter took place shortly before the UK's final exit from the EU in 2020), where it is questionable whether Lithuanian law provides sufficient answers to this. The LC-LT also explicitly governs social relationships regulated by other laws that arise in the course of professional, official, creative, or other activities performed by individuals.² Thus, it at least opens up future opportunities for Lithuanian legislators to extend the scope of certain employment law protection also to other categories of individuals who are not traditional employees "following the example of some Western European countries."³ The question that arises, however, is whether Lithuanian legislators not only have leeway to extend this protection, but also have an obligation to do so due to EU requirements resulting from newly developing understandings of traditional employment terms, illustrated in the context of an EU directive adopted more than 30 years ago.

1. THE FRAMEWORK DIRECTIVE AND ITS PERSONAL SCOPE OF APPLICATION

Legal basis for the EU's power to adopt measures in health and safety at work is governed by Article 153 TFEU,⁴ i.e., adopt legislative measures by the means of the ordinary legislative procedure. On this basis, the EU can enact legislation via directives. With the objective of introducing measures to improve the occupational health and safety protection of workers at work,⁵ the Framework Directive was adopted on 12 June 1989. It forms the basis for further directives that were subsequently adopted and forces employers indirectly to provide special protection for their workers. The Framework Directive applies to "all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural and leisure, etc.)."⁶

To determine for whom such occupational health and safety protection measures shall apply, it is essential to analyze who is a 'worker' under the Framework Directive. Who should be protected as a 'worker' under the Framework Directive is, however, only regulated by it to the extent that it is "any person employed by an employer, including trainees and apprentices but excluding domestic servants."⁷ Trainees and apprentices and similar persons should be workers, and the same applies to workers in the public sector who might work under special national regulations and not under general employment law.⁸ Only domestic servants are excluded.⁹

However, this is an incomplete definition, as it remains unclear what is meant by 'employed by an employer' and how broadly this should be understood – i.e., whether it can also cover some persons who have a status of genuine self-employed persons under national law. The Framework Directive does not refer to the national 'worker' concepts, so a European understanding of the term must be developed.

² Republic of Lithuania Law on the Approval, Entry into Force and Implementation of the Labour Code, Register of Legal Acts (2016, no. 23709), art. 1 para. 3.

³ Tomas Davulis, "Darbo Teisės Rekodifikavimas Lietuvoje 2016–2017 m," *Teisė* Vol. 104 (2017): 13–14 // DOI: 10.15388/Teise.2017.104.10842

⁴ Treaty on the Functioning of the European Union, *Official Journal* 115 (09.05.2008) p. 0114–0116, art. 153 (ex art. 137 TEC).

⁵ Cf. *Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work*, *Official Journal* L 183 (29.6.1989) p. 1, art. 1 para. 1.

⁶ Council Directive 89/391/EEC, *supra* note 5, art. 2 para. 1.

⁷ *Ibid.*, art. 3 lit. a.

⁸ Cf. *ibid.*, art. 3 lit. a and art. 2 para. 1.

⁹ Cf. *ibid.*, art. 3 lit. a.

It seems a pragmatic approach to simply take the detailed 'worker' concept already developed by the CJEU as a basis, which first and foremost originates from the area of freedom of movement. In 1964, the CJEU had ruled that the terms 'worker' and 'activity as workers' under EU law may not be defined by reference to the laws of the Member States, but rather correspond to a uniform EU definition ('community meaning') of worker.¹⁰ The concept of worker in EU law is therefore an autonomous concept that 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 provide an autonomous definition.¹¹ However, even when a directive expressly referred to the national concept of worker or employee, the CJEU nevertheless defined in some cases a 'worker' concept itself by invoking *effet utile*.¹²

Genuinely self-employed persons should not be workers, but the fact that a person has the status of a genuinely self-employed person under national law does not mean necessarily that they would also be classified as such under EU law.¹³ If there is no reference to the national concepts, the concept of 'worker' used in EU legislation must be interpreted considering EU law, and thus the term 'genuinely self-employed' must also be interpreted considering EU law.

The judgment in the case *Lawrie-Blum* in 1986 had a significant impact on the content of the term 'worker' – first but foremost in the context of freedom of movement. The CJEU stated that the concept of 'worker' in Article 45 TFEU (ex Article 39 TEC) should be interpreted broadly, as (1) performing services (2) in a specific time (3) for another under the direction of another (4) for remuneration.¹⁴ This so-called *Lawrie-Blum* formula became the basis for an autonomous conceptualization at the EU level. It describes an exchange relationship of 'performance of services' for 'remuneration'. The services owed are not deliverable-oriented, but activity-related, as they must be provided 'in a specific time'.¹⁵

However, this exchange relationship can also occur in services contracts, so it is not alone sufficient to distinguish a worker from a self-employed person.¹⁶ Hence, the criterion 'under the direction of another' becomes important. The CJEU understands this to include the control of the activity.¹⁷ In detail, the CJEU mentions instructions regarding the content, time and place of the activity.¹⁸ However, also a *de facto* obligation to follow instructions may be enough so that all kinds of subordination relationships could be sufficient.¹⁹

The CJEU further shaped this concept, e.g., in the case *Agegate*, in the sense that a self-employed person performs tasks under their own responsibility and bears

¹⁰ CJEU, Case C-75/63, *Unger (Hoekstra)* (1964) EU:C:1964:19, 184.

¹¹ CJEU, Case C-53/81, *Levin* (1982) EU:C:1982:105, para. 11 et. seq.; CJEU, Case C-337/97, *Meeusen* (1999) EU:C:1999:284, para. 13; CJEU, Case C-176/96, *Lehtonen* (2000) EU:C:2000:201, para. 45.

¹² CJEU, Case C-216/15, *Ruhrlandklinik* (2016) EU:C:2016:883, para. 36 et. seq.

¹³ Cf. CJEU, Case C-229/14, *Balkaya* (2015) EU:C:2015:455, para. 35.

¹⁴ CJEU, Case C-66/85, *Lawrie-Blum* (1986) EU:C:1986:284, para. 17.

¹⁵ 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): 190.

¹⁶ Cf. Rolf Wank, "Die Entwicklung der Rechtsprechung des EuGH zum Arbeitnehmerbegriff," *Europäische Zeitschrift für Arbeitsrecht* (2023): 34.

¹⁷ CJEU (*Balkaya*), *supra* note 13, para. 39.

¹⁸ CJEU, Case C-413/13, *FNV Kunsten* (2014) EU:C:2014:2411, para. 36; CJEU, Case C-256/01, *Allonby* (2004) EU:C:2004:18, para. 72.

¹⁹ CJEU, Case C-232/09, *Danosa* (2010) EU:C:2010:674, para. 56; CJEU (*Balkaya*), *supra* note 13, para. 48; cf. Ulrich Preis, "BGB § 611a Arbeitsvertrag": recital 42, in: Rudi Müller-Glöße et al., eds., *Erfurter Kommentar zum Arbeitsrecht* (Munich: C.H. Beck, 2024).

the economic risk,²⁰ and does not form an integral part of that employer's undertaking.²¹ In later judgments, the CJEU has adhered to this definition and continues to use it today.²² In this sense, the CJEU determines an employment relationship based on certain criteria or indicators. Following established case law, these are used to make an overall assessment of all the circumstances of the case, taking into account "both to the nature of the activities concerned and the relationship of the parties involved."²³ Whether a worker is such, must be assessed based on all the factors and circumstances characterizing the relationship between the parties on a case-by-case basis,²⁴ i.e., the CJEU follows a primacy-of-facts or substance-over-form approach.

Recent EU legislation seems to refer to one single general EU 'worker' concept.²⁵ The CJEU has partially done this as well in the past.²⁶ It indeed appears that the CJEU has increasingly moved towards a single concept of 'worker' in secondary law.²⁷ However, the CJEU has also pointed out that the concept of 'worker' depends on the meaning and purpose of the respective matter, i.e. that there is not necessarily one single concept of 'worker'.²⁸

Because there seem to be different views in the Member States as to whether such a 'general' worker concept indeed exists, it is necessary to not simply adopt the 'worker' concept from the area of freedom of movement, but first to analyze how individual Member States deal with this issue.

