Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects

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Foreword

Recent years have witnessed rapid and profound changes in the world of work, both in regard to work organisation and the content of work. New forms of work organisation, such as outsourcing and contracting out, are increasingly common. This tendency has contributed to the emergence of economically dependent work which represents a form of work falling within a "grey zone" between subordinate work and self-employment. There are different terms which have been developed in order to describe and categorise this group of workers - those most frequently used being: ‘economically dependent workers’, ‘parasubordinate workers’ (quasi-subordinate workers) or ‘persons similar to wage earners’.

In legal terms economically dependent workers are self-employed. The basic and common characteristic of these workers is that they are similar to self-employed in so far as they work at their own risk and are not subordinate to an employer. At the same time, they are ‘economically dependent’ in the sense that they are more or less exclusively reliant on just one client enterprise.

In the year 2000 the Commission raised the issue of economically dependent work in the consultation of the social partners on the modernisation and improvement of employment relations. The social partners and the Commission agreed that more information and research was necessary. Furthermore, in its legislative resolution on the Council common position on the Directive amending the Insolvency Directive, the European Parliament called on the Commission to carry out an in-depth study and to hold a joint public hearing with Parliament on economically dependent workers. As a result of these requests, the Commission launched the study "**Economically dependant work/ Parasubordination: legal, social and economic aspects**". The purpose of the study was to provide a detailed and comprehensive overview of the legal, social and economic situation in relation to economically dependent work in the Member States.

The completion of the study culminated in a Public Hearing on 19 June, 2003 **"Economically dependent work/parasubordinate work"** organised jointly by the Committee on Employment and Social Affairs of the European Parliament and DG Employment and Social Affairs, where the results of the study, as well as the issues and problems relating to economically dependent work in general, were discussed.

I am delighted to welcome the publication of this study.

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General Director

Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects[1]

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[1] The contents of the study do not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment and Social Affairs.

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Executive summary

The first part of the report examines the distinction between work under an employment contract (subordinate employment/work) and self-employment, on the basis of the existing definitions in the Member States of the EU, indicating how various definition techniques are used. In particular, the report sets out the main criteria used by the law and judges to identify the two concepts and tackles the problem of categorising forms of work that lie half-way between work under an employment contract and self-employment (the so-called "grey area"). The existence of such a legal division is a constant feature of all the regulations considered and is found in international law. The distinction between work under an employment contract and self-employment has the general, very important consequence that rights and guarantees are recognised for persons of subordinate status in the legal sense. The first chapter ends by providing a set of statistical data on the distribution of work under an employment contract and self-employment in the Member States of the EU.

The second chapter describes the phenomenon of economically dependent work, indicating its characteristic features. There is a degree of uncertainty surrounding the definition of economically dependent work, not only because the legal framework is scant and fragmented, but also because a comparison reveals that there is a certain amount of confusion as regards both the actual designation of the phenomenon and the overlap with the different problem of false self-employed workers. The analysis conducted reveals that this is a form of work in which there is no subordinate status in the legal sense, while there exists a state of economic dependence, but one that needs to be clarified and described in legal terms. Some States have legal concepts of an economically dependent worker, while in many others it is a phenomenon that is well-known and discussed. A study of these systems makes it possible to identify the criteria used to define this type of work: primarily personal work, continuity over time, single client. Of the socio-economic factors that can explain the spread of economically dependent work, the main one is the increasingly frequent use of the practices of outsourcing or contracting out, through which numerous activities that used to be carried out in a firm by workers with subordinate status (employees) are now entrusted to self-employed workers under arrangements that tend to lead to the emergence of economic dependence which States seek to describe using the elements set out above.

Generally speaking, the approach of national legislatures and the social partners – as shown by some experience at the level of collective agreements – appears to be fairly empirical and characterised by practical aspects which, far from abstract requirements of classifying economically dependent employment in one category rather than another, are concerned with meeting the requirements of labour protection wherever they may arise.

The third chapter, which takes up the material analysed in the second chapter, pursues the analysis of the current problems of reconstructing "economically dependent" self-employment and provides a number of potential pointers to future developments in regulations. Consideration is given in particular to the prospects for reform that are currently being discussed in certain European countries: maintenance of the status quo, establishment of a third type of work between subordinate work and self-employment, expansion of the concept of work under an employment contract, creation of a minimum threshold of rights that make no reference to the designation of the relationship because they are common to all forms of work. In conclusion, it is pointed out how any action of coordination at Community level that was steered by the social partners would not start from scratch because, in certain sectors, there is already a certain process of osmosis between the regulations on subordinate employment relationships and self-employment. The task is therefore to support and rationalise these trends.

Chapter 1

EMPLOYMENT AND SELF-EMPLOYMENT

1. Distinguishing between subordinate employment and self-employment

The distinction between “employment” and “self-employment” is a recurring feature of all European legal systems. There is an historical reason for this distinction: the industrial revolution introduced ways and means of organising production whereby employment, in conceptual and legal terms, became widespread, giving rise to a dominant category – subordinate employment. This category covers all the types of work done by those who “sell” their labour to an employer who, in turn, uses that labour for his/her own economic ends.

In parallel with this new legal category we find a different and, in certain respects, more traditional, legal form of exchanging personal work for financial remuneration, called self-employment. In this category we find the professions and a growing number of occupations which, whilst not conforming to the Taylor-Ford organisational model, are governed by the principles of civil and commercial law.

Not only is the distinction between employment and self-employment recognised in all the European countries, but tends to be regarded as being very clear-cut. Identifying the above two concepts is a matter of key importance due to the fact that employment is governed by very different principles and rules from those that apply to self-employment, with the result that whether an employment relationship is defined as subordinate employment or self-employment has serious consequences from a strictly legal point of view and also in socio-economic terms.

Consequently, it must be stressed that the definitions are crucially important, not in terms of the definitions per se, but because they are used as the basis of laws which set out the benefits and advantages of each category.

The difference between the benefits and advantages of each category can best be understood if we bear in mind the areas of private law which cover these two categories into which European laws divide the world of work: subordinate employment is governed by labour law, whereas self-employment is governed by civil and commercial law.

Labour law, which governs subordinate employment, is based on the need to protect the worker, who is regarded – legally and socially – as being the weak party in a contract. Thus, in an effort to ensure that workers enjoy the rights and protection relating to their subordinate (dependent) status, legislation has, historically, intervened frequently in major aspects of the employment relationship between an employee and his/her employer (from recruitment to dismissal, from pay to working hours, etc), in such a way as to reduce the freedom the contracting parties normally enjoy.

To sum up, the main feature of subordinate employment under labour law is the considerable level of protection that the legislation provides employees.

Self-employment, on the other hand, is treated as a contract governed by general rules set out in civil and, in many cases, commercial law. This is the main difference in terms of legislation: the self-employed person is not at all regarded as a weak contracting party, but is seen to be on an equal footing with the other party (the client). Apart from a few examples which shall be looked at below, there is no specific legislation protecting this type of worker; indeed, he/she is considered in the same way as anyone who signs a contract.

In brief, the main feature of self-employment is the lack of a protection system similar to that for employees, given that the work/pay exchange is governed by market forces.

As will be easily understood, the importance of the definitions of employment and self-employment depends, in the final analysis, on whether or not work is governed by market forces.

Under labour law, employment is not subject to market forces and the employee enjoys protection, both in terms of his/her relationship with the other party and in the event of need (e.g. accidents, unemployment, etc.).

In the case of self-employment, civil and commercial law mainly endeavour to ensure that the market operates correctly and efficiently.

2. Self-employment: definition and content

There is a tendency in European countries to identify self-employment in a negative way, by saying that it does not display the characteristics of employment – as defined in law or through judicial practice. This is why in this part of the report we shall deal mainly with the concept of subordinate employment. According to the traditional definition, what is not included in that concept comes within the scope of self-employment.

The main difficulty is that whilst one can speak of a *general* and *unified* category in the case of subordinate employment, it would be absurd and wrong to do so in the case of self-employment, which is, above all, an abstract concept which, in practice, is linked to many, fragmented legal systems[2].

Self-employment is a very complex phenomenon covering a variety of activities, such that any general rule – where it exists - becomes residual and secondary. This does not apply to subordinate employment, but concerns the practices that we define as self-employment (e.g. contracting, agency work, service provision).

As a general category, self-employment refers to a single type of contract – the work contract – which stems historically from the *locatio operis*, a category which in Roman law covered every contract and relationship involving the provision of a personal service in exchange for remuneration.

In contemporary law, the original *locatio operis* has been broken down into a wide variety of contractual practices, in addition to the work contract:

- contracting
- agency work
- service provision or supply
- the professions (the traditional ones such as law or medicine, as well as the emerging ones such as management consulting or advertising).

However, new contractua practices have become routine. They are increasingly used by businessmen, but often not covered by legislative provisions:

- franchising
- engineering
- factoring
- leasing
- management contracting
- transfer of know-how
- software production and supply.

[2] V. A. Lyon-Caen, *Le droit du travail non salarié*, Paris, Editions Sirey, 1990; A. Perulli, *Il lavoro autonomo*, Milano, Giuffrè, 1996; R. Wank, *Arbeitnehmer und Selbstandige*, Verlag, C.H. Beck, Monaco, 1988.

There is a further difficulty in identifying self-employment: how do we determine, from a legal viewpoint, whether or not self-employment is distinct from the activity of a company. This is particularly relevant in the case of a natural person running a small or very small business (micro-enterprise). In this case, two questions arise:

1) Should the entrepreneur and the self-employed person be included in the same legal category, i.e. the "company" category or the "self-employment" category?
2) If the answer to the first question is no and it is decided that the two should be kept separate, then the question must be: what are the criteria distinguishing the entrepreneur from the self-employed person?

To a large extent, these questions determine the limits of self-employment. Although both categories are an expression of private economic initiative, the trend both in national and Community legislation is to keep self-employment and company activities separate. Thus, the answer to the first question is no: at best, self-employment and companies are regarded as distinct legal categories, each able to be linked to a different body of laws.

The main criterion for distinguishing an entrepreneurial activity from self-employment is the way in which work and the means of production are organised. Organisation, i.e. the choosing, procuring and combined use of a number of inputs, is the key legal factor distinguishing entrepreneurship from self-employment. Where the economic activity is carried out without an organisational base, then it must be self-employment. It must be pointed out, however, that, in practice, it is not always easy to assess the organisational base, e.g. in the services sector the trend is to "dematerialise" the enterprise, in the sense that the material elements used by the company are so few that it is often, not to say always, the case that work is the only component (e.g. *software companies*). It is clear that in such cases it is much more difficult to distinguish clearly between self-employment and entrepreneurship.

Once the problem has been posed in general terms, it is considered preferable in this report not to stick too rigorously and absolutely to the distinction between self-employment and entrepreneurial (company) activity. There are two conflicting reasons for this. First, the entrepreneurial activities are often very small, i.e. they are referred to as micro-enterprises, where the organisational factor (even leaving aside the above-mentioned practice of "dematerialisation", which can also occur in medium and large-size companies) is of minor importance compared to the personal efforts put in by the person running the enterprise.

However, it was the problem – a major one in our research - of identifying situations where a worker is in a weak position economically and legally and providing protection for such situations that prompted us to include micro-enterprises in the self-employed category. Indeed, from the viewpoint of dependence in economic and legal terms, self-employment and micro-enterprises can be regarded as one and the same, otherwise persons whose situations are similar would end up being treated in very different ways.

For the purposes of this report, useful points to consider when making a general review of self-employment can be found in the rules governing subcontracting and inter-company relations, which are biased in favour of the company that is stronger in the market. For instance, it was considered necessary for Italian Act No. 192 of 1998 to introduce a form of protection for companies trading with financially stronger companies. Article 9 of the Act forbids one or more companies from taking advantage of the state of economic dependence of a client company or supplier. By "economic dependence" the law means, in this case, a situation in which a company in a commercial relationship with another company can exert influence to the detriment of the other, thus creating an imbalance. The Act also makes provision for the company that meets with abuse to find suitable alternatives in the market.