It is not helpful that the Framework Directive has been translated in very different ways into different languages. For example, the English version uses the word 'worker' (i.e. not the UK term 'employee'), the German version uses the word "*Arbeitnehmer*" (employee),²⁹ and the Lithuanian version uses the word "*darbuotojas*" (employee).³⁰ By the principle of language equality, the wording of the provision is of equal importance in all language versions when interpreted.³¹ However, as already discussed, the term 'worker' in the Framework Directive should have an equal meaning and must have the same effect in all Member States. It is therefore advisable not to focus too much on the wording of the individual language versions when interpreting the scope of the Framework Directive, but to look at the individual national transpositions and the breadth of the national scopes of application of the national occupational health and

²⁰ CJEU, Case C-3/87, *Agegate* (1989) EU:C:1989:650, para. 36; CJEU (*FNV Kunsten*), *supra* note 18, para. 36.

²¹ CJEU, Case C22/98, *Becu* (1999) EU:C:1999:419, para. 26; CJEU (*FNV Kunsten*), *supra* note 18, para. 36.

²² E.g., CJEU (*Balkaya*), *supra* note 13, para. 34; CJEU, Case C-432/14, *O* (2015) EU:C:2015:643, para. 25; CJEU, Case C-422/14, *Pujante Rivera* (2015) EU:C:2015:743, para. 29; CJEU, Case C-14/09, *Genc* (2010) EU:C:2010:57, para. 19; CJEU, Case C-228/07, *Petersen* (2008) EU:C:2008:494, para. 45; CJEU, Case C-138/02, *Collins* (2004) EU:C:2004:172, para. 26; CJEU, Case C-456/02, *Trojani* (2004) EU:C:2004:488, para. 23; CJEU, Case C-337/10, *Neidel* (2012) EU:C:2012:263, para. 23; CJEU, Case C316/13, *Fenoll* (2015) EU:C:2015:200, para. 27; CJEU, Case C-518/15, *Matzak* (2018) EU:C:2018:82, para. 28.

²³ CJEU, Case C428/09, *Union syndicale Solidaires Isère* (2010) EU:C:2010:612, para. 29; CJEU (*Fenoll*), *supra* note 22, para. 29.

²⁴ CJEU, Case C47/14, *Holterman Ferho Exploitatie* (2015) EU:C:2015:574, para. 46; CJEU, Case C147/17, *Sindicatul Familia Constanța* (2018) EU:C:2018:926, para. 42.

²⁵ Cf. 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, Official Journal L 186 (11.7.2019) p. 105–121, art. 1 para. 2 and recital 8.

²⁶ E.g., CJEU, Case C-519/09, *May* (2011) EU:C:2011:221, para. 21.

²⁷ Martin Risak and Thomas Dullinger, *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change* (Brussels: ETUI aisbl, 2018), 25.

²⁸ CJEU, Case C-85/96, *Martínez Sala* (1998) EU:C:1998:217, para. 31; CJEU (*Allonby*), *supra* note 18, para. 63; CJEU, Case C-543/03, *Dodl and Oberhollenzer* (2005), EU:C:2005:364, para. 27.

²⁹ All translations from German into English are by the author of the present article unless otherwise noted.

³⁰ All translations from Lithuanian into English are by the author of the present article unless otherwise noted.

³¹ CJEU, Case 80–76, *North Kerry Milk Products* (1977) EU:C:1977:39, para. 11, 12 et seq.

safety regulations to understand how the Member States interpret the term in an EU law compliant manner and to approximate the Framework Directive's 'worker' concept.

It is beyond the scope of this article to analyze to what extent the extension to the public sector or to interns or appendices is similar or different in the three countries under consideration and to what extent it is sufficient. It should be noted that all three countries proceed in a systematically similar way, albeit according to their national circumstances. This is therefore only intended to provide an overview.

Instead, the article analyzes the extent to which the three countries may use a different basic concept as the basis for the extension and whether this basic concept is sufficient.

2. TRANSPOSITION INTO LITHUANIAN LAW

The transposition of the Framework Directive in Lithuania is found in the Law of the Republic of Lithuania on Occupational Safety and Health (hereinafter LoOSH-LT).³² In defining the personal scope of application, the law refers firstly to the concept of 'employee' from Article 21 Paragraph 2 of the LC-LT.

2.1. Employee

The reference to the term 'employee' can only be an intermediate step in the coverage of the personal scope of application. Since this term primarily serves the purpose of defining a natural person who can legally enter into an employment contract,³³ the definition of the 'employment contract' is of crucial importance.

According to Article 32 Paragraph 1 of the LC-LT, the 'employment contract' is an agreement between the employee and the employer by which (1) the employee undertakes to perform a job function (2) for the "*nauda*" (benefit) and (3) under the "*pavaldumas*" (subordination) of the employer, and (4) the employer undertakes to pay remuneration therefor.³⁴ It is firstly characterized by an exchange relationship of 'performing a job function' for 'remuneration'. It is the way in which work is organized under an employment contract that distinguishes it from other contract types. 'Job function' means that the employee is obliged to perform certain work or to fulfil certain duties, i.e. they must not only perform certain tasks but the work has a continuous nature which is not deliverable-oriented.³⁵ Not deliverable-oriented means that there is no result of the work created and transferred to the work orderer, as it would the case, e.g., with the Lithuanian "*Rangos sutartis*" (contract to produce a work) from which the employment contract can be distinguished by this characteristic alone.³⁶

In addition, the performed job function must serve the 'benefit' of the employer, whereby this characteristic serves mainly to clarify who the actual employer would be in the case of a temporary employment relationship.³⁷ Accordingly, the employer is defined as a person "for whose benefit and under subordination of whom, by an

³² Cf. Law of the Republic of Lithuania on Occupational Safety and Health, Official Gazette (2003, no. 70-3170).

³³ Tomas Davulis, *Lietuvos Respublikos darbo kodekso komentaras* (Vilnius: VĮ Registrų centras, 2018), 83.

³⁴ Republic of Lithuania Law on the Approval, Entry into Force and Implementation of the Labour Code, *Register of Legal Acts* (2016, no. 23709), art. 32 para. 1.

³⁵ *J.S. v UAB "Romerta"*, Supreme Court of the Republic of Lithuania (2001, no. 3K-3-123); *Z.V. v S.P.*, Supreme Court of the Republic of Lithuania (2002, no. 3K-3-264).

³⁶ Cf. Law on Approval, Entry into Force and Implementation of the Civil Code of the Republic of Lithuania. Civil Code, *Official Gazette* (2000, no. 74-2262), art. 6.644 para. 1.

³⁷ Cf. Tomas Davulis, *supra* note 33, 86.

employment contract, a natural person has undertaken to perform a job function for remuneration.”³⁸

The most important remaining characteristic is that of ‘subordination’. The literature suggests it is necessary for every employment contract under Lithuanian law.³⁹ And indeed, this seems to be the case. The “*Paslaugų sutartis*” (services contract), which is probably the most likely to be confused with the employment contract, only exists where there is no ‘employment relationship’ or ‘other subordination relationship’ involved between the service provider and the client.⁴⁰

A further indication of this is that illegal bogus 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 remuneration.⁴¹ The content of this form of illegal work must logically be exactly congruent with the content of the definition of the ‘employment contract’ given by the LC-LT. Similarly, Article 6.264 Paragraph 2 of the Civil Code of the Republic of Lithuania (hereinafter CC-LT) offers a further indication, which regulates a person’s liability for damage caused by the fault of its employees. In doing so, Article 6.264 Paragraph 2, on the one hand, refers to work under an employment contract and, on the other hand, to work under a (pseudo) civil contract where the working person is acting under the direction and control (i.e., subordination) of the work orderer,⁴² i.e., where an actual employment contract is concealed.⁴³

However, it must be noted that the term ‘subordination’ alone is an empty shell. Some form of subordination can occur in all forms of contractual relationships as the balance of power between the parties to a contract is rarely identical. As the Lithuanian court practice has formulated that there is in general no subordination of the parties in other civil law contracts,⁴⁴ it is therefore important how the term is filled with life when it comes to the employment contract.