It is easy to imagine that a situation of dependence as just described will occur most often with small or very small companies. Therefore, the structural similarity between self-employment and micro-enterprises, and the acknowledgement of the need to provide protection, through legislation, specifically for situations of economic dependence in which a company may find itself, all lead to the conclusion that micro-enterprises should be part of the self-employment concept.

To sum up, self-employment is a concept which encompasses a (growing) variety of activities and related legal systems. This is a reliable premise on which to base the proposals contained in this report. Indeed, it would be wrong, methodologically speaking, to start from the assumption that self-employment is a single, unified category similar to subordinate employment, as this would make it difficult to assess the problems and find suitable solutions.

Having said that, one must be aware of the parameters of "self-employment", as it is often necessary to distinguish between its various components. Indeed, the existence of economic dependence, especially in the case of smaller companies, i.e. micro-enterprises, would suggest the need to extend the self-employment category in order to encompass them.

3. Defining techniques and methods

The European countries take a dual approach to defining the concepts of employment and self-employment:

a) *The statutory approach*: The law provides separate general definitions for subordinate employment and self-employment.

b) *The case law approach*: the definitions are derived from a case-study method based on case law, which identifies a number of factors or criteria to distinguish between subordinate employment and self-employment.

As we shall see, a legal system, in some cases, opts for one of the two approaches, in others – and this is what happens most frequently – the statutory and case law approaches merge one with the other, and the definition is often obtained by combining the legal and case-study techniques.

Another point worth mentioning is a further difference in terms of the degree of legal coverage the law gives to the above two concepts. Although, as will be recalled from the previous paragraph, one characteristic common to all Member States is that they base the distinction between subordinate employment and self-employment on the fact that the workers in the former category are covered by a system of legal protection. In practical terms, the two concepts are not given the same degree of legal coverage in all the legal systems considered.

a) *Systematic and general level of legal coverage*. In some cases, the laws provide a general and systematic definition of employment (and self-employment), setting out the whole scope of application of the legislation under labour law.

b) *Particular level of legal coverage*. In other cases, there is no general definition of the concept of employee. Here, one seeks to establish the scope of application of more limited and specific rules to define that concept, but it is not always possible to extract a systematic legal definition.

One further common factor is that it is not usually important whether an individual classifies him/herself as an employee or a self-employed person. What are important, according to the principle of effectiveness, are the actual characteristics of the work done in each individual case.

One last point concerns the terminology used. In the legal systems under consideration, the terms used are “employment contract” or “employment relationship”, which tallies with Community legislation where the two terms are used interchangeably so as not to conflict with national rules. Therefore, in this report no account will be taken of a possible distinction between employment “contract” and employment “relationship”.

4. Employment and self-employment in European countries

The countries may be divided into two groups, those with a legal definition of employment and/or self-employment and those which base both concepts on case law.

Group A: countries with laws containing a legal definition

- Austria
- Belgium
- Finland
- Italy
- Norway
- Netherlands
- Portugal
- Spain
- Sweden

Group B: countries not having a legal definition

- Denmark
- France
- Germany
- Greece
- Ireland
- Luxembourg
- United Kingdom

However, this division into groups A and B has a mainly formal value, as it does not tell us much about what the two concepts include. For instance, it cannot be said that in the countries which have a legal definition the content of the two concepts are clearer or more accurate than in those in Group B.

With or without a legal definition, it is not difficult to see that employment and self-employment appear rather complex because of the stakes involved (application or failure to apply the protection and guarantees provided for in labour law).

By making a comparative analysis of the countries under consideration, we can obtain a clear picture of subordinate employment, using the more frequently recurring and significant factors and criteria.

5. Employment and self-employment: identification criteria

Subordination is, first and foremost, a *legal concept.* Therefore, the socio-economic meaning of subordination, based on the employee's social and economic dependence on the employer must be put to one side. Even though the tendency to identify subordination in terms of social and economic dependence can be traced back to the historical assumptions which led to the formulation of the legal concept, as well as to laws and case law, that identification does not show what the technical and legal concept actually consists of.

As regards the legal concept, subordination implies a structural element in the relationship: employer control (*eterodirezione*) i.e. the fact that the person performing the work is under the direction and supervision of an employer. That control involves:

a) giving instructions to the employee as to how the work is to be carried out;

b) penalising any shortcomings;

c) monitoring the worker while he/she is working.

Subordinate employment may therefore be described as a hierarchical relationship between employer and employee; a relationship recognised in law as unequal but, at the same time, balanced by a complex system of protection for the worker (regarded as the "weak contracting party").

However, there are other additional indicators or criteria capable of defining the legal concept of subordination:

a) The type and number of the additional indicators vary widely from one country to another
b) There is no clear order of priority assigned to them.
c) The indicators are not all present at the same time, only one or two.
d) Their presence or absence does not seem to be a decisive factor in classifying a relationship/contract. They are often considered as indications to be freely assessed by a judge.

The indicators which seem to be most significant in determining subordinate employment status are:

- The worker is part of the employer's organisation
- The worker is not exposed to personal financial risk in carrying out the work
- Terms of payment
- The worker works set hours or a given number of hours per week or month
- The worker does not own the materials and equipment for the job.

The combined and variable use of employer control and the aforementioned indicators provide the basis for a legal definition of subordinate employment.

As has already been said (see paragraph 2 above), the concept of self-employment is a negative one, or rather, it is defined as the opposite of employment. Thus, we define self-employment as work performed by a person who does not have subordinate status, or who is not directed by a third party, and where the subordinate employment indicators are either not present or not significant.

The legal definition is not very meaningful in practical terms. On the contrary, it is rather more important to bear in mind that self-employment is a complex, multi-faceted category and that such complexity should also be reflected in the legislation.

6. The "grey area" between employment and self-employment

Studies and empirical research very often refer to the existence of an area lying somewhere between subordinate employment and self-employment but which, according to binary rationale,

cannot be attributed to one category or the other. The often-used term “grey area” has led to a certain confusion in analytical terms.

The term “grey area” can have at least two different meanings:

a) “Grey” is used to describe those types of work that do not easily fit into the binary system as, objectively speaking, they display some employment and some self-employment characteristics;
b) “Grey” is used to describe certain types of work which appear to be self-employment but which, in fact, are subordinate employment.

The meaning in sub-paragraph b) above raises the question as to how to correctly assess and legally classify employment using the ordinary tools that the law places at the disposal of the judges and other competent authorities. According to the above meaning, the term “grey area” refers to the so-called “false” self-employed. In other words, persons who are in practice treated as self-employed but who, in the eyes of the law, clearly fall into the employed category because they fulfil all the requirements thereof (as provided for in legislation or prescribed in case law).

The meaning of the term “grey area” as defined in sub-paragraph a) is conceptually different: here, the question is not to verify that the law is being correctly applied in a specific case. On the contrary, this meaning casts doubt as to the accuracy of the legal categories (employed and self-employed) and of the legal and case law criteria on which the classifications are based. In other words, this is not about an illegal practice of false self-employment but, on the contrary, about employment practices which cannot be easily classified on the basis of the criteria (or tests) that the laws prescribe in order to determine whether an individual is an employee or self-employed.

In short, cases where classification as self-employed is uncertain and cases of false self-employment are two different situations which require to be treated differently in law. The first concerns the interpretation (or updating) of the defining criteria of employment and self-employment, whilst the second concerns the question of how to apply the law in force.

The answer to both these questions must be sought in case law.

In the case of sub-paragraph b), where the problem is one of effectiveness and not of the unreliability of the legal categories and the related rules, the judges’ task is to expose false self-employment and classify it as employment. Thus we need to extend the subordinate employment category in terms of quantity, not quality.

Qualitative extension of one of the two categories is possible in the case of sub-paragraph a), where the judge is expected to rule on situations involving unclear classifications, so that the breadth of the self-employed and employed categories will, in part, depend on the judges' use –on a restricted or large scale – of the subordination indicators, especially the main indicator, i.e. the control under which the work is carried out. German case law has adopted a very flexible concept of employer control, based on the idea of control as a means of ensuring that the workers' role in the production process is functional and useful. By using a very wide definition of employer control, the German judges manage to extend the scope of application of the labour law to include many aspects of the grey area within the meaning of sub-paragraph a).

On the other hand, in Italian case law the variations in the interpretation of employer control are evident. In the past, judges adopted a rigorous approach, excluding from subordinate status those employment relationships that did not exactly match the criteria for subordinate employment. Nowadays, the tendency is for case law to take account of the new forms of work and production organisation whereby the employer's traditional hierarchical and controlling authority has been reduced, with the result that an individual is classified as an employee when the work he/she does is not subject to continuous and detailed directions, but only to general instructions, based on programmes designed in the interests of the company.

7. How the Member States define subordinate employment

This paragraph provides a brief summary of the definitions of employment used in the Member States and Norway, highlighting whether the definition is a legal one or based on case law.

AUSTRIA

The Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) contains a legal definition of subordinate employment: an employee is a person who undertakes to work for a certain time, which may be specified or not, for another person (the employer). In legal theory and practice an individual is an employee when he/she is under the authority and control of the employer with regard to the working time where the work is to be carried out and how the work is to be carried out.

All the above factors do not have to apply for an individual to be an employee. It is sufficient that they outweigh opposing factors indicating self-employment status. Self-employment is based on an open services contract (*freier Dienstvertrag*) or a work contract (*Werkvertrag*).

BELGIUM

The concept of subordinate employment is covered in legislation (Act of 3 July 1978), whilst self-employment includes all the situations where the features of subordinate employment are absent.

An employment contract means one in which an individual undertakes to place his/her labour at the disposal and under the control of another person in exchange for remuneration. Under Belgian law, an employee, according to the legal definition, must be under the control (even potentially) of an employer who is entitled to direct and control the work carried out.

When determining employment status, whether an individual classifies him/herself as an "employee" or as a "self-employed" person is not important. What is important is whether the individual is performing the work as an employee or a self-employed person.

DENMARK

In Danish law there is neither a precise legal definition of nor case law rulings on subordinate employment. General mention is made of individuals earning a salary for full-time, part-time or temporary work.

This is because, traditionally in this country, labour law is not an organic discipline, so it is not important to define the general concept of subordinate employment. Every law dealing with labour matters defines its own scope of application without adopting one sole definition of an employee.

FINLAND

The Employment Contracts Act contains a legal definition of subordinate employment: an employee is a person who undertakes to work under the direction and control of an employer in exchange for remuneration. That Act applies even when the individual works from home or with

his/her own tools. Another indicator of subordinate employment is the fact that an individual works for one person only.

FRANCE

Self-employment, which the civil code defines as a contract through which a person undertakes to «faire un ouvrage», is covered by numerous laws relating to occupational activities which fall under this category. As previously mentioned, case law defines self-employment as a situation where the characteristics of subordinate status are absent.

The subordinate employment concept derives from legal theory and practice, based on the definition contained in the civil code. However, the labour code does not contain a general definition of subordinate employment.

The civil code regards the employment contract as a contract subspecies – "le louage de gens de travail qui s'engagent au service de quelqu'un" (an agreement whereby individuals take on a commitment to work for another person) [art. 1779. *a*)].

Case law refers to a link of legal subordination (le lien de subordination juridique), with the adjective "legal" distinguishing subordinate employment from the concept of economic dependence. However, the law has defined the employment contract as an agreement whereby natural persons, the employees, place their labour at the service (or disposal) and under the control of another person, the employer, in exchange for payment[3].

However, the law intervenes in some types of contracts in order to formulate a presumption of the existence of an employment relationship: for commercial travellers, sales representatives and travelling salesmen (Art. L. 751-1 of the labour code); in journalists' employment contracts (Art. 761-2 of the labour code); for entertainment workers (Art. 762-1 of the labour code).

Particularly relevant is the legislation (Art. L. 781-1 of the labour code) which extends labour law to "particular groups of workers", including those whose occupation consists mainly of selling all types of goods or products, all types of books, publications and tickets supplied to them on an exclusive or quasi-exclusive basis by one industrial or commercial company, or by taking orders for or receiving the goods to be sold, moved or transported for the account of one industrial or commercial company, where such persons carry out their occupation in premises provided or

[3] G. Lyon-Caen, J. Pelisser, A. Supiot, *Droit au Travail*, Paris, Dalloz, 1998, p. 118.

designated by the aforementioned companies and under the conditions and for a price set by the latter.