Therefore, Article 32 Paragraph 2 of the LC-LT provides a comprehensive definition of it. It is “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.”⁴⁵ This subordination relates to the obligations arising from the employment contract.⁴⁶ It becomes clear that the performance of the work by the working persons is determined by the work orderer, i.e. under heteronomy. The wording rather indicates more of purely organizational control rights (‘right to control or manage’) for the work orderer and obedience obligations for the working person.⁴⁷ This control can be exercised in two ways – either by issuing instructions or by the procedures in force at the workplace. With some deal of goodwill, one could also read “integration into the work organization” of the work orderer into this as a form of indirect control; however, it is not used in a blanket manner. It would have to be shown by the fact that because the working person

³⁸ LC-LT, *supra* note 34, art. 21 para. 3.

³⁹ Tomas Davulis, *supra* note 33, 86.

⁴⁰ CC-LT, *supra* note 36, art. 6.716 para. 2.

⁴¹ *Law on Employment of the Republic of Lithuania*, Register of Legal Acts (2016, no. 18825), art. 56 para. 1.

⁴² CC-LT, *supra* note 36, art. 6.264 para. 2.

⁴³ Cf. Virgilijus Valančius et al., *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė. Pirmas tomas* (Vilnius: UAB “Justitia”, 2003), 368–369.

⁴⁴ Z.V. v S.P., *supra* note 35.

⁴⁵ LC-LT, *supra* note 34, art. 32 para. 1.

⁴⁶ Tomas Davulis, *supra* note 33, 132.

⁴⁷ Tomas Bagdanskis, Vilius Mačiulaitis and Mantas Mikalopas, *Lietuvos Respublikos darbo kodekso komentaras: individualieji darbo santykiai* (Vilnius: UAB “Rito projects”, 2018), 53.

is “integrated into the work organization”, it has to perform the work, e.g., at a certain place, at a certain time or in a certain way.

The existence of subordination must be analyzed based on an overall assessment of the individual case.⁴⁸ However, due to the narrow wording of Article 32 Paragraph 2 of the LC-LT, there always needs to be a potential control/obey relationship. When interpreting an employment contract, the rules of contract interpretation (Articles 6.193-6.195 of the CC-LT) 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 concluded.⁴⁹ The characteristics of an employment contract result from the agreed obligations of the parties.⁵⁰ Thus, both parties must at least assume that the working person is obliged to work under the control of the work orderer or follow instructions.⁵¹ In other words: There is no employment contract if there are no obligations to work under the supervision or control or to follow instructions.

In addition to subordination, due to Paragraph 3, it seems the special nature of an employment contract that “in carrying out a job function, the commercial, financial or industrial threat that arises falls to the employer.”⁵²

First, this is to be understood 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 LC-LT.⁵³ However, parts of the literature argue that this can also be seen as a further criterion for distinguishing an employment contract from self-employed contractual relationships. These arguments are drawn from the court practice of the Supreme Administrative Court of the Republic of Lithuania in tax law on “*individuali veikla*” (individual activity) as set out in Article 2 Paragraph 7 of the Law on Personal Income Tax of the Republic of Lithuania (hereinafter LoPIT-LT).⁵⁴ It is sometimes contrasted with the employment relationship. The main reference is to “*savarankiškumas*” (autonomy), which is essential for an individual activity and is not given or given to a limited extent in an employment relationship. In this sense, ‘autonomy’ can be seen as the antithesis of ‘subordination’. According to some parts of literature the sharing of the profit/loss risk should be regarded as a blank decisive feature and consequently a further criterion alongside ‘subordination’.⁵⁵ However, another part follows a different logic, which argues that only a person who takes commercial and industrial risks, can work autonomously in a profit-oriented manner.⁵⁶ If understood in this 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

⁴⁸ Cf. Tomas Davulis, *supra* note 33, 133–134.

⁴⁹ *K.M., K.S., M.T.H. and T.N. v UAB “Kevin EU” and UAB “Open Banking LT”*, Supreme Court of the Republic of Lithuania (2022, no. e3K-3-151-684/2022), para. 39; *R.J. v UAB “Autobestas”*, Supreme Court of the Republic of Lithuania (2018, no. 3K-3-68-248/2018), para. 14; *R.A. v AB “ORLEN Lietuva”*, Supreme Court of the Republic of Lithuania (2018, no. e3K-3-114-701/2018), para. 27.

⁵⁰ *G. L. v UAB „TV žaidimai”*, Supreme Court of the Republic of Lithuania (2023, no. e3K-3-109-684/2023), para. 46.

⁵¹ Cf. *ibid.*

⁵² LC-LT, *supra* note 34, art. 32 para. 3.

⁵³ Cf. Tomas Bagdanskis, Vilius Mačiulaitis and Mantas Mikalopas, *supra* note 47, 54.

⁵⁴ Cf. *Law on Personal Income Tax of the Republic of Lithuania*, Official Gazette (2002, no. 73-3085), art. 2 para. 7.

⁵⁵ Cf. Beata Martišienė, “Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai,” *Teisė* Vol. 80 (2011): 144 // DOI: 10.15388/Teise.2011.0.156.

⁵⁶ Cf. Tomas Davulis, *supra* note 3, 13.

possibility of autonomous decisions exists or not. In addition, the Supreme Administrative Court, when dealing explicitly with the distinction between an employment relationship and an individual activity in a tax context, was following such an approach.⁵⁷

It has not yet been conclusively clarified by the court practice how Article 32 Paragraph 3 of the LC-LT is to be understood. This means whether it merely represents a prohibition on transferring risks and costs to the employee if an employment relationship exists, or whether it serves also as a further criterion in addition to 'subordination', which can also establish an employment contract in the absence of 'subordination', or whether it serves as a guiding principle for the understanding of 'autonomy' and therefore ultimately of 'subordination'. So far, at least the tax case law points to the latter.

Based on this understanding, it should be noted that an employment contract so far always contains the criterion of 'subordination'. This is initially to be understood as organizational subordination, i.e. one party has the right to determine when, where and how the work is performed, and the other party must follow suit. If one interprets the term more broadly, one could also conclude that any form of *de facto* subordination can establish an employment relationship. Reference can be made to the CJEU court practice that can be found in *Danosa* or *Balkaya*.⁵⁸ But even in this case, the question of whether some kind control/obeyance relationship exists is always considered. A possible sole economic dependency and a resulting similar need for protection has not yet been addressed by either case law or the literature, and the law does not yet offer any reference points for this.

2.2. Extension of the scope of application to other employment-like relationships

Returning to the consideration of the scope of application of the LoOSH-LT, in line with the Framework Directive this term 'employee' is extended to legal relationships that are equivalent to employment relationships and to persons who perform unpaid work.⁵⁹ Such equivalent relationships are listed exhaustively in Article 4 Paragraph 3 of the Law on Employment of the Republic of Lithuania (hereinafter LoE-LT). 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 sector, as required by the Framework Directive in Article 2 Paragraph 1.⁶⁰

Persons carrying out unpaid activities are listed exhaustively in Article 9 of the LoE-LT, 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, i.e. unpaid workers including trainees and apprentices according to Article 3 of the Framework Directive.⁶¹ This means that the definition of 'employee' from the LC-LT remains unaffected, but the personal scope of the law is extended. Accordingly, an 'employee' as defined by the LC-LT is covered as well as certain public sector employees and certain persons who perform unpaid work. Domestic servants are not covered, because they are not listed. There is no catch-all provision, i.e., a consideration of whether, under certain circumstances, a larger group of actually self-employed addressees would be similarly or even equally in need of protection concerning occupational health and

⁵⁷ Cf. *Saerimner v State Tax Inspectorate*, Supreme Administrative Court of the Republic of Lithuania (2012, no. A-602-164-12).

⁵⁸ Cf. CJEU (*Danosa*), *supra* note 19, para. 56; CJEU (*Balkaya*), *supra* note 13, para. 48; cf. also Ulrich Preis, *supra* note 19, para. 42.

⁵⁹ LoOSH-LT, *supra* note 32, art. 2 para. 9.

⁶⁰ Cf. Council Directive 89/391/EEC, *supra* note 5, art. 2 para. 1.

⁶¹ Cf. *ibid.*, art. 3 lit. a.

safety risks or because of their economic dependency and should therefore be included into the scope of application.

This concept, which the LC-LT determines, is characterized by a purely binary division into employees and self-employed persons and an 'all or nothing' approach. It means that Lithuanian law appears to be based on a single basic concept of 'employee', which extends content-wise not only to Lithuanian core employment regulations but also to other areas.⁶² A working person who falls into one of these two categories is subject to either all employment law or no employment law at all – including the LoOSH-LT.

Since the LC-LT and the LoOSH-LT, which both transpose numerous EU directives with a 'worker' concept as their personal scope of application,⁶³ rely on the same basic 'employee' concept, this approach appears to assume that there is a single 'general' EU concept of 'worker'.⁶⁴

3. TRANSPOSITION INTO GERMAN LAW

The implementation of the Framework Directive in Germany is essentially found in the "*Arbeitsschutzgesetz*" (Occupational Health and Safety Act – hereinafter ArbSchG).⁶⁵ In the definition of the personal scope of application, the terminology is changed compared to the Framework Directive. Instead of the term "*Arbeitnehmer*" (employee) used in the German version of the Framework Directive, the term "*Beschäftigter*" is used in the Occupational Health and Safety Act,⁶⁶ which, literally translated, is a synonym of the word "*Arbeitnehmer*", but can have different context-specific legal meanings.

The term "*Beschäftigter*" in the context of the ArbSchG is legally defined exhaustively and firstly lists traditional "*Arbeitnehmer*" (employees) only as one subcategory of covered working persons. Thus, the term "*Beschäftigter*" is understood in this context more broadly than "*Arbeitnehmer*" (employees).

3.1. Employees

To understand the concept of 'employee' in German law, it is first necessary to take a brief look at the structure and history of German employment law. Unlike in Lithuania, employment law in Germany is not codified, but fragmented into a multitude of legal sources which makes it easier to define different scopes of application for different areas of employment law than in a codified system. Until 1 April 2017, the employment contract was only a subcategory of the service contract without its own legal definition, the distinction of which from the service contract was shaped exclusively by case law. A distinction was made between a "*freier Dienstvertrag*" (free service contract) and the employment contract. Only since 1 April 2017, has the employment contract been legally defined in Section 611a of the German Civil Code (hereinafter BGB).⁶⁷ The criteria

⁶² Reference is made to one 'employee' or 'employment contract' term, e.g. health and safety: OSHL-LT, *supra* note 32, art. 2 para. 9; social security: Law on State Social Insurance of the Republic of Lithuania, *Lietuvos aidas* (1991, no. 107-0), art. 4 para. 1; personal income tax: LoPIT-LT, *supra* note 54, art. 2 para. 31.

⁶³ Cf. Annex to the LC-LT, *supra* note 34; Annex to the OSHL-LT, *supra* note 32.

⁶⁴ Cf. Tomas Davulis, *supra* note 3, 13; Tomas Davulis, *supra* note 33, note 208.

⁶⁵ Cf. *Occupational Health and Safety Act* [ArbSchG] of 7 August 1996 (Federal Law Gazette I p. 1246), as amended by Article 2 of the Act of 31 May 2023 (Federal Law Gazette 2023 I no. 140).

⁶⁶ Cf. *ibid.*, sec. 2 para. 2.

⁶⁷ Cf. *Civil Code* [BGB] in the version promulgated on 2 January 2002 (Federal Law Gazette I p. 42, 2909; 2003 I p. 738), last amended by Article 17 of the Act of 6 May 2024 (Federal Law Gazette 2024 I no. 149), sec. 611a; For the sake of completeness, it should be noted that not only this one, but the existence of several existing 'employee' concepts in German law could be assumed, cf. Rolf Wank, "Der Arbeitnehmerbegriff in der Europäischen Union – Praktische Konsequenzen," *Europäische Zeitschrift für Arbeitsrecht* (2018): 328.

for definition previously established by case law have been incorporated into the law.⁶⁸ 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 dependency."⁶⁹ Personal dependency is the essential characteristic that distinguishes the employment contract from the service contract. It can result from the work being tied to instructions or the determination by the work orderer. Being 'tied to instructions' may concern "the substance, implementation, time and place at which the activities are pursued."⁷⁰ 'Determination' can manifest itself by an integration into the work orderer's work organization,⁷¹ or the dependence on the work orderer's organization.⁷² However, being 'tied to instructions' and 'determined' overlaps to some extent, as an activity that is tied to instructions is usually also determined.⁷³ And a determination does usually only occur with a minimum level of being tied to instructions.⁷⁴

Anyone who is not able to essentially determine their activities freely and to determine the times at which they work is tied to instructions.⁷⁵ In this context, the degree of personal dependency is subject also to the specific nature of the activity concerned.⁷⁶ In determining whether or not an employment contract exists, all circumstances are to be given overall consideration,⁷⁷ and the principle 'substance over form' is followed.⁷⁸ The main duty of the employee is personally dependent work. In exchange, the employer has the duty to pay the agreed remuneration.⁷⁹

In this respect, the German employment contract and thus also this German concept of employee follow the *Lawrie-Blum* formula and are similar to the Lithuanian concepts of employee and employment contract – at least when interpreted literally.

However, in light of the rise of crowd work, the German Federal Labour Court recently demonstrated a willingness to significantly soften the prevailing understanding of personal dependency. In a 2021 judgment, the court examined the app-based employment conditions unilaterally imposed by a platform operator offering small assignments for its app users against remuneration. These conditions effectively required the working person to consistently accept and complete specific micro tasks over an extended period, otherwise the work would have been not economically viable for the working person. The court found this a sufficient indicator for a determined work performance, even in the absence of any explicit contractual obligations to accept the work.⁸⁰ The court found that by signing a framework agreement, registering on the platform, and

⁶⁸ Cf. "The 1:1 codification of established supreme court case law leaves the legal situation in Germany unchanged" – Bundestagsdrucksache (German Parliament Document) 18/9232, 18; Different opinion: Some of the literature notes that the characteristic of the employee's integration into the employer's organization developed by case law has not been incorporated into the law, but continues to exist, cf. Rolf Wank, *supra* note 67, 328.

⁶⁹ BGB, *supra* note 67, sec. 611a para. 1 sentence 1.

⁷⁰ Ibid., sec. 611a para. 1 sentence 2; Federal Labour Court (BAG), 17.05.1978 – 5 AZR 580/77, AP BGB § 611 Abhängigkeit Nr. 28; Federal Labour Court (BAG), 09.09.1981 – 5 AZR 477/79, AP BGB § 611 Abhängigkeit Nr. 38.

⁷¹ Federal Labour Court (BAG), 01.12.2020 – 9 AZR 102/20, *Neue Zeitschrift für Arbeitsrecht* (2021): 555 para. 31.

⁷² Federal Labour Court (BAG), 13.08.1980 – 4 AZR 592/78, AP BGB § 611 Abhängigkeit Nr. 37; BAG (5 AZR 477/79), *supra* note 70.

⁷³ BAG (9 AZR 102/20), *supra* note 71, 555 para. 31.

⁷⁴ Ulrich Preis, *supra* note 19, para. 42.

⁷⁵ BGB, *supra* note 67, sec. 611a para. 1 sentence 3.

⁷⁶ Ibid., sec. 611a para. 1 sentence 4.

⁷⁷ Ibid., sec. 611a para. 1 sentence 5.

⁷⁸ Ibid., sec. 611a para. 1 sentence 6.

⁷⁹ Ibid., sec. 611a para. 2.

⁸⁰ BAG (9 AZR 102/20), *supra* note 71.

engaging with it, the working person had implicitly agreed to this form of work arrangement. The platform controlled the worker's actions indirectly, i.e., not through direct instructions, but by structuring and combining tasks to fit the work orderer's needs, using incentives and subtle nudges rather than explicit orders to guide the working person's behavior.⁸¹

The case was significant in demonstrating that personal dependency can still occur without a formal obligation to follow direct instructions. This lowered the threshold for establishing 'employee' status, creating the possibility for crowd or platform workers to be classified as 'employees'. However, the judgment does not imply that platform workers are automatically considered employees; each case must be evaluated on its individual circumstances.

If there is an employment relationship, a multitude of German employment laws regulate different aspects of it. The German definition of employee thus relies mainly on the criteria of personal dependency; economic dependency plays no role in the evaluation. However, this understanding of personal dependency alone is already significantly broader than the Lithuanian concept of subordination, as it does not necessarily require an obligation to follow instructions or entail a direct control/obey relationship – instead subtle determination of the work performance can be sufficient in individual cases. This broader interpretation also expands the German concept of employee compared to the Lithuanian concept, and consequently, the personal scope of application of German occupational health and safety regulations compared to those in Lithuania.