GERMANY

There is no general legal definition of employee (*Arbeitnehmer*) or self-employed person (*Selbständiger*). Historically, the German civil code (BGB) draws a distinction between work contract (*Werkvertrag*) and service contract (*Dienstvertag*), but this does not correspond exactly to the distinction between self-employment and employment.

German law provides sectoral definitions of subordinate employment:

a) *Social security* – The Social Security code contains a definition of employee (§ 7.1, Book IV). According to this definition, subordinate employment is not self-employed work, especially when it is done within the bounds of an employment relationship. Indicators of subordinate employment are: the work is done under the control of another person and the worker is part of the employer's organisation.

It is assumed that an individual is an employee within the meaning of social security law when at least three of the following factors apply:

1. the individual concerned does not ordinarily employ anyone who is covered by compulsory social insurance and whose monthly remuneration from the employment relationship exceeds 630 German marks;

2. the individual has been working for a long time and mainly for one principal only;

3. this or a similar type of principal usually has similar activities carried out for him/her by employees employed by him/her;

4. the activity of the individual concerned does not display the typical characteristics of an entrepreneurial activity;

5. the activity of the individual is the same as that carried out previously for the same employer under an employment relationship.

Thus, German legislation has considerably broadened the scope of application of the social security act, extending it beyond the limits of subordinate employment to include those individuals, formally self-employed, who find themselves in a position of economic dependence.

b) *Tax law* – Income tax legislation states that employees are those persons engaged or employed at present or in the past in the public services or in private work and who have drawn a

salary from this or a previous work relationship. An employment relationship shall subsist as long as a worker must use his/her own labour on behalf and under the control of the employer.

That definition was drawn up in light of judicial guidance, in the absence of a general definition of employee, to describe a factory worker with a full-time, permanent employment relationship (*Normalarbeitsverhaltnis*).

In the opinion of the German judges, personal dependence (*persönliche Abhängigkeit)* is the best indicator of subordinate employment and distinguishes it from self-employment. Personal dependence is identified on a case by case basis by means of a number of indicators capable of measuring the degree of that dependence.

The main indicator of subordinate employment is the fact that the individual is under the control of the employer (*eterodirezione*). Others include the fact that the individual is part of the employers' organisation (*organisatorische Abhängigkeit*); the service benefits the employer/entrepreneur and not the worker; the need for social protection (*soziale Schutzbedürftigkeit*), proof of the service provider's weak socio-economic situation.

GREECE

In Greece, case law has defined subordinate employment. The judges consider a person who places his/her work at the disposal of an employer to be in subordinate employment. The employer is entitled to direct how, when and where the work is to be carried out. Furthermore, the employer has considerable control over the way the work is carried out.

Self-employment is also defined in case law.

IRELAND

The Industrial Relations Act 1990 does not provide a precise definition of an employee, with the result that this concept and the concept of self-employed person are unclear in legal terms. Despite being unclear, the employee concept is the key to having access to a number of entitlements to work, social security and income tax benefits

In an effort to assist businesses and trades union organisations to correctly identify individuals' employment status, a Code of Practice on Employment Status was prepared to provide a number of criteria to clarify the differences between the two employment categories[4].

An individual will be an employee if he/she:

- Is under the control of another person who directs as to how, when and where the work is to be carried out;
- Supplies labour only;
- Receives a fixed hourly/weekly/monthly wage;
- Cannot sub-contract the work. If the work can be sub-contracted and paid by the person sub-contracting the work, the employer/employee relationship may simply be transferred on;
- Does not supply materials for the job;
- Does not provide equipment other than the small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case;
- Is not exposed to personal financial risk in carrying out the work;
- Does not assume any responsibility for investment and management in the business;
- Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;
- Works set hours or a given number of hours per week or month;
- Works for one person or for one business;
- Receives expense payments to cover subsistence and/or travel expenses;
- Is entitled to extra pay or time off for overtime.

The Code of Practice contains additional factors to be considered:

- An individual could have considerable freedom and independence in carrying out work and still remain an employee;

[4] The *Code of Practice* was prepared by the Employment Status Group set up under the Programme for Prosperity and Fairness (PPF) in July 2001. The Employment Status Group comprises representatives of the Irish Congress of Trade Unions (ICTU), the Irish Business and Employment Confederation (IBEC), the Department of Social Welfare, Enterprise, Trade and Employment and Revenue Commissioners. The Code can be accessed on the website http://www.revenue.ie/pdf/revdsw.pdf

- An employee with specialist knowledge may not be directed as to how the work is carried out;
- An individual who is paid by commission, by share, or by piecework, or in some other atypical fashion may still be regarded as an employee;
- Some employees do not work on the employer's premises;
- There are special PRSI (pay related social insurance) rules for the employment of family members**.**

ITALY

Historically, Italian labour law is based on a general definition of subordinate employment contained in the Civil Code (1942). According to the legal definition, an employee is an individual who, in exchange for payment, has to work, either in an intellectual or manual capacity, for and under the direction of an entrepreneur (Art. 2094 c.c.).

The key criterion for classifying an individual as an employee is that he/she is under the control and direction of the employer. The definition has always appeared problematic given the importance of the employee concept in Italian law: it determines whether or not labour law and the related entitlements apply.

The legal definition cannot alone determine an individual's employment status. There is copious case law which, over time, has provided some indicators which can be used alongside the main one (i.e. employer control). The main indicators used by the judges to determine employment status are:

- Set working hours
- A set workplace
- Payment conditions
- The individual is under the control and direction and disciplinary powers of the employer
- The individual is part of the employer's organisation
- The individual is not exposed to any financial risk

In line with the predominating case law approach, used even by the Constitutional Court, the wishes of the parties concerned are not a decisive factor in terms of classification. It is the judge

who has to decide whether or not an individual is an employee, based on the actual relationship between the parties, even in the period subsequent to the drawing up of the contract.

However, more recent case law states that when it is not possible to derive from the actual execution of the contractual relationship definite elements for the classification of the relationship, then the wishes of the parties (*nomen iuris)* can be taken into account.

The employee concept is contrasted with that of self-employed, with the civil code providing a negative definition: a self-employed person is an individual who does not work under the subordinate status in relation to his/her client) (Art. 2222 c.c. *Contratto d'opera*).

LUXEMBOURG

Consolidated case law has determined that a contract of employment must fulfil three requirements: work must be performed, that work must be done in exchange for payment and there must be a tie of subordination with the employer, who is entitled to issue instructions to the worker. In other words, once again, employer control (*eterodirezione*) is the determining factor.

NORWAY

The definition of subordinate employment is contained in Act 1 of 1977 concerning worker protection and the working environment. Under this Act, a dependent worker is one who works for another person. The very general nature of this provision has meant that case law has had to provide clarification. Thus, a number of criteria have been drawn up to determine whether or not an individual is an employee. These include the employer's right to direct the worker, the worker's duty to carry out the work personally; whether or not the tools of the trade belong to the individual; and who is responsible for the result.

NETHERLANDS

There is a legal definition of subordinate employment whereby an employer is entitled to direct the worker as to how the work is carried out and to ensure that good conduct is maintained within the company (Art. 1639b of the civil code). This definition of subordinate employment, based on the employer having an authoritative relationship, is used to distinguish between employment and self-employment.

PORTUGAL

In Portugal, the law defines a contract of employment as one whereby an individual, in exchange for payment, undertakes to carry out intellectual or manual work for another person, under the control and direction of that person (Civil Code, Article 1152 and Contract of Employment Act, Article 1).

SPAIN

In Spain, Article 1 of the Workers' Act sets out the Act's scope of application and defines employees as those individuals who voluntarily work for another's account in exchange for payment, within the limits of the organisation and under the directions of a natural or juridical person, referred to as employer or entrepreneur. The Act expressly excludes self-employment from its scope of application.

In the light of the above definition, case law attributes two distinctive features to employment:

a) dependence, which suggests that control is exercised by the employer;

b) ownership by another. This comprises the risk, the means of production and the financial benefits obtained by the company from the employee's work.

Dependence and ownership by another are concurrent features defining subordinate employment.

SWEDEN

The term "employee" is defined in Swedish law. Reference is made to permanent contracts. This is the most common type of contract in the country; fixed term contracts are possible only under certain conditions.

UNITED KINGDOM

English labour law, in common with that of other European countries, seems to be based, historically, on a distinction between contract of employment or contract of service and contract for services.

There is no legal definition of subordinate employment or self-employment, but definitions of the two concepts have been provided by case law:

Legal protection is recognised for an “employee”, i.e. an individual (subordinate or dependent) working under a “contract of employment”.

- This is contrasted with the self-employed worker, i.e. an independent contractor working under a contract for services.

The distinction between the two is based on a set of criteria (common law tests), used to classify the employment relationship (control, integration, economic reality and mutuality of obligation), for each of which there is a number of indicators of subordinate status:

1. Control: The degree of discretionary power and autonomy in carrying out the work

Indicators:

- duty to obey orders
- discretion as to number of hours worked
- supervision of working methods

2. Integration: As an employee, an individual is regarded as being part of the business; the way the work is organised is more important than the individual being under the control of another person.

Indicators:

- disciplinary/grievance procedure
- inclusion in occupational benefit schemes

3. Economic reality: How are the financial risks distributed between the employer, the employee and the State?:

- method of payment
- freedom to hire others
- providing equipment
- investing in own business
- method of payment of tax
- coverage for sick pay and holiday pay

4. Mutuality of obligation: Concerns recruitment conditions, provides formal indicators that an individual is a subordinate employee.

Indicators:

- duration of employment
- regularity of employment
- right to refuse work
- custom in the trade.

The criteria are used together to show that the individual is working under some degree of subordination and continuing economic dependence.

The wishes of the parties with respect to classification are of secondary importance in any decision taken by the judges who are brought in when the other criteria do not enable a clear definition of the relationship to be obtained.

8. Employment and self-employment in Community law

Community law has also had to deal with the definition of the two concepts of employment and self-employment, first and foremost in order to determine the scope of application of the rules governing free movement. The EC Treaty provisions (Art. 39-42) use the general term “workers”, but it is not difficult to see that they refer to subordinate employment. Article 1 of Regulation 1612 of 1968 recognises the right of every citizen of a Member State to “take up an activity as an employed person and to pursue such activity within the territory of another Member State”.

Apart from the above example, there is no definition of subordinate employment in Community law. One would have to consult the now consolidated case law of the European Court of Justice which has, over the decades, prescribed some basic criteria for identifying this concept.

First, the Court states that it cannot be left to the individual States to define the concept of worker, for we would end up giving them the right to alter the area of application which depends on that definition, with the risk of excluding some categories from the guarantees provided under the Treaty[5]. In order to determine the content of the category under consideration, we would have to "have recourse to the generally recognised principles of interpretation, beginning with the ordinary meaning to be attributed to those terms … in the light of the objectives of the Treaty."[6].

[5] Court of Justice 19 March 1964, case 75/63, Unger vs. Bedriifsvereninging voor Detailbandel en Ambachten.
[6] Court of Justice, 23 March 1983, case 53/81 Levin vs. Secretary of State for Justice, para. 9.

Putting the onus on national laws, the Court, in the *Lewrie-Blum*[7] ruling, stated that in the context of Art. 39 (formerly 48) of the EC Treaty, the definition of employment must be based on "objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned." Thus, the essential feature of subordinate employment 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." In Community law, too, a major feature of employment is the fact that the worker performs his/her work under the direction of another person.

In other areas, the definitions are less important in that they cannot be used to demarcate the scope of Community rules.

In legislation governing social security for migrant workers a very broad concept of worker is used, unrelated to national general definitions of employees and self-employed persons (see Article 1 of Regulation 1408 of 1971).

Likewise, with regard to equality, Community legislation covers both categories of workers and does not restrict protection measures to employees only:

a) the legislation governing equal treatment of men and women covers both employment and self-employment. Indeed, under Directive 86/613/EC the legislation contained in Directive 76/207/EC is made applicable to employees and self-employed persons alike.

b) the scope of application of Directive 2000/78/EC on equal treatment for men and women with regard to employment and working conditions and Directive 2000/43/EC governing the principle of equal treatment of persons irrespective of racial or ethnic origin covers both employment and self-employment [Art. 3.1 a)].

c) The principle of equal treatment also applies to social security schemes for employees (Directives 79/7/EC and 86/378) and self-employed persons (Directive 86/613).