In addition to employees, the ArbSchG also extends the personal scope of application to civil servants, judges and soldiers (i.e. workers in the public sector) as well as those persons employed in workshops for the disabled or for the purpose of their vocational training. In this respect, the personal scopes of application of the Lithuanian and German occupational health and safety laws are similar, albeit according to their national circumstances.

3.2. Employee-like persons

There is a crucial difference in an additional listing. The ArbSchG is also applicable to "*arbeitnehmerähnliche Personen*" (employee-like persons) excluding only domestic servants.⁸² On the one hand, this serves to exclude domestic servants, as is also permitted by the Framework Directive. On the other hand, it includes 'employee-like persons' – a status of working persons that Lithuanian law does not include or recognize. The term 'employee-like persons' already appeared in German law before the adoption of the Framework Directive in different contexts. Since the term 'worker' in Article 3 of the Framework Directive is to be understood broadly, German literature deems it necessary, according to an interpretation of the Framework Directive in conformity with EU law, that the ArbSchG also applies to employee-like persons and that they are to be qualified as 'workers' within the meaning of the Framework Directive.⁸³

It is obvious that this view does not assume the existence of a single, general autonomous 'worker' concept arising from CJEU's freedom of movement jurisprudence which automatically extends to other areas. On the contrary, it rejects the existence of

⁸¹ Gregor Thüsing and Gisela Hütter-Brungs, "Crowdworking: Lenkung statt Weisung – Was macht den Arbeitnehmer zum Arbeitnehmer?," *Rechtsprechungs-Report Arbeitsrecht* (2021): 231.

⁸² ArbSchG, *supra* note 65, sec. 2 para. 2.

⁸³ Christine Schulze-Doll, "ArbSchG § 2 Begriffsbestimmungen": para. 19, in: Wolfhard Kohte et al., eds., *Gesamtes Arbeitsschutzrecht* (Baden-Baden: Nomos, 2023); cf. Daniela Pottschmidt, *Arbeitnehmerähnliche Personen in Europa* (Baden-Baden: Nomos, 2006), 212 et. seq., 231.

such a single concept.⁸⁴ However, it does not mean that there is another autonomous concept of 'worker' for every legal act of EU's secondary law, but rather that subject matters must be bundled together.⁸⁵ The 'worker' concept from the freedom of movement can serve as orientation.⁸⁶ But it must then be examined whether and to what extent there are contextual deviations from it – the interpretation is made teleological.

Accordingly, it is argued that the Framework Directive's concept does not apply to the *Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organization of working time* (so-called Working Time Directive),⁸⁷ as an individual directive, as employee-like persons are in this respect not subject to the same risks as employees due to their limited time commitment.⁸⁸ The employee-like person seems to be an intermediate category between employees and the self-employed. However, it is regarded as a catch-all provision to close gaps in protection and avoid circumvention,⁸⁹ i.e., the law applies if at least the qualification as an employee-like person is established.⁹⁰ Employee-like persons are in principle genuinely self-employed and are not to be qualified as employees in legal terms, so employment law does not apply to them in principle.⁹¹

The term can be found in various forms in different laws relating to employment law. A comprehensive definition can be found in German collective bargaining law. The "*Tarifvertragsgesetz*" (Collective Bargaining Act) does apply explicitly to employee-like persons.⁹² According to this definition, employee-like persons are economically dependent persons and in need of social protection comparable to an employee.⁹³ In contrast to an employment contract, there is therefore no or a significantly mitigated personal or organizational dependency – otherwise the working person would be an employee. It is assumed that the working person is economically dependent on the work orderer and, as a result, is in need of social protection to the same extent as an employee if several criteria are met: (1) work based on a service contract or a contract to produce a work for other persons,⁹⁴ (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 person,⁹⁵ or (3b) on average more than 50 per cent of the income of the working person (total gainful activity) is received only by one work orderer.⁹⁶

However, this is not a generally binding definition and only applies to collective bargaining law but can at least serve as a guidance for other contexts.⁹⁷ The concept of

⁸⁴ Cf. Rolf Wank, *supra* note 16, 32; Abbo Junker, *supra* note 15, 190; Different opinion: "The concept of freedom of movement for workers should always be applied if the Union legal act itself does not contain a reference or an independent definition of the term." – Ulrich Preis, *supra* note 19, para. 18.

⁸⁵ Cf. Rolf Wank, *supra* note 16, 37.

⁸⁶ Cf. Rolf Wank, *supra* note 67, 341.

⁸⁷ 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, *Official Journal* L 299, 18.11.2003, p. 9-19.

⁸⁸ Rolf Wank, "Die personellen Grenzen des Europäischen Arbeitsrechts: Arbeitsrecht für Nicht-Arbeitnehmer?," *Europäische Zeitschrift für Arbeitsrecht* (2008): 186; cf. Daniela Pottschmidt, *supra* note 83, 254 et seq.

⁸⁹ Christine Schulze-Doll, *supra* note 83, para. 19.

⁹⁰ *Ibid.*

⁹¹ Frank Hohmeister, "BUrlG § 2 Geltungsbereich": para. 14, in: Frank Hohmeister, and Angelika Oppermann, eds., *Bundesurlaubsgesetz* (Baden-Baden: Nomos, 2013).

⁹² Collective Bargaining Act [TVG] in the version published on 25 August 1969 (Federal Law Gazette. I p. 1323), last amended by Article 8 of the Act of 20 May 2020 (Federal Law Gazette. I p. 1055), sec. 12 a para. 1.

⁹³ *Ibid.*, sec. 12 a para. 1.

⁹⁴ This means that it does not matter whether the work is deliverable-oriented or not.

⁹⁵ Collective Agreements Act, *supra* note 83, sec. 12 a para. 1 lit. a.

⁹⁶ *Ibid.*, sec. 12 a para. 1 lit. b.

⁹⁷ Cf. Heinz Josef Willemsen and Michael Müntefering, "Begriff und Rechtsstellung arbeitnehmerähnlicher Personen: Versuch einer Präzisierung," *Neue Zeitschrift für Arbeitsrecht* (2008): 193.

the 'employee-like person' has therefore been significantly shaped by case law. It is the nature and duration of the activity as well as the amount of remuneration which lead to the economic dependency of the employee-like person on their employer – instead of a personal dependency.⁹⁸ Such a person is dependent on the utilization of their labour and the income from the performed work to secure their livelihood.⁹⁹ This is particularly the case if the person only works for one work orderer,¹⁰⁰ or the remuneration received from a work orderer represents the essential basis of the working person's livelihood.¹⁰¹ The actual existing income situation is decisive, i.e., it is not decisive whether it would have been possible for the working person to generate income from other sources.¹⁰² If there is no high remuneration resulting from the work performed for the work orderer,¹⁰³ it should however be analyzed whether there are no other income or significant assets that could secure the livelihood.¹⁰⁴

This economic dependency must also have reached the point that the working person is in need of social protection in terms of their overall position 'comparable to an employee'.¹⁰⁵ The need for social protection 'comparable to an employee' is to be assumed if the degree of dependency has reached a level that is normally only found in an employment relationship and if the services provided are typical for an employee.¹⁰⁶

This approach is essentially applied in different areas of employment law, e.g. also for the Federal Paid Leave Act that regulates the leave entitlements of employees.¹⁰⁷ However, the concept of employee-like person is in principle considered an indefinite legal concept,¹⁰⁸ which can take different shapes in different contexts. Thus, a different understanding arises in occupational health and safety law, as the use of the criterion of 'economic dependency' is seen as going against its purpose. Instead, the comparable need for social protection results from the working person's inclusion into the work orderer's danger-causing work organization.¹⁰⁹ The need for the 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 it.¹¹⁰ It is not the status, but the real and dangerous work that is decisive.¹¹¹

Similar considerations are also reflected in Lithuanian law. Article 30 of the LT-LC stipulates that when two or more employers operate in the same workplace or at the

⁹⁸ Federal Labour Court (BAG), 21. 2. 2007 – 5 AZB 52/06, *Neue Zeitschrift für Arbeitsrecht* (2007): 700; Federal Labour Court (BAG), 17.01.2006 – 9 AZR 61/05, *Neue Juristische Online Zeitschrift* (2006): 3822; Federal Labour Court (BAG), 15.11.2005 – 9 AZR 626/04, *Neue Juristische Online Zeitschrift* (2007): 5253; Federal Labour Court (BAG), 26.09. 2002 – 5 AZB 19/01, *Neue Zeitschrift für Arbeitsrecht* (2002): 1415.