On the other hand, in other aspects of employment relationships, Community legislation adopts two solutions. The first is to omit all reference to the two categories (see Directive 93/104/EC on working hours and Directive 98/59/EC on collective redundancies).

The second solution is to refer to national legislation. For example:

[7] Court of Justice 3 July 1986, case 66/85, Lawrie-Blum vs. Land Baden-Württemberg, para. 17. Subsequently vs. Court of Justice 31 May 1989, case 344/87, Bettray vs. Secretary of State for Justice; Court of Justice 14 December 1989, case C-3/87, Her Majesty the Queen vs. Ministry of Agriculture, Fisheries and Food ex parte Agegate Ltd.; Court of Justice 26 February 1992, case C-357/89, Raulin vs. Minister van Onderwijs en Wetenschappen; Court of Justice 26 February 1992, case C-3/90, Bernini vs. Minister van Onderwijs en Wetenschappen; Court of Justice 12 May 1998, case C-85/96, Martinez Sala vs. Freistaat Bayern.

- Directive 96/34/EC which incorporates the framework agreement on parental leave applies to all workers of both sexes having a contract or an employment relationship defined by law, by collective agreement or based on practices in force in each Member State.

- Directive 96/71/EC relating to the posting of employed persons states that for the purpose of the directive, the definition of worker shall be that used in the Member State to which the worker is posted.

- The provisions of Directive 97/81/EC, which incorporates the framework agreement on part-time work, apply to part-time workers having an employment contract or relationship defined by law, by collective agreement, or based on practices in force in each Member State.

- Directive 99/70/EC on fixed-term employment: the rules apply to fixed-term workers with an employment contract or relationship governed by law, by collective contracts or based on practices in force in each Member State.

On the whole, instead of prescribing protection measures based on the general definitions of employment and self-employment, Community law seems to be much more interested in the very nature of the problems and, therefore, in providing protection for workers wherever such a requirement arises. The trend in more recent Community legislation in certain specific areas, such as that of equal treatment,[8] on the other hand, is to do away with the distinction between employment and self-employment and to simply have a "prestatore di lavoro" (person carrying out work) category.

9. Developing identification criteria for the two concepts

The distinction between employment and self-employment has long existed in all European laws. It emerged and developed with the industrial revolution and is still the *summa divisio* where employment is concerned. However, there is no doubt that the traditional meaning attributable to the two concepts has, over time, become obsolete.

[8] Directive 2000/78/EC on equal treatment in employment and working conditions and article 3.1 a) of Directive 2000/43/EC governing the principle of equal treatment for all persons irrespective of racial or ethnic origin include both employment and self-employment in their scope of application; the legislation governing equal treatment for men and women with regard to working conditions covers employment and self-employment (see Directive 86/613/EC on the application of the rules contained in Directive 76/207/EC to both employees and self-employed persons).

In the present-day context, empirical analyses have shown that in terms of the structure of individual work performance and forms of work organisation[9], the world of work has undergone profound changes. These changes have also had legal consequences: the employment/self-employment distinction may have remained substantially unchanged, but we need to take a fresh look at the traditional definitions.

A review of entrepreneur or employer control, which, as we have seen, is one of the defining criteria of employment (§ 5) would confirm such a conclusion. Nowadays, employer control or the ways in which that control over the employees manifests itself is often different from in the past, even though it is still a major factor in the definition of employment. First, we have dispensed with the Taylor-Ford company model based on a vertical structure, i.e. a hierarchical organisation, with a pyramidal distribution of power, and have adopted a horizontally-organised post-Fordist model. Today, the distribution of power is more complex and diffuse than before, when the employer was recognised as the head of the company (nowadays we have groups or networks of companies). Changes of this kind make it more difficult to identify who has effective control over work and how that control is exercised.

Second, changes in the methods of control and, consequently, in the definition of subordinate employment are related to the spread of new forms of work: in the case of temporary employment, the employer no longer has sole control (i.e. direction and supervision). Control is now shared between the temporary employment agency and the client. Temporary employment is regarded as subordinate employment but, of course, the traditional definition of subordination cannot apply given that the control and direction of the work is shared between the two entrepreneurs.

On the other hand, changes leading to the alteration of the traditional definitions of subordinate employment and self-employment stem from the fact that the very quality of the work is changing. The content of work requires cooperation and not just carrying out production line activities: a higher level of knowledge, better attitudes and more skills are required of the workers; they have to be specialised and multi-functional at the same time.

These trends mean that employees now have more scope for decision-making, with the result that, practically speaking, hierarchical control and authority is being weakened. In a nutshell, subordinate employment is now said to resemble self-employment in that it is more independent in terms of its execution.

[9] EWON, *New forms of work organization. The benefits and impact on performance*, Savage, April, 2001

Likewise, in the broad general category of self-employment, it is increasingly common to find situations where the absence of authority and control by a third party is not so clear cut, as the entrepreneur/client has considerable power of interference.

In conclusion, whilst the legal definitions of subordinate employment and self-employment remain unchanged, in practice, they are being updated in the light of the changes outlined above, mainly through case law rulings. The criterion of employer control (*eterodirezione*) is still a decisive one, but the judges have to turn to the other employment indicators more often and apply them more widely in order to correctly classify the employment situation.

Generally speaking, having noted the judges' attitude to the problem of classifying the employment relationship, it is now time to look at how the changing interpretation of the identification criteria of the two cases is affected by the judges' choice between two models: the first, more widely used in systems based on the Roman tradition, takes as its starting point the definition of the category (subordinate employment or self-employment) and the judges decide whether the case under consideration fits the definition perfectly; the second, widely applied in the common law system, uses a more pragmatic approach, with the judges deciding how close the case under consideration comes to a model using the most common and frequently occurring characteristics of self-employment and subordinate employment.

Of course, this is a theoretical simplification as, in reality, the two models are not so clearly distinguishable. However, the second model is probably the quickest and most efficient way of distinguishing between employment and self-employment in today's rapidly and constantly changing economic and production framework.

10. International comparisons

If we look beyond the borders of the European Union, distinguishing between subordinate employment and self-employment is a problem that is common to a very large number of countries. In practice, in all capitalist economic and production systems, work organisation has led to a legal distinction being drawn between the two categories.

Studies by the International Labour Organisation (ILO) confirms this: "the question of workers' protection has focused mainly on the universal idea of the employment relationship, based on a distinction between dependent workers and self-employed persons ... this fundamental orientation exists in a number of countries, with some variations, and is also reflected in a good

number of international labour standards. The situation of self-employed persons, on the other hand, has resulted in their having a lower level of protection"[10].

With reference to the definition of subordinate employment, it is to be noted that "the employment relationship, as a legal concept, is based on similar factors" in a very large number of countries, "even though controversy may arise when specific cases are examined with a view to determining whether or not the relationship is one of subordinate employment, especially if the legislative text is unclear"[11].

Despite the variety of definitions of employment found worldwide, one factor is common to all, i.e. the existence of a (subordinate) employment relationship depends on a number of objective conditions being present at the same time; in other words on the way the workers and the employer have established their respective positions, rights and obligations, and on the actual services due. It does not depend on the interpretation that either or both of them give to the relationship[12]. This is an important principle, known as the "primacy of fact principle", compliance with which the judge is expected to ensure.

The approach taken to distinguish between employment and self-employment is similar to that used in the EU, where the decision is based on a series of indicators or tests, "with the result prescribed by law and notwithstanding the appearance or description given to the relationship"[13].

In addition to a certain degree of uncertainty when applying the definitions to practical cases - a difficulty that it will probably not be possible to remove from the legal process of classification - the ILO studies also highlighted the fact that the traditional definitions of employment and self-employment cannot easily be adapted to the changing production and social contexts.

The reason is two-fold: on the one hand, subordinate employment is disguised as self-employment (disguised employment relationship); on the other, there are cases where it is difficult to tell with any certainty whether a given activity should be classified as subordinate employment or self-employment. This is not new, but in recent years such cases have sharply increased, in terms of both quantity and quality, suggesting - even to international observers - that protective legislation is facing a problem of "defocusing".

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[10] ILO, *Meeting of Experts on Workers in Situations needing Protection (The Employment Relationship: Scope)*, Basic Technical Document, Geneva, 15-19 May 2000, http://www.ilo.org

[11] ILO, *Meeting of Experts on Workers in Situations needing Protection (The Employment Relationship: Scope)*, Basic Technical Document, Geneva, 15-19 May 2000, http://www.ilo.org

[12] ILO, *Meeting of Experts on Workers in Situations needing Protection (The Employment Relationship: Scope)*, Basic Technical Document, Geneva, 15-19 May 2000, http://www.ilo.org

[13] ILO, *Meeting of Experts on Workers in Situations needing Protection (The Employment Relationship: Scope)*, Basic Technical Document, Geneva, 15-19 May 2000, http://www.ilo.org

Table 1 – Summary Table

GENERAL FEATURES OF THE LEGAL SYSTEMS CONCERNED	
Binary division of work performance; there are no intermediate categories	
(SUBORDINATE) EMPLOYMENT	**SELF-EMPLOYMENT**
Definition	
Work carried out under employer control (direction and supervision) + other indicators of subordination (e.g. risk, being part of the organisation, working set hours)	Is arrived at through a negative approach, starting from the definition of employment: absence of employer control
Where is the definition found?	
❑ in law ❑ in case law ❑ in law and case law	
Characteristics of the two categories	
a) systematic and general level of coverage: in some countries the scope of application of the legislation is broad b) limited level of coverage: in other countries	Composite category covering: ❑ contracting, agency, service provision + intellectual occupations ❑ new contractual practices such as franchising, engineering, factoring,

scope of application is limited and specific		management contracts ❑ micro-enterprises
Consequences of the binary distinction		
Different types of law apply		
Labour law		Civil and commercial law
Legislation based on different rationales		
Worker protection		Market forces
Problems caused by the binary distinction		
Employment	"grey area" ❑ false self-employed persons ❑ difficult-to-classify forms of employment	Self-employment

11. Statistical data on employment and self-employment

In an effort to determine the quantitative significance of the distinction between subordinate employment and self-employment, the following pages provide statistical data on the situation in each Member State and estimates for the European Union as a whole. Tables 2 to 18 contain Eurostat data for the 15 Member States as well as a summary of the situation in the European Union: attention is drawn to the job breakdown for men and women. Tables 19 and 20 provide OECD data on self-employment in the Member States.

In Europe, self-employment accounts for about 15% of all employment, although in 2000 the proportion of self-employed fell to 14.8%. This represents an appreciable drop especially if compared with 15.8% in 1992 and 1995, and 15.7% in 1996.

The ratio of self-employed men to self-employed women is disproportionate, with a difference of 6-7 percentage points in favour of the men. This trend remained constant over the period under consideration.

If we look at individual Member States (Table 18), figures show that Greece has the highest percentage of self-employment, followed by Portugal and Italy. At the other end of the spectrum, France, Denmark, Luxembourg and Sweden come well below the European average.

Recent OECD statistics suggest a growing world trend in self-employment over the last decade of the twentieth century, in contrast with the seventies when the reverse was true. Among the interesting facts to emerge from the OECD data are that growth in self-employment is strongest in the business and community services sectors; there is a close link between self-employment and subordinate employment, in that many self-employed persons were previously employees; the number of self-employed persons who do not employ anyone themselves has remained unchanged over time, with few becoming “employers” or entrepreneurs with their own dependent employees.

Indeed, the figures show that the self-employment category comprises two sub-categories: own-account workers and those who employ their own workers (employers). This distinction is important if we are to separate the data relating to this category which, as mentioned above (Chapter 1 para. 2), also includes what we refer to in this report as micro-enterprises, the term describing own-account workers (see Table 20).