⁹⁹ BAG (5 AZB 52/06), *supra* note 89, 700; BAG (9 AZR 61/05), *supra* note 89, 3822; BAG (9 AZR 626/04), *supra* note 89, 5253; BAG (5 AZB 19/01), *supra* note 89, 1415.

¹⁰⁰ BAG (Federal Labour Court), 17.01.2006 – 9 AZR 61/05, *Neue Juristische Online Zeitschrift* (2006): 3822.

¹⁰¹ Federal Labour Court (BAG), 28.06.1973 – 5 AZR 568/72, *Neue Juristische Wochenschrift* (1973): 1995; Federal Labour Court (BAG), 08.06.1967 – 5 AZR 461/66, *Neue Juristische Wochenschrift* (1967): 1982.

¹⁰² BAG (9 AZR 61/05), *supra* note 89, 3823; Federal Labour Court (BAG), 17.06.1999 – 5 AZB 23/98, *Neue Zeitschrift für Arbeitsrecht* (1999): 1176.

¹⁰³ Federal Labour Court (BAG), 23.12.1961 – 5 AZR 53/61, *Neue Juristische Wochenschrift* (1962): 1125; Federal Labour Court (BAG), 04.11.1998 – VIII ZB 12/98, *Neue Zeitschrift für Arbeitsrecht* (1999): 56.

¹⁰⁴ Federal Labour Court (BAG), 23.02.1977 – VIII ZR 222/75, *Neue Juristische Wochenschrift* (1977): 854.

¹⁰⁵ BAG (5 AZR 461/66), *supra* note 92, 1982; BAG (9 AZR 626/04), *supra* note 89, 5253.

¹⁰⁶ BAG (9 AZR 61/05), *supra* note 89: 3822; Federal Labour Court (BAG), 02.10.1990 – 4 AZR 106/90, *Neue Zeitschrift für Arbeitsrecht* (1991): 240.

¹⁰⁷ Cf. Frank Hohmeister, *supra* note 82: para. 14-20.

¹⁰⁸ Cf. Federal Labour Court (BAG), 21.01.2019 – 9 AZB 23/18, *Neue Zeitschrift für Arbeitsrecht* (2019): 494 para. 32.

¹⁰⁹ Wolfhard Kohte, "ArbSchG § 2 Begriffsbestimmungen," in: Norbert Kollmer et al., eds., *Arbeitsschutzgesetz: ArbSchG* (Munich: C.H. Beck, 2021), recital 83 et seq.; cf. Daniela Pottschmidt, *supra* note 83, 226 et seq.

¹¹⁰ Christine Schulze-Doll, *supra* note 83, recital 19.

¹¹¹ *Ibid.*

same work sites, they must organize the work in such a way as to ensure the safety and health of all employees, regardless for which employer the employee works.¹¹² This acknowledges that, in terms of occupational health and safety, it is not necessarily the subordination towards a particular employer in the contractual relationship that creates the vulnerability of the working person in this context, but the dangers and risks caused by the work performed and the work environment.

However, German law goes a step further than the Lithuanian legal framework. Under German law, it makes no difference whether the working person is engaged under a service contract or a contract to produce a work, i.e. regardless of whether the work is deliverable-oriented or not. In contrast to an 'employee' under German law, the 'employee-like person' is not personal dependent, i.e., they must not follow instructions by the work orderer or perform the work determined.

Such relationships are possible, e.g., in the construction sector, in manufacturing professions or in courier services if these are provided by self-employed persons, but the same security measures are required due to the organizational involvement into the work orderer's activities.¹¹³ Furthermore, crowdworkers – working either via a platform or directly – could be employee-like persons if they are not working in an employment relationship under personal dependency,¹¹⁴ but work predominantly for one platform operator or crowdsourcer.¹¹⁵ 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.

4. THE TRANSPOSITION INTO UK LAW

Despite 'Brexit', EU law, and thus also the Framework Directive, continued to have effect in the UK during the implementation period by the *European Union (Withdrawal Agreement) Act 2020*, which ended only on 31 December 2020.¹¹⁶ As a result, the Highest Court in the case of *IWUGB v SSWP* still had to deal with the interpretation of the term 'worker' according to Article 3 of the Framework Directive in accordance with EU law in 2020.¹¹⁷ This is why the decision remains relevant despite the UK's withdrawal from the EU.

4.1. Employee or limb (a) worker

The Framework Directive is implemented in UK law through the Health and Safety at Work etc. Act 1974 (hereinafter HSWA1974)¹¹⁸ and associated regulations. The judgment concerned more of an individual question, which will not be dealt with in depth in this article, but the Highest Court also carried out a comprehensive analysis of the term worker in the Framework Directive, which will be considered in more detail in the following. It is striking that the scope of application of the HSWA1974 and associated

¹¹² LoOSH-LT, *supra* note 32, para. 30.

¹¹³ Examples: cf. Wolfhard Kohte, *supra* note 109, para. 86–95.

¹¹⁴ Cf. Federal Labour Court (BAG), 21.5.2019 – 9 AZR 295/18, *Neue Juristische Wochenschrift* (2019): 1411–1415.

¹¹⁵ Wolfhard Kohte, *supra* note 109, para. 100.

¹¹⁶ 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, *Official Journal* C 384I, 12.11.2019, p. 1–177, art. 126.

¹¹⁷ Cf. The Independent Workers' Union of Great Britain v The Secretary of the State for Work and Pensions and the Secretary of State for Business, *Energy and Industrial Strategy* [2020] EWHC 3050.

¹¹⁸ Cf. Health and Safety at Work etc. Act 1974, c. 37, available at: <https://www.legislation.gov.uk/ukpga/1974/37/> (accessed 1 April 2024).

regulations initially only covered 'employees'.¹¹⁹ According to the wording, an 'employee' is merely a person who works based on an employment contract.¹²⁰ Such a contract can be express or implied, and oral or in writing.¹²¹ A contract of employment in the meaning of the HSWA1974 can be also a contract of apprenticeship.¹²² This means that trainees and apprentices, as the Framework Directive requests, are also covered. Furthermore, the HSWA1974 applies to a person who, otherwise than under a contract of employment, holds the office of constable or is appointment as a police cadet,¹²³ so that it also covers certain working persons in the public sector. Domestic employment is excluded by Section 51 of the HSWA1974.¹²⁴

4.2. Limb (b) worker

Was the Framework Directive properly transposed into national law if the scope of application in Section 53 of the HSWA1974 and related regulations only included 'employees' or 'limb (a) workers', but not the further so-called 'limb (b) worker' as existing in Section 230 Paragraph 3 of the Employment Rights Act 1996 (hereinafter ERA1996)? Section 230 Paragraph 3 of the ERA1996 has two parts or limbs – (a) and (b). 'Worker' according to Section 230 Paragraph 3 can mean either employees or so-called 'limb (a) workers' who work under a contract of employment. Or it can be a so-called 'limb (b) worker' who works under another type of contract, whereby the working person undertakes to perform work or services personally for the work orderer – this means that limb (b) workers are actually self-employed.¹²⁵ Therefore, the term 'worker' is comprised of employees and also includes certain self-employment persons. However, 'limb (b) worker' does not include self-employment persons *per se*.¹²⁶

The distinction between employees and limb (b) workers is not easy. It lies beyond the scope of the present article to delve deeply into the yet unresolved question as to where exactly to draw the demarcation line as well as which characteristics distinguish them and to what extent. Nevertheless, it is necessary to get at least a rough understanding. The policy behind the inclusion of limb (b) workers into UK law was to extend some benefits of protection to working persons who are "in the same need of that type of protection as employees 'stricto sensu'".¹²⁷

Limb (b) workers have only a set of core employment rights, which is more limited than that of employees,¹²⁸ which makes a correct distinction very important. The reason why employees are thought to need such 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 position.¹²⁹

'Limb (b) worker' is a broader term than 'employee', because it seems that the element of an organizational subordination might be present but not as pronounced, so that the distinction between the two worker statuses, unlike the distinction between

¹¹⁹ Ibid., sec. 2 para. 1.

¹²⁰ Ibid., sec. 53 para. 1.

¹²¹ Employment Rights Act 1996, c. 18, <https://www.legislation.gov.uk/ukpga/1996/18/section/230> (accessed 1 April 2024), sec. 230 para. 2.

¹²² HSWA1974, *supra* note 118, sec. 53 para. 1.

¹²³ Ibid., sec. 51A para. 1.

¹²⁴ Ibid., sec. 51.

¹²⁵ ERA1996, *supra* note 121, sec. 230 para. 3.

¹²⁶ 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* Vol. 6(1-2) (2017): 23 // DOI: 10.20318/sllerj.2017.3922.

¹²⁷ Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para 17 (4).

¹²⁸ Mark Freedland and Jeremias Prassl, *supra* note 126, 27.

¹²⁹ Byrne Bros (Formwork) Ltd v Baird, *supra* note 127, para 17 (4).

'employee' and 'employee-like person' in German law, is not necessarily characterized by a different type of dependency, but rather by a different degree of subordination.¹³⁰ However, so far, to qualify for 'employee' status, it is necessary that there are mutual obligations between the parties of the contract, i.e., that the work orderer is committed to providing work in the future and the working person is contractually bound to accept and perform the work offered by the work orderer.¹³¹ This requirement does not appear to be essential for obtaining 'limb (b)' status. This becomes evident by the ruling of the Supreme Court in the *Uber BV v Aslam* case.¹³² This judgment is particularly relevant because it also caused a stir outside the UK, as it concerned a company that is also active in numerous countries in continental Europe and a model that is gaining ground under the already mentioned labels such as 'platform work' or 'work on demand'.

Even though the Supreme Court considered that 'subordination' might not be a freestanding and universal characteristic of a worker,¹³³ 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."¹³⁴ 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'.¹³⁵

In making this decision, the Supreme Court relied primarily on the element of 'control' and its degree, which is generally a typical feature of subordination.¹³⁶ 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 sanctions.¹³⁷

This lack of mutual obligations makes the concept of 'limb (b) worker' broader than the concept of 'limb (a) worker', so that it is 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 work.¹³⁸ The term employee in Lithuanian law corresponds more to the term employee or 'limb (a) worker' in UK law than to the term 'limb (b) worker'. Consequently, the concept of 'limb (b) worker' is broader than that of Lithuanian 'employee' and also includes groups of working persons who would be considered genuine self-employed persons under Lithuanian law – which, however, are excluded from any employment law protection under Lithuanian law.

The effects are also clear here if one looks at the interpretation of the term worker in the Framework Directive. The Highest Court in *IWUGB v SSWP*, referring to *Allonby*, Attorney General Kokott's opinion in *O'Brien* and Attorney General Mengozzi's Opinion in *Fenoll*, pointed out that there is no single definition of worker in EU law, but that "it

¹³⁰ Ibid., para 17 (5); cf. Mark Freedland and Jeremias Prassl, *supra* note 126, 24.

¹³¹ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

¹³² Cf. *Uber BV v Aslam* [2021] UKSC 5.

¹³³ Ibid., para. 74; *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, para. 39.

¹³⁴ *Uber BV v Aslam*, *supra* note 120, para. 97.

¹³⁵ Ibid., para. 87.

¹³⁶ Ibid., para. 97; cf. ILO, *The Employment Relationship: An annotated guide to ILO Recommendation 198* (Geneva: ILO, 2007), 35.

¹³⁷ *Uber BV v Aslam*, *supra* note 132.

¹³⁸ Cf. LoE-LT, *supra* note 41, art. 56 para. 1.

varies according to the area in which the definition is to be applied.”¹³⁹ Moreover, it saw no indication that the use of the term ‘worker’ in the Framework Directive indicates an intention that the scope of application of the Directive should be identical to the provisions on freedom of movement.¹⁴⁰

The Highest Court went on to take a closer look at the autonomy of the EU’s concept of ‘worker’, but came to a slightly different conclusion than the general German view.¹⁴¹ It mentioned that the definition of ‘worker’ in Article 3 of the Framework Directive differs from ‘the’ autonomous EU law meaning.¹⁴² The Highest Court thus seems to assume that there is one ‘general’ autonomous worker term with EU law meaning, but that the term in Article 3 of the Framework Directive might differ from this one term.

It would, however, not be permissible that an extension of the concept of worker in the Framework Directive could lead to an extension of the concept of worker in the area of freedom of movement, as it was already stated in *Uber BV v Aslam* 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’.”¹⁴³ Nevertheless, the Highest Court in *IWUGB v SSWP* emphasized that the term ‘worker’ in Article 3 of the Framework Directive “was intended to have a single meaning applicable in all Member States,”¹⁴⁴ as it would otherwise lead to “different levels of safety and health protection” between Member States and “competition at the expense of safety and health,” which was to be addressed by the Framework Directive.¹⁴⁵ In this sense, the term ‘worker’ in Article 3 of the Framework Directive must also be an autonomous EU law definition.¹⁴⁶

The Highest Court noted that the CJEU has repeatedly referred to the same autonomous definition of worker in a variety of different contexts,¹⁴⁷ emphasizing in particular the case of *Ruhrlandklinik* as “a particularly striking example of the use of purposive interpretation to apply the autonomous definition in circumstances.”¹⁴⁸

According to the Highest Court, also the objectives of the Framework Directive “suggest a scope fixed by reference to a single EU-wide meaning.”¹⁴⁹ The Highest Court furthermore referred to Article 31 of the EU Charter of Fundamental Rights in its decision, however noting that in its view it can only serve as an ‘interpretive aid’.¹⁵⁰ Article 31 would not be suitable, “to override the express exclusion of domestic servants,”¹⁵¹ but the fact that the Framework Directive confers to the right to “working conditions which respect his or her health, safety and dignity” on “every worker,”¹⁵² would support an interpretation of Article 3 of the Framework Directive as broad as possible and therefore does not only “include” employees, but also limb (b) workers.¹⁵³

¹³⁹ *IWUGB v SSWP*, *supra* note 117, para. 82 (a); cf. CJEU (*Allonby*) *supra* note 18, para. 64; Opinion of AG Kokott in CJEU-Case C-393/10, *O’Brien* (2011), EU:C:2011:746, para. 25; Opinion of AG Mengozzi in CJEU-Case C-316/13, *Fenoll* (2014), EU:C:2014:1753, para. 29.

¹⁴⁰ *IWUGB v SSWP*, *supra* note 117, para. 82 (b).

¹⁴¹ *Supra* note 84.

¹⁴² *IWUGB v SSWP*, *supra* note 117, para. 82 (g).

¹⁴³ *Uber BV v Aslam*, *supra* note 132, para. 72.

¹⁴⁴ *IWUGB v SSWP*, *supra* note 117, para. 82 (h).

¹⁴⁵ *Ibid.*, para. 13.

¹⁴⁶ *Ibid.*, para. 82 (l).

¹⁴⁷ Such as the Treaty provisions on freedom of movement (*Lawrie-Blum*) and equal pay (*Allonby*), the Working Time Directive (*Union Syndicale*, *Fenoll*, *Syndicatul Familia Constanta*) and the Temporary Agency Work Directive (*Ruhrlandklinik*).

¹⁴⁸ *IWUGB v SSWP*, *supra* note 117, para. 82 (m).

¹⁴⁹ *Ibid.*, para. 82 (i).

¹⁵⁰ *Ibid.*, para. 82 (n).

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, para. 143.

Ultimately, the Highest Court made the following points clear: There is a difference between employees and limb (b) workers in UK law. The EU's 'worker' term in the area of health and safety is to be understood autonomously, i.e. it should have the same content across EU domestic borders. However, the EU's 'worker' term is also dependent on the context. In the case of the Framework Directive, it is necessary to interpret it more broadly and also include groups of working persons who are actually self-employed persons under national law and deviating from the concept of 'worker' in the area of freedom of movement. According to this understanding, the EU's autonomous 'worker' concept(s) would be relatively flexible according to purpose, but identical in all Member States.