Table 2 - EMPLOYMENT IN THE EU (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	157491	155890	154419	155272	156717	159205	161772	164702
Self-employed (% total employment)	15.6	15.8	15.8	15.7	15.6	15.4	15	14.8
Part-time employment (% total employment)	13.9	14.5	16	16.4	16.9	17.3	17.6	17.7
Fixed term contracts (% total employment)	9.2	9.4	10	10.2	10.6	11	11.3	11.4
MALE								
Total employment	93786	92389	90646	90731	91362	92539	93443	94746

(000)								
Self-employed (% total employment)	18.0	18.2	18.5	18.5	18.4	18.1	17.9	17.6
Part-time employment (% total employment)	4.1	4.4	5.2	5.5	5.8	6	6.1	6.2
Fixed term contracts (% total employment)	8.0	8.3	9.1	9.3	9.7	10.1	10.3	10.3
FEMALE								
Total employment (000)	63707	63505	63775	64542	65356	66665	68328	69956
Self-employed (% total employment)	12.3	12.3	12	11.8	11.7	11.6	11.2	10.9
Part-time employment	28.3	29.1	31.2	31.6	32.3	32.9	33.2	33.3

(% total employment)								
Fixed term contracts (% total employment)	10.8	10.9	11.4	11.5	11.9	12.3	12.7	12.9

Tab. 3 - BELGIUM (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	3748	3731	3714	3729	3757	3802	3851	3895
Self-employed (% total employment)	18.2	18.4	18.8	18.9	18.6	18.2	17.9	17.7
Part-time employment (% total employment)	13.6	14.2	15.7	16.3	17.2	18.4	20.3	20.8
Fixed term	4.2	4.1	4.4	4.8	5.3	6.7	8.1	7.5

contracts (% total employment)								
MALE								
Total employment (000)	2312	2268	2234	2235	2234	2239	2231	2253
Self-employed (% total employment)	19.5	19.5	20.1	20.4	20.3	19.9	19.3	19.6
Part-time employment (% total employment)	2.3	2.4	3.2	3.4	3.8	4.3	5.3	5.8
Fixed term contracts (% total employment)	2.4	2.5	3.1	3.5	3.8	4.8	5.9	5.4
FEMALE								
Total employment (000)	1437	1464	1481	1494	1523	1564	1620	1642

Self-employed (% total employment)	16.2	16.7	16.9	16.5	16.2	15.9	16	15.2
Part-time employment (% total employment)	31	31.9	33.8	34.7	35.9	37.7	40.2	40.5
Fixed term contracts (% total employment)	7	6.5	6.4	6.9	7.7	9.4	11.1	10.4

Table 4 - DENMARK (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	2621	2600	2611	155272	2659	2693	2722	2763
Self-employed (% total employment)	9.1	9.3	8.2	15.7	7.8	7.4	7.2	6.9

Part-time employment (% total employment)	23.3	23	21.8	16.4	22.5	22.3	21.6	21.3
Fixed term contracts (% total employment)	10.3	9.7	10.6	10.2	9.8	9.1	8.9	9.1
MALE								
Total employment (000)	1409	1390	1439	90731	1446	1453	1466	1480
Self-employed (% total employment)	12	12.3	10.7	18.5	10.3	9.8	9.7	9.2
Part-time employment (% total employment)	10.8	10.7	10.8	5.5	12.2	11.1	10.4	10.2
Fixed term contracts (% total	9.4	8.6	9.6	9.3	9.2	8.3	7.8	7.7

employment)								
FEMALE								
Total employment (000)	1212	1209	1172	64542	1212	1239	1256	1282
Self-employed (% total employment)	5.7	6	5.2	11.8	4.7	4.6	4.4	4.3
Part-time employment (% total employment)	37.8	37.1	35.4	31.6	34.9	35.5	34.7	34.1
Fixed term contracts (% total employment)	11.4	10.9	11.9	11.5	10.5	10.1	10.2	10.6

Table 5 - GERMANY (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment	38457	37880	37384	37275	37194	37537	37944	38534

(000)								
Self-employed (% total employment)	9.3	9.6	10.3	10.3	10.5	10.6	10.4	10.2
Part-time employment (% total employment)	14.1	14.5	16.3	16.7	17.6	18.4	19	19.4
Fixed term contracts (% total employment)	9.2	9.4	9.4	10	10.5	11.1	11.6	11.4
MALE								
Total employment (000)	22337	22066	21563	21340	21229	21332	21413	21671
Self-employed (% total employment)	10.5	10.9	11.9	12.2	12.6	12.7	12.6	12.5
Part-time employment	2.5	2.7	3.6	3.8	4.3	4.7	4.9	5

(% total employment)								
Fixed term contracts (% total employment)	8.5	8.9	8.9	9.7	10.1	10.6	11.1	10.9
FEMALE								
Total employment (000)	16120	15814	15821	15935	15965	16205	16531	16863
Self-employed (% total employment)	7.6	7.7	8	7.7	7.8	7.8	7.5	7.4
Part-time employment (% total employment)	30.2	30.9	33.7	33.9	35.3	36.4	37.3	37.9
Fixed term contracts (% total employment)	10.1	10.2	10.2	10.5	11.1	11.6	12.3	12.1

Table 6 - GREECE (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	3659	3696	3820	3805	3792	3921	3929	3920
Self-employed (% total employment)	46.7	46.9	45.8	45.7	45.4	45.1	44.4	44.0
Part-time employment (% total employment)	3.9	4.5	4.8	5	4.8	5.6	5.8	4.3
Fixed term contracts (% total employment)	6.8	5.1	5.1	5.5	5.6	6.7	6.7	7.0
MALE								
Total employment (000)	2411	2408	2445	2421	2397	2473	2458	2444

Self-employed (% total employment)	47.4	47.7	47.1	46.9	47	46.6	46.1	45.9
Part-time employment (% total employment)	2.2	2.6	2.7	3	2.6	3.1	3.3	2.4
Fixed term contracts (% total employment)	6.9	5.1	4.8	5.2	5.2	6.1	5.8	5.8
FEMALE								
Total employment (000)	1248	1287	1375	1384	1395	1448	1471	1476
Self-employed (% total employment)	45.4	45.4	43.7	43.5	42.8	42.5	41.5	40.9
Part-time employment (% total employment)	7.4	8.1	8.4	8.7	8.5	10	9.9	7.4

Fixed term contracts (% total employment)	6.7	5.2	5.7	6	6.3	7.7	8.2	8.9

Table 7 - SPAIN (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	13966	13772	13571	13745	14135	14664	15173	15671
Self-employed (% total employment)	18.8	19.3	18.7	18.9	18.1	17.8	17.1	16.6
Part-time employment (% total employment)	4.6	5.9	7.4	7.7	8	7.9	8.1	8
Fixed term contracts (% total employment)	26.2	27	28.3	27.4	27.5	27.2	27.2	26.7

MALE								
Total employment (000)	9459	9222	8892	8947	9154	9458	9653	9838
Self-employed (% total employment)	18.8	19.6	19.5	20	19.5	19.1	18.7	18.3
Part-time employment (% total employment)	1.5	2.1	2.8	3	3.1	2.9	2.9	2.8
Fixed term contracts (% total employment)	23.8	24.7	26.7	25.9	26.1	26	25.6	25
FEMALE								
Total employment (000)	4505	4550	4680	4798	4981	5205	5520	5833
Self-employed (% total	18.6	18.8	17.3	16.9	15.6	15.3	14.3	13.7

employment)								
Part-time employment (% total employment)	11.2	13.5	16.2	16.6	17.1	16.9	17.1	16.9
Fixed term contracts (% total employment)	31.2	31.6	31.4	30.3	30	29.3	30	29.5

Table 8 - FRANCE (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	22092	22030	21925	21994	22097	22376	22782	23317
Self-employed (% total employment)	9.7	9.4	8.5	8.3	8.1	7.9	7.7	7.4
Part-time employment (% total	12.3	13.1	15.8	16.3	17	17.3	17.1	16.9

employment)								
Fixed term contracts (% total employment)	9.3	9.6	11.4	11.7	12.3	12.9	13.3	13.8
MALE								
Total employment (000)	12556	12439	12196	12215	12252	12377	12584	12865
Self-employed (% total employment)	11.2	10.9	10.1	10	9.8	9.6	9.4	9.1
Part-time employment (% total employment)	3.5	3.8	5.1	5.3	5.5	5.6	5.5	5.4
Fixed term contracts (% total employment)	7.9	8.1	10.3	10.6	11.2	11.8	12.4	13
FEMALE								
Total	9536	9591	9729	9779	9845	9999	10198	10452

employment (000)								
Self-employed (% total employment)	7.8	7.4	6.5	6.2	6	5.7	5.5	5.3
Part-time employment (% total employment)	23.9	25.2	29.1	30	31.2	31.6	31.4	31
Fixed term contracts (% total employment)	23.9	25.2	29.1	30	31.2	31.6	31.4	31

Table 9 - IRELAND (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	1170	1182	1302	1349	1432	1531	1619	1696
Self-employed	21.7	21.9	20.2	19.6	19.1	18.3	17.5	17

(% total employment)								
Part-time employment (% total employment)	8.3	9.1	11.6	11.4	13.6	16.5	16.4	16.4
Fixed term contracts (% total employment)	6.6	6.9	8	7.5	7.3	5.9	4.1	3.8
MALE								
Total employment (000)	772	764	812	832	870	920	963	1002
Self-employed (% total employment)	28.1	28.7	27.1	26.3	25.8	24.8	24	23.5
Part-time employment (% total employment)	3.5	3.8	5.1	4.9	6	7.5	7.2	6.9
Fixed term	4.5	4.8	6.1	5.3	5.1	4.2	2.9	2.7

contracts (% total employment)								
FEMALE								
Total employment (000)	397	418	490	517	562	611	656	694
Self-employed (% total employment)	9.5	9.7	8.9	8.9	8.9	8.6	8.1	7.7
Part-time employment (% total employment)	17.6	18.7	22.4	22	25.4	30	30	30.1
Fixed term contracts (% total employment)	10.5	10.7	11.1	10.9	10.7	8.5	5.7	5.5

Table 10 - ITALY (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								

Total employment (000)	23032	22920	21993	22131	22215	22448	22686	23059
Self-employed (% total employment)	27.5	27.3	26.9	26.9	26.7	26.6	26.3	26.2
Part-time employment (% total employment)	6	6	6.3	6.5	6.8	7.3	7.9	8.4
Fixed term contracts (% total employment)	5.2	5.2	5.4	5.4	5.8	6.3	7	7.5
MALE								
Total employment (000)	15052	14978	14298	14299	14309	14379	14427	14566
Self-employed (% total employment)	29.6	29.4	29.6	29.8	29.7	29.7	29.4	29.7

Part-time employment (% total employment)	2.8	2.8	2.9	3	3.1	3.4	3.5	3.7
Fixed term contracts (% total employment)	4.1	4.1	4.3	4.5	4.8	5.3	5.8	6.1
FEMALE								
Total employment (000)	7981	7942	7695	7831	7906	8069	8259	8493
Self-employed (% total employment)	23.5	23.4	21.9	21.8	21.4	21.2	20.8	20.3
Part-time employment (% total employment)	11.8	11.8	12.7	12.9	13.4	14.3	15.6	16.5
Fixed term contracts (% total	7.2	7.2	7.2	6.9	7.4	8.1	9.1	9.7

employment)								

Table 11 - LUXEMBOURG (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	:	190	214	220	227	237	249	262
Self-employed (% total employment)	:	8.1	7.9	7.8	7.5	7.3	7	6.8
Part-time employment (% total employment)	:	6.5	8.5	8	8.2	9.1	9.8	10.5
Fixed term contracts (% total employment)	:	3.1	4.6	3.9	3.8	4.6	4.8	4.9
MALE								
Total employment	:	121	140	142	145	149	158	165

(000)								
Self-employed (% total employment)	:	7.9	8.3	8.4	8.1	8	7.4	7.7
Part-time employment (% total employment)	:	1.0	1.4	1.1	1	1.5	1.5	2.0
Fixed term contracts (% total employment)	:	2.4	4.3	3.7	3.2	4.4	4.8	4.0
FEMALE								
Total employment (000)	:	69	74	78	82	88	91	97
Self-employed (% total employment)	:	8.4	7.1	6.5	6.5	5.9	6.1	5.3
Part-time employment	:	16.2	21.8	20.5	21	22	24	25.0

(% total employment)								
Fixed term contracts (% total employment)	:	4.3	5.2	4.4	4.7	4.9	4.9	6.8

Table 12 - NETHERLANDS (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	6733	6891	7098	7310	7542	7766	7984	8182
Self-employed (% total employment)	14.9	14.9	16.3	15.8	15.7	15.2	14.7	14.3
Part-time employment (% total employment)	33.1	34.6	37.5	38.1	38.2	39	39.8	41.1
Fixed term contracts	7	8.3	9.3	10	9.9	10.6	10.5	11.9

(% total employment)								
MALE								
Total employment (000)	4132	4164	4204	4303	4417	4515	4586	4678
Self-employed (% total employment)	15.1	16.1	17.6	17.5	17.5	17	16.3	16
Part-time employment (% total employment)	15.6	15.4	16.8	17	17.3	18	18.1	19.2
Fixed term contracts (% total employment)	5.2	5.8	7.2	7.4	7.6	8.3	8.2	9.6
FEMALE								
Total employment (000)	2601	2727	2894	3007	3125	3250	3397	3503

Self-employed (% total employment)	14.6	13.1	14.4	13.4	13.3	12.8	12.5	12.1
Part-time employment (% total employment)	60.9	64	67.6	68.3	67.9	68.1	69	70.5
Fixed term contracts (% total employment)	9.9	12.3	12.5	13.6	13.2	13.9	13.7	15

Table 13 - AUSTRIA (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	3950	3959	3928	3906	3926	3956	4011	4046
Self-employed (% total employment)	22.3	21.8	20.4	20	19.7	19.5	19.2	18.9
Part-time	14	14	14.1	14	14.7	15.7	16.4	16.3

employment (% total employment)								
Fixed term contracts (% total employment)	6.2	6.3	6.4	6.3	6.3	6.3	6.4	6.4
MALE								
Total employment (000)	2244	2249	2242	2224	2225	2237	2262	2279
Self-employed (% total employment)	22.4	21.9	20.7	20.2	20.3	20.1	20.1	19.9
Part-time employment (% total employment)	4.5	4.5	4.1	3.7	4.1	4.3	4.2	4.1
Fixed term contracts (% total employment)	6.3	6.3	6.4	6.2	6	6.4	6.3	6.1

FEMALE								
Total employment (000)	1706	1710	1685	1681	1700	1717	1749	1766
Self-employed (% total employment)	22.2	21.7	20.1	19.8	19.1	18.7	18.2	17.6
Part-time employment (% total employment)	26.5	26.5	27.4	27.6	28.5	30.4	32.2	32.2
Fixed term contracts (% total employment)	6.2	6.2	6.3	6.5	6.6	6.3	6.6	6.9

Table 14 - PORTUGAL (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	4691	4647	4515	4538	4615	4739	4818	4913

Self-employed (% total employment)	26.5	26.9	29.2	29.6	29.4	29.4	28.4	27.5
Part-time employment (% total employment)	7.9	7.6	8.1	9.3	10.7	10.9	10.9	10.8
Fixed term contracts (% total employment)	10.8	10	8.7	9.7	11.1	12.4	13.6	14.8
MALE								
Total employment (000)	2679	2635	2529	2537	2569	2628	2650	2697
Self-employed (% total employment)	27.7	28.4	31.5	31.7	30.9	30.4	29.5	28.5
Part-time employment (% total	4.1	4.1	4.1	5.1	5.8	6	6.2	6.2

employment)								
Fixed term contracts (% total employment)	9.3	8.4	7.6	8.9	10.1	11.4	12.4	13.4
FEMALE								
Total employment (000)	2014	2013	1987	2002	2046	2111	2168	2216
Self-employed (% total employment)	25	24.9	26.3	27	27.6	28.1	27.2	26.2
Part-time employment (% total employment)	25	24.9	26.3	27	27.6	28.1	27.2	26.2
Fixed term contracts (% total employment)	12.9	12.2	10.2	10.7	12.3	13.7	15.1	16.5

Table 15 - FINLAND (source: *Eurostat*)

	1991	1992	1995	1996	1997	1998	1999	2000
ALL								
Total employment (000)	2337	2168	2042	2072	2139	2184	2230	2264
Self-employed (% total employment)	12.9	13.2	12.8	12.8	12.6	11.8	11.8	11.5
Part-time employment (% total employment)	10.1	10.4	11.7	11.5	11	11.4	12.1	12.3
Fixed term contracts (% total employment)	15.9	15.8	15.9	15.9	15.9	15.4	14.8	14.4
MALE								
Total employment (000)	1204	1111	1068	1089	1125	1154	1171	1190
Self-employed	16.5	17.3	16.7	16.5	16.3	15	15.3	15

(% total employment)								
Part-time employment (% total employment)	6.7	7.3	8.2	8	7.1	7.4	7.7	8
Fixed term contracts (% total employment)	13	12.8	12.9	13	13	12.3	11.7	10.9
FEMALE								
Total employment (000)	1134	1058	975	983	1014	1030	1059	1074
Self-employed (% total employment)	9.1	8.9	8.6	8.7	8.7	8.2	8.1	7.7
Part-time employment (% total employment)	13.6	13.7	15.4	15.3	15.3	15.9	16.9	17
Fixed term	19.1	19.1	19.2	19.1	19.1	18.8	18.2	18.2

contracts (% total employment)								

Table 16 - SWEDEN (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	4485	4294	4088	4065	4022	4071	4166	4271
Self-employed (% total employment)	4.6	5	5.6	5.5	5.6	5.5	5.6	5.6
Part-time employment (% total employment)	24.2	24.8	25.2	24.6	24.4	23.8	23.7	22.6
Fixed term contracts (% total employment)	7.7	8.3	11	10.8	11.3	12	12.6	13.1
MALE								

Total employment (000)	2318	2202	2107	2107	2104	2149	2182	2229
Self-employed (% total employment)	6.7	7.4	8.1	8	8	7.8	8.1	8.2
Part-time employment (% total employment)	7.3	8.1	9	9.1	9.2	9.1	9.8	10.6
Fixed term contracts (% total employment)	5.6	6.2	9.1	8.7	9	9.5	9.9	10.6
FEMALE								
Total employment (000)	2168	2093	1981	1958	1918	1922	1985	2043
Self-employed (% total employment)	2.5	2.6	3.2	3	3	3.1	3.1	2.9

Part-time employment (% total employment)	42.8	43.1	43	41.9	41.4	40.5	39.3	36
Fixed term contracts (% total employment)	10	10.3	12.9	12.8	13.6	14.7	15.4	15.7

Table 17 - UNITED KINGDOM (source: *Eurostat*)

	1991	**1992**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
ALL								
Total employment (000)	26357	25933	26215	26508	26967	27282	27610	27910
Self-employed (% total employment)	13	13.1	13.4	13.2	13	12.4	12.1	11.8
Part-time employment (% total employment)	22.6	23.3	24.3	24.8	24.9	24.7	24.8	25

Fixed term contracts (% total employment)	5	5.2	6.3	6.5	6.7	6.5	6.2	6.2
MALE								
Total employment (000)	14781	14372	14475	14597	14884	15074	15240	15388
Self-employed (% total employment)	17.8	17.6	18.2	17.8	17.2	16.3	15.9	15.4
Part-time employment (% total employment)	6.2	6.9	8.1	8.6	8.8	8.7	9.1	9.1
Fixed term contracts (% total employment)	3.6	4.1	5.3	5.3	5.6	5.5	5.4	5.2
FEMALE								
Total employment	11576	11561	11740	11911	12082	12208	12369	12522

(000)								
Self-employed (% total employment)	6.9	7.5	7.6	7.6	7.8	7.7	7.4	7.4
Part-time employment (% total employment)	43.5	43.7	44.4	44.7	44.6	44.5	44.2	44.6
Fixed term contracts (% total employment)	6.9	6.7	7.6	7.9	8.1	7.9	7.3	7.4

Table 18. % self-employment in EU Member States in 2000

1. Greece	44.0
2. Portugal	27.5
3. Italy	26.2
4. Austria	18.9
5. Belgium	17.7
6. Ireland	17
7. Spain	16.6
8. Netherlands	14.3
9. United Kingdom	11.8
10. Finland	11.2
11. Germany	10.2
12. France	7.4
13. Denmark	6.9
14. Luxembourg	6.8
15. Sweden	5,6

Table 19 – Self-employed in EU and Norway *(% of non-agriculture civil employment)*

Country	1980	1990	1995	1996	1997	1998	1999	2000	1980/ 2000 (2)
Austria	8.81	6.62	7.19	6.89	7.05	7.37	7.44	-	-1.37
Belgium	11.27	12.93	13.87	14.04	14.07	13.84	-	-	2.58
Denmark (1)	8.25	7.19	6.85	7.11	6.71	6.95	7.16	6.61	-1.64
Finland	6.04	9.29	10.16	10.26	10.00	10.00	9.85	9.71	3.67
France	10.71	9.32	8.58	8.48	8.36	8.28	8.18	8.06	-2.65
Germany	6.98	8.52	8.72	8.99	9.25	9.36	9.22	9.22	2.24
Greece	30.90	27.39	27.74	27.49	26.99	26.54	25.66	25.87	-5.03
Ireland	10.30	13.16	13.52	12.85	12.96	13.50	12.79	12.86	2.56
Italy	19.20	22.24	23.12	23.35	23.21	23.25	23.38	23.21	4.01
Luxembourg	9.19	7.12	6.08	6.01	5.92	5.75	5.62	-	-3.57
Netherlands	9.06	7.84	9.63	9.77	9.99	9.68	9.25	-	0.20
Norway	6.53	6.12	5.87	5.46	5.28	5.25	5.07	4.83	-1.69
Portugal	14.90	16.73	19.26	19.69	18.98	18.30	17.56	16.75	1.85
Portugal	14.90	16.73	19.26	19.69	18.98	18.30	17.56	16.75	1.85

Sweden	4.51	7.26	9.27	9.12	9.05	9.00	9.03	8.86	4.36
United Kingdom	7.11	12.41	12.19	11.87	11.83	11.49	11.15	10.83	3.72
EU15+Norway	10.87	12.64	12.78	12.82	12.78	12.68	12.43	12.54	1.63

Source: EIRO calculations on OECD Labour Force Data (non-agriculture civil employment), http:/www.oecd.org/

(1) 1981 instead of 1980 (2) where data for 2000 were not available, the most recent data were used

Table 20 – Proportion of "employers" in self-employment category (source: OECD, *Employment outlook 2000*)

	Employers	Own-account workers
Austria	68.8	31.2
Belgium	10.3	89.7
Denmark	50.1	49.9
Finland	42.3	57.7
France	49.7	50.3
Germany	53.0	47.0
Greece	28.8	71.2
Ireland	39.9	60.1
Netherlands	37.4	62.6
Portugal	35.6	64.4
Spain	29.6	70.4
Sweden	41.0	59.0
United Kingdom	25.8	74.2

Chapter 2

ECONOMICALLY DEPENDENT EMPLOYMENT

1. Introduction

In the previous chapter we established that the legal systems of EU Member States (and of countries that are not members of the EU) are based on a binary model comprising only two major legal categories, subordinate employment and self-employment – there is no third option.

This model for distinguishing between two catergories of employment, long used by all the European states, has remained substantially unchanged up to now. Indeed, there has been no change from binary to ternary, through the introduction of a third category, in any of the legal systems considered.

It is important to point this out in order to highlight the new features, which will be described in this chapter, where we shall examine forms of employment displaying characteristics of each of the two traditional categories.

From a strictly formal viewpoint, these forms of employment are usually classified as self-employment. However, there has been a growing trend toward providing (or extending) legal protection for them. In those countries where this trend has not yet resulted in an amendment of the laws, it is clear from the public debate that many are those wanting greater protection than the traditional binary model affords.

When describing the forms of employment which combine the features of subordinate employment and self-employment, we shall use the expression “economically dependent workers” or “quasi-subordinate workers”.