5. COMPARISON OF THE DIFFERENT CONCEPTS

The Lithuanian concept of employee is significantly more rigid than the corresponding concepts in UK, German, and EU law, and is basically in line with the EU's worker concept of freedom of movement.¹⁵⁴ This is already evident from the fact that both UK and German law offer intermediary categories or catch-all provisions in the form of 'limb (b) workers' and 'employee-like persons', which Lithuanian law does not offer.

In addition, German law has a particularly strong contextual interpretation of which certain working persons are covered by the scope of application because they are vulnerable in a similar way to employees in a particular context – as can be seen from the fact that the term 'employee-like person' is not always identical within German law.

According to the UK and German views presented, the EU worker concept has in many cases an autonomous meaning, but not necessarily identical in all contexts of EU law. If this view is applied to Lithuania, this means that the Lithuanian concept of employee may be in line with the EU's worker concept(s) in most cases, but not in all cases – essentially not in those cases in which the EU's worker concept in a directive is to be understood more broadly or narrowly than the EU's worker concept on freedom of movement.

For the interpretation of the worker concept of the Framework Directive, this means that both the scope of application defined by UK and German case law and legislators according to their interpretation of EU law is significantly broader than the Lithuanian one. The German interpretation of the Framework Directive is the broadest, because it even covers persons who are involved in the work orderer's work organization or processes that create risks, even though there are no signs of an organizational subordination or control apart from this.

Following the German and UK interpretation, the Framework Directive's worker concept must be interpreted uniformly across the borders of Member States, i.e. a person who works in Germany under certain conditions and within a certain structure must receive the same protection if it were to work in Lithuania under the same conditions and within the same structure. However, this would not be the case when it comes to the presented different interpretations of the scope of application of Article 3 of the Framework Directive, which would mean two different outcomes in the absence of CJEU case law on this issue: either Germany and/or the UK interpret the worker concept of the Framework Directive unnecessarily broadly or Lithuanian law defines the scope of application too narrowly, contrary to EU law.

¹⁵⁴ Cf. Tomas Davulis, *supra* note 33, note 208.

An argument for the first result would be that EU law does not recognize such intermediate categories between employees and self-employed persons.¹⁵⁵ These two intermediate categories in UK and German law could also be seen as rather exceptions.¹⁵⁶

However, it should also be noted, that the European Commission raised already doubts about whether the traditional binary distinction between 'employees' and 'self-employed persons' can still be an adequate representation of the economic and social reality of work.¹⁵⁷ Despite that, it is not the status of the working person that is decisive for the interpretation of the EU's worker concept, in particular not the status under national law, but the factual situation.¹⁵⁸ Both the Highest Court in the UK and the German literature did not only refer to the national status of the working person, but have provided a detailed analysis of the EU's worker term and considered a broader interpretation to be necessary. Both, the UK and Germany interpreted the term 'worker' in the Framework Directive teleologically. However, the Lithuanian law seems to have no clear answer to this teleological approach.

It initially appears that this teleological approach has only limited relevance and is initially limited to the Framework Directive, raising the question of whether it might actually be more of an exception itself. Due to Brexit, no further impetus in this area can be expected from the UK. However, the German Federal Labour Court seems inclined to extend this approach to other areas as well. In a 2019 judgement interpreting the term 'worker' in *Directive 2006/54/EC*,¹⁵⁹ it was as well indicated that there is no uniform definition in EU law.¹⁶⁰ Instead, according to the court, the meaning of the term depends on the specific context of its application, and in individual cases, it may also include employee-like persons who are not considered employees.¹⁶¹ However, final clarity on this question – whether Germany is misguided in its broader interpretation here, or whether Lithuania's understanding of the EU's 'worker' concept is too narrow – can only be provided by the CJEU.

It can certainly be argued that, despite the narrower Lithuanian 'employee' term in the area of health and safety, no infraction proceedings have yet been initiated against Lithuania and that this could be seen as an indication that the Lithuanian 'employee' term is broad enough and EU-compliant in the area of health and safety. However, the Highest Court in the UK also dealt with this issue in the case *IWUGB v SSWP* and stated that not much can "be drawn from the Commission's failure to bring infraction proceedings in respect of this particular aspect of the UK's implementation of the Framework Directive."¹⁶² It seems that the only Lithuanian criterion that currently offers the opportunity to solve this potential issue is the expansion of the concept of 'subordination' by a broader understanding, as it is still the essential distinguishing criterion from other contractual work relationships in Lithuania.

¹⁵⁵ Rolf Wank, *supra* note 16, 47; cf. Daniela Pottschmidt, *supra* note 83, 54.

¹⁵⁶ Cf. José João Abrantes; Edoardo Ales, Helga Aune, et al., *Thematic Report 2009: Characteristics of the Employment Relationship* (Brussels: ELLN34, 2010), 34.

¹⁵⁷ European Commission, "GREEN PAPER Modernising labour law to meet the challenges of the 21st century," COM(2006) 708 final, [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) (accessed 1 April 2024), 10.

¹⁵⁸ Cf. CJEU (*Ruhrlandklinik*), *supra* note 12, para. 27.

¹⁵⁹ 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, *Official Journal* L 204, 26.07.2006, p. 23–36.

¹⁶⁰ Federal Labour Court (BAG), 25.06.2020 – 8 AZR 145/19, *Neue Zeitschrift für Arbeitsrecht* (2020): 1622 para. 70.

¹⁶¹ *Ibid.*, para. 44.

¹⁶² *IWUGB v SSWP*, *supra* note 117, para. 80.

CONCLUSIONS

If the German and/or UK interpretation on the scope of application of the Framework Directive were to prevail, Lithuania could address the issue by broadening its understanding of subordination to align more with the UK's court practice when it comes to the concept of 'limb (b) workers' or the German court practice when it comes to the concept of 'employee'. This approach would involve moving away from a strict focus on direct control or obedience obligations, instead embracing a more flexible understanding of subordination that includes indirect and subtle forms of work determination. However, this bears the risk that the concept of subordination could become inflated. Apart from that, the German interpretation in the area of occupational health and safety would still remain notably broader, as it encompasses the concept of 'employee-like persons', which does not require any personal dependence or organizational subordination. Nevertheless, if one were to follow this approach, it would mean that, e.g., persons who would be 'limb (b) workers' would be employees under Lithuanian law. However, if one follows this approach and lowers the benchmark for the establishment of an employment contract according to Article 32 of the LC-LT in this way, this low benchmark would also apply to all other areas of employment law. Such persons would become subject to all Lithuanian employment regulations, including areas such as employment termination protection, because the single Lithuanian employee concept would then correspond to the broadest EU worker concept. Crucially, there are areas in which this approach might be permissible under EU law, but would most likely fail in practice, e.g. when genuine self-employed persons who would be considered employees under health and safety law would suddenly receive protection against dismissal under employment law. Furthermore, if one follows the German interpretation, then taking into account employee-like persons, persons working under a "*Rangos sutartis*", i.e. working in a 'deliverable-oriented' manner, would also explicitly be covered. Moreover, there are areas where too broad interpretation deviating from EU case law would be inadmissible, e.g. in the area related to freedom of movement.

A second solution would therefore be to also introduce intermediate categories or catch-all provisions in certain areas such as occupational health and safety, similar to these legal systems and also to establish a two-tier system.¹⁶³ For example, this could be done by inserting a catch-all provision in Article 2 Paragraph 9 of the LoOSH-LT, which only applies to the latter.

A middle way could involve adopting varying interpretations and understandings of the concept of subordination within Lithuanian employment law, each with different degrees of flexibility. These interpretations would no longer rely solely on the facts and circumstances of individual cases but would also consider the relevant area of law and the intended purpose of the legal norm. As a result, different employee concepts might emerge within Lithuanian employment law, sometimes deviating from the single domestic legal definition provided in the LC-LT. Following this approach, it would be expedient to examine whether an EU worker concept would be applicable in relation to a 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

¹⁶³ Advocating the implementation of intermediary statuses: Rolf Wank, *Workers' Protection National Study for Germany for the ILO*, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/genericdocument/wcms_205364.pdf (accessed 1 April 2024), 47; Emanuele Menegatti, „The Evolving Concept of 'worker' in EU law", *Italian Labour Law e-Journal*, Issue 1, Vol. 12 (2019): 82 // DOI: 10.6092/issn.1561-8048/9699.

wording of the domestic definition. However, there is no evidence of such an approach in Lithuanian case law to date.

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