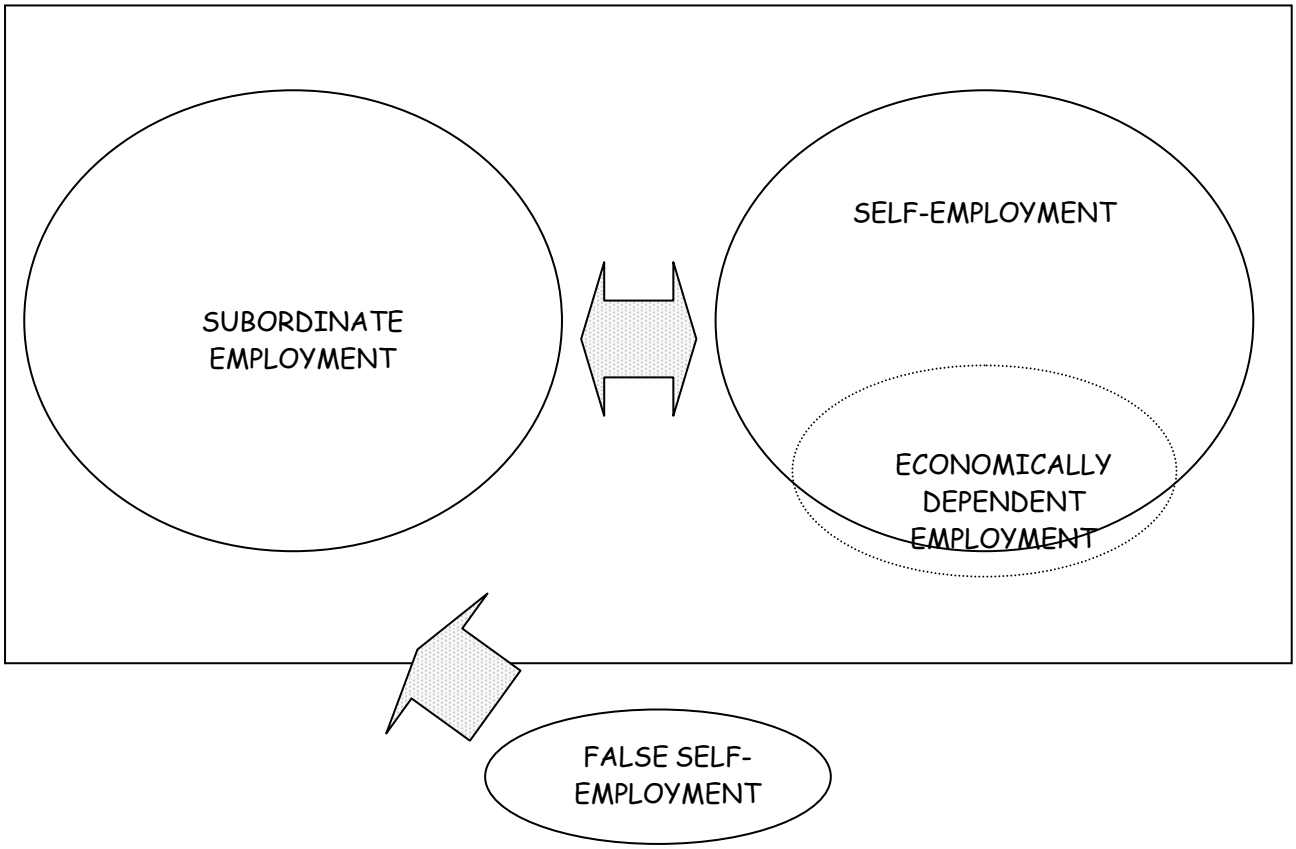
Before attempting to define that concept, a few preliminary details may help to clarify the situation:

a) Economically dependent workers are currently included in the self-employed category. Theirs is indeed self-employment, although with special features;
b) Economically dependent workers must not be confused with false self-employment, as they differ legally, socially and economically (see Chapter 1, § 6);

c) The concept of economically dependent worker is, at present, open and only partly defined, as the precise type of work involved cannot be identified.

The distinction between subordinate employment and self-employment still stands, but the trend is to identify a sub-group in the latter category, as shown in Figure 1.

Figure 1



We must now look at how the European states define and, if necessary, regulate economically dependent employment.

2. The economically dependent worker concept

European countries can be divided into those that use the concept of economically dependent worker and those that do not.

A) Countries with a definition of economically dependent or quasi-subordinate workers are:

- ITALY

- GERMANY
- UNITED KINGDOM

We can also include in this group those countries which do not have a legal definition of such workers, but where a wide-ranging debate is underway about whether or not legal measures should be introduced to cover them:

- AUSTRIA
- DENMARK
- FINLAND
- FRANCE
- GREECE
- IRELAND
- NORWAY
- NETHERLANDS
- PORTUGAL

B) Other countries with no definition of economically dependent worker and no significant internal political or social debate on the matter:

- BELGIUM
- LUXEMBOURG
- SPAIN
- SWEDEN

2.1 Countries with a legal definition of economically dependent worker

The concept of economically dependent worker is recognised in a majority group of countries (Group A). Within that group are those countries where the concept is covered by legal rules and where it is possible to identify the legal characteristics of economically dependent employment or the rules applicable to it.

The Member States where the concept of economically dependent worker is most clearly defined are Italy and Germany where, for the past two decades at least, the term "quasi-subordinate employment" has been used, sometimes in legal theory, sometimes by the law-makers. Therefore, these countries are in the privileged position of being able to assess the factors relating to the situation and the solutions that have been provided in law.

It is also worth mentioning the interesting developments in the United Kingdom, where recent legislation has introduced a third category, that of “worker”.

ITALY

The concept

The concept of economically dependent worker or quasi-subordinate worker, which is the more accurate term, has existed in Italian law for thirty years now. The first reference to it in legislation dates back to the reform of the procedural rules (*processo di lavoro*) which dealt not only with subordinate employment, but with agency contracts, sales representation and other collaboration relationships involving continuous and coordinated work, performed mainly in a personal capacity (Art. 409, No. 3, Civil Procedure Code). It was in this code that the term “quasi-subordinate employment” was introduced to define forms of self-employment displaying special characteristics (see above), which made it similar to subordinate employment.

The extension is not limited to the procedural rules but concerns also invalidity of relinguishments and settlements concerning quasi-subordinate workers' rights, stemming from legal provisions and collective agreements (Art. 2113, Civil Code).

However, one cannot conclude from this that quasi-subordinate employment, in legal terms, is synonymous with the concept of a “weaker contracting party”: the rules applicable to quasi-subordinate workers are only those prescribed by law, and contractual weakness cannot become the prerequisite for extending to them, by way of interpretation, other protection measures applicable to employees.

The question of quasi-subordinate employment has attracted growing interest in recent years, mainly as a result of the pensions reform in 1995 (Act No. 335 of 1995), which extended pension rules provided for subordinate employees to the self-employed. The reform act also provided for the establishment of a special public pension fund for quasi-subordinate workers.

Subsequently, still in the social security sector, the rules governing occupational accidents and diseases were extended to cover quasi-subordinate workers. Finally, for tax purposes, quasi-subordinate workers’ incomes are treated in the same way as employees’ incomes.

However, the extending of subordinate employees’ protection to quasi-subordinate workers has not meant that the two are recognised as equals when calculating social security contributions. For Italian quasi-subordinate workers, these contributions are calculated as

follows: one third of the contribution must be paid by the worker, with the remaining two thirds paid by the client.

Despite the extension of protective measures that has taken place over time, one cannot say that quasi-subordinate employment is a third category of employment, different from employment or self-employment. In practice, it is still included in the self-employment category.

In Italian law, the definition of economically dependent employment is based on three main characteristics:

a) continuity
b) coordination
c) the mainly personal nature of the work

We shall now analyse each of these characteristics in turn.

Continuity means that the work is intended to meet a long-term requirement of the other party and that it will take time to complete; in other words, it will not be over in an instant (i.e. the contract will be a lengthy one). However, since this is self-employed work, aimed at achieving a result, one cannot speak of a long-lasting obligation in the legal sense. It is the *de facto* continuity of the service that is important. In practice, even in cases where although the work is completed in a single effort, the worker may have spent considerable time preparing it, so continuity may be said to exist, i.e. there is a relationship of temporary duration. Similarly, the criterion will be met in cases where the "work" is repeated over time.

Coordination of the work by the client must be distinct from employer control (*eterodirezione*), otherwise the work could fall within the subordinate employment category. In structural terms, coordination, unlike control, does not imply a close link in terms of the way the work is performed in space and time. Coordination is a functional relationship, a necessary connection between the execution of the work and the organisation of the work by the beneficiary (entrepreneur or not). In other words, the obligation on the part of the quasi-subordinate worker to comply with requirements is not as strong as it is for an employee.

The *mainly personal nature* of the work to be done must be understood either in quantitative terms, i.e. provision of capital or other workers, or in qualitative terms, i.e. the importance of the service for the business involved.

With regards to the quantitative aspect, the fact that the work has to be of a <u>mainly</u> personal nature means that it is possible to exclude activities that are purely entrepreneurial. For instance, the following must be excluded: services rendered in the form of a company (partnership or joint stock company), or services rendered by a natural person whose job is to direct the work of others without being personally involved in that work.

As regards the qualitative aspect, the concept of "mainly personal" becomes more attenuated: in some cases, the condition can still be met even though a third party is involved, provided that – and we are thinking mainly of professional people – the worker's contribution is essential and irreplaceable for the preparation, theoretical knowledge and experience.

Protection

Quasi-subordinate employment falls within the self-employment category, but given the characteristics we have just examined, it is clear that such workers are in a weak position and depend socially and economically on the other party. Because these workers do not fit into the general category, Italian legislation has provided them with some specific protection measures.

a) Rights in matters concerning the employment relationship:

- protection in the event of relinguishments and settlements concerning binging rights[14]
- use of the procedural rules (legal process concerning labour law)[15]

b) Rights in matters concerning social security:

- pension[16]
- protection against occupational accidents and diseases[17]
- maternity protection[18]
- sickness benefits[19]

Collective bargaining

The Italian case is particularly interesting. First, Italy has legislation and a particularly intense legal debate is under way surrounding the question of economically dependent employment. Second, Italy's major trade unions (CGIL, CISL and UIL) have in recent years set up their own organisational structures to represent the interests of economically dependent

[14] Art. 2113 Civil Code.
[15] Art. 409 Code of Civil Procedure.
[16] Art. 2, para. 26-31, Act 335 of 1995.
[17] Art. 5, legislative decree No. 38 of 2000.
[18] Art. 59, Act No. 447 of 1997.
[19] Act No. 488 of 1999.

workers. These structures (NiDIL-CGIL[20], ALAI-CISL[21], CPO-UIL[22]) have begun to develop collective bargaining specifically for economically dependent workers.

A look at the collective agreements drawn up so far can provide an idea of the type of protection that can be put in place through collective bargaining.

In terms of content, the collective agreements cover individual profiles of relationships between economically dependent workers and the companies concerned, and profiles of trades unions, in an effort to establish a system of stable trade union relations in this area.

Content of collective agreements for economically dependent workers

Employment relationship

- Contract in writing
- Duration of relationship
- Tasks carried out
- Working hours and conditions
- Pay and payment conditions
- Health and safety at work
- Suspension of the relationship (illness, accident, family reasons)
- Training
- Ending the relationship
- The worker's duties

Union rights

In most cases collective agreements undertake to ensure that economically dependent workers are guaranteed union rights compatible with their status and are able to participate in in-house union activities.

GERMANY

The concept

[20] See http://www.cgil.it/nidil/
[21] See http://www.cisl.it/alai/cococo.htm
[22] See http://www.uil.it/cpo/

Germany is another country where the question of economically dependent work is most well known and debated. Here too, it is possible to trace the steps taken to find a suitable legal framework and rules and regulations applicable to this type of work.

As was the case in Italy, the first German law to deal with economically dependent workers who, in the German system, are called "workers similar to employees" (*arbeitnehmeränliche Person*), is a kind of procedural law. It extended to these workers the procedural protection that applies to employees.

The Procedural Act on labour law (*Arbeitsgerichsgesetz*, § 5) includes among employees "other persons who, because of a lack of economic autonomy, are treated as dependent workers".

The same terms are used in the Holidays Act (*Bundesurlaubsgesetz*, 1963, § 2). However, perhaps the most relevant legislation is the 1974 Collective Agreement Act (*Tarifvertraggesetz*-TVG, §12a). This Act extends its scope of application to economically dependent persons in need of social protection similar to that given to employees, in cases where these individuals carry out work for the benefit of other persons under a service or work contract, personally and largely without the collaboration of subordinate employees, and :

a) work mainly for one individual, or
b) receive more than half their total occupational income mainly from one individual; in the event that this cannot be known in advance, and provided that there is nothing to the contrary in the collective agreement, their earnings shall be based on the previous six months. Should the duration of the activity be less than six months, earnings shall be calculated for the whole of that period.

Commercial agents are excluded from this provision.

The Holidays Act introduced a broad definition of quasi-subordinate worker to German law. However, the debate is still ongoing regarding the introduction of a general definition of *arbeitnehmeränliche Person*.

More recently, protection against sexual harassment in the workplace was extended to *arbeitnehmeränliche Personen* under a 1994 Act (*Beschaftigtenschutzgesetz*, § 1).

In 1998 and 1999 social security legislation was amended (*Sozialgesetzbuch-SGB*), § 7, book IV). In an attempt to combat false self-employment a number of presumptions were introduced to broaden the concept of subordinate employee (see Chapter 1 § 6). This resulted in full social security cover for both employees and *arbeitnehmeränliche Personen*.

A report drawn up in Germany by a group of associations operating in the commercial sector and the Chambers of Commerce Association[23] has suggested that the introduction of these amendments has had negative effects and that they brought about the sudden termination of many self-employment contracts or jeopardised their extension. The report includes the following examples to illustrate this situation:

a) *Commercial agent in the capital goods sector* A commercial agent had worked for a medium-sized mechanical engineering company for many years. In 1999, in the wake of the legislative reform, the engineering company terminated the representative's contract for fear that it would have to pay his social security contributions. This stemmed from the fact that the agent had been working very closely with the company; he had even rented a small office on company premises from which he managed his principal's whole distribution system. The agent had explicitly requested this close cooperation so that he could deal more effectively with customers' enquiries. With his further qualification as a mechanical engineer he was even able to take account of customers' requests in planning.

b) *Direct selling* The regulations concerning what is termed "false self-employment" led to considerable uncertainty among the sales representatives of the Federal Direct Selling Association's member companies, causing a significant decline in turnover. For instance, a large family business, employing sales representatives to distribute cleaning equipment and fully fitted kitchens, even had to cut back its production as a result of losing many of its sales representatives due to the climate of uncertainty. Although amended several times, the after-effects of these reforms are still being felt.

c) *Non-distribution sectors* Self-employed persons in the building, construction and advertising sectors, freelance contributors to the media and data processing experts complained about the withdrawal or cancellation of orders and the failure to extend contracts. So great was the principals' fear of the contractual relationships being classed as false self-employment and that they would be liable to pay large social security contributions, they terminated the relationships, despite the fact that there was a good chance these would not be classified as false self-employment. However, there was considerable uncertainty regarding the legal position.

[23] Federal Association of Insurance Intermediaries (BVK), The German Direct Selling Association, The National Federation of German Trade Associations for Commercial Agencies and Distribution (CDH), The German Association of Chambers of Industry and Commerce (DIHK), Practical experience report on Economically dependent work / Parasubordination: legal, social and economic aspects, Bon/Berlin 18.07.2002.

In the main, in both German legal theory and practice quasi-subordinate workers are considered as belonging to the self-employed category and, more precisely, as forming a sub-category in need of greater protection than that provided to most self-employed persons. The characteristics of this category of worker are set out in many legislative provisions, but there is no general definition, nor can the individual indicators below be used across the board.

- absence of economic independence[24];
- economic dependence[25], different from the personal dependence (*persönliche Abhängigkeit*) of subordinate employees;
- need for social protection[26], an indicator of economic dependence;
- work performed personally, without the aid of subordinate employees[27]
- work done mainly for one person or worker relies for more than half of his/her total income on one single person[28].

Protection

Some of the protection provided to employees are extended to quasi-subordinate workers. They concern:

- procedural rules concerning labour law[29]
- collective agreements[30]
- holidays[31]
- social security (pension)[32]

UNITED KINGDOM

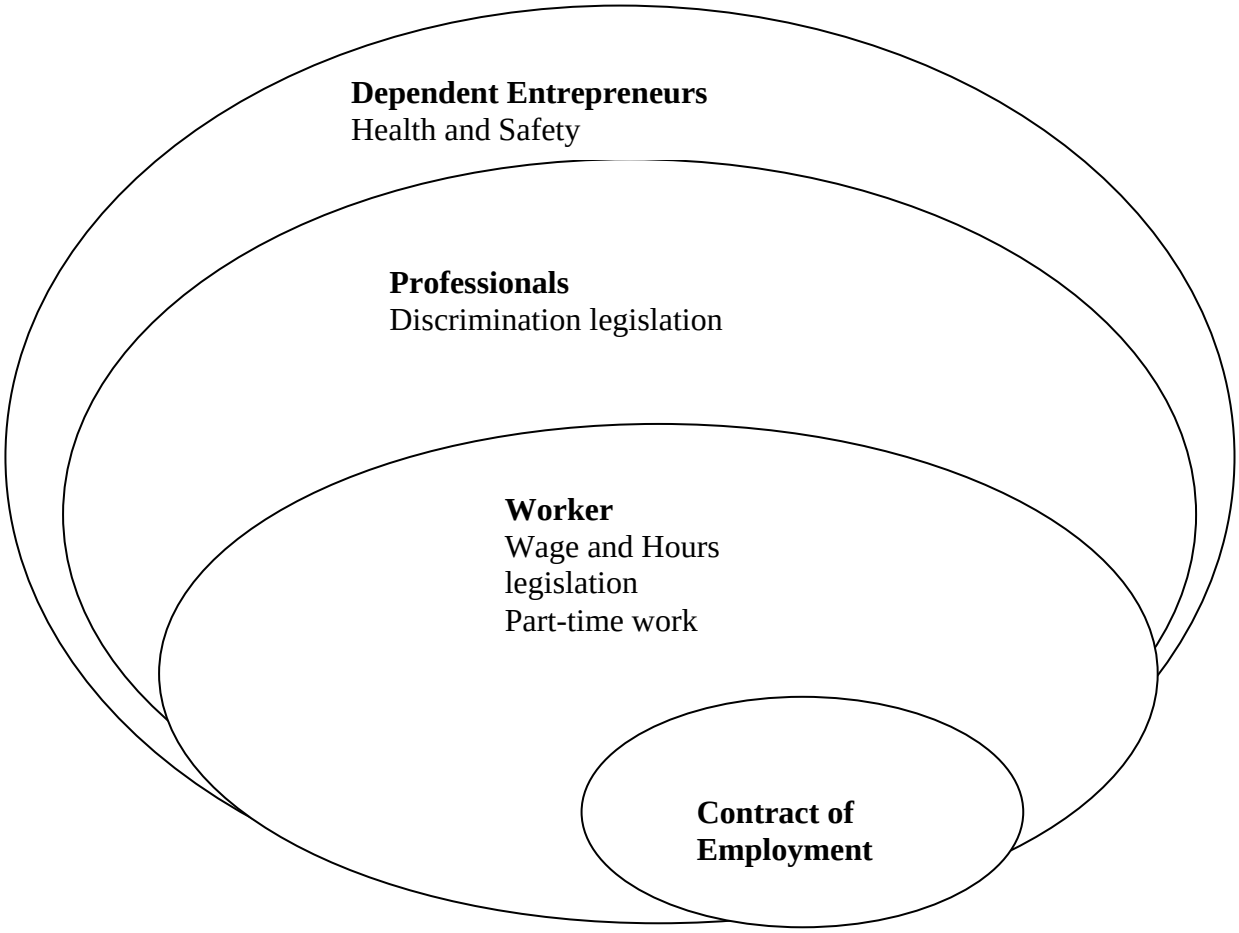
The concept

Even though there is no definition of quasi-subordinate worker in the UK, more recent English legislation has introduced the category of "worker", lying somewhere between (subordinate) employee and self-employed person.

[24] Legal Process concerning Labour Act (*Arbeitsgerichtsgesetz* 1953 § 5); Holidays Act (*Bundesurlaubsgesetz*) 1963 § 2; Health and Safety Act (Arbeitsschutzgesetz) § 2, n. 3.
[25] Collective Agreement Act (*Tarifvertraggesetz*-TVG) §12a.
[26] Collective Agreement Act (*Tarifvertraggesetz*-TVG) §12a.
[27] Collective Agreement Act (*Tarifvertraggesetz*) §12a; Social Security Code (*Sozialgesetzbuch-SGB*), § 7, Book IV.
[28] Collective Agreement Act (*Tarifvertraggesetz*) §12a; Social Security Act (*Sozialgesetzbuch-SGB*), § 7, Sub-section IV, Book IV.
[29] *Arbeitsgerichtsgesetz* 1953 § 5
[30] *Tarifvertraggesetz*- TVG, §12a
[31] *Bundesurlaubsgesetz* 1963 § 2
[32] *Sozialgesetzbuch-SGB*, § 7, Sub-section IV, Book IV

To be more precise, the legislation uses the term "worker" to cover a wider category of subordinate employees, as well as cases whereby an individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual[33].

Recent legislation sets out a system of protection organised in concentric circles, moving away, to some extent, from the traditional binary division of subordinate employment and self-employment. Below is a graphic representation of the scope of the protection which, traditionally, was provided only to employees.



N.B. The term "dependent entrepreneurs" may be translated by the term "micro-entrepreneur" or "entrepreneur working for a single client", used in this report. The term "professional" describes the self-employment to which the Sex Discrimination Act 1975, section 82(1) applies, insofar as the legislation requires only that the work be done personally by the individual.

[33] See Employment Rights Act 1996, s. 230(3); National Minimum Wage Act 1998, s. 54(3); The Working Time Regulations 1998, SI 1998/1833, reg. 2(1); The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, SI 2000/1551, Art. 2.

Protection

As the above figure shows, in a number of areas, traditionally reserved for subordinate employment only, the scope of application of the following English laws has been extended to cover "workers":

- discrimination[34]
- national minimum wage[35]
- working time[36]
- part-time work[37]

2.2. Countries where a debate is under way on the question of economically dependent employment

Even though the legislation in other countries has not yet dealt with the concept of economically dependent employment, the question is attracting growing attention. It is also widely thought that, in many cases, it is inappropriate to classify certain forms of work as self-employment as this would mean that some minimum guarantees would end up being denied to individuals who find themselves in what we define as a position of economic dependence.

NETHERLANDS – A wide-ranging debate about economically dependent workers is under way in the Netherlands. "Economically dependent workers" are workers who are officially self-employed but who rely on a single client for their income and perform tasks which are normally performed by employees.

There are no specific laws or legislative proposals designed to change the demarcation between subordinate employment and self-employment by introducing an economically dependent worker status. On the contrary, it is thought preferable to introduce more protection for self-employed persons without employees of their own, which will also cover economically dependent workers.

[34] Equal Pay Act 1970 s. 1(6) a; Sex Discrimination Act 1975 s. 82; Race Relations Act 1976 s. 78; Disability Discrimination Act 1996 s. 68.
[35] National Minimum Wage Act 1998, s. 54(3).
[36] The Working Time Regulations 1998, SI 1998/1833, reg. 2(1).
[37] The Part-time Workers (Prevention of Less Favourable Treatment) Regulations SI2000/1551, art. 2.

DENMARK – The concept of economically dependent worker in Danish law corresponds to the idea of a freelance worker, i.e. an individual who works for one or a few clients and does not employ anyone him/herself. These workers form a group distinct from the self-employed, in the strict sense of the term, and employees. They work mainly through outsourcing and are involved in activities such as book-keeping, selling, and advisory services in the information technology sector. They are often integrated into the company organisation.

There are few legislative provisions to protect freelancers: health and safety in the workplace, maternity leave and the relevant daily allowances.

Other countries with an ongoing debate, especially between the social partners, on the need to extend the protection offered to employees to economically dependent workers or to provide them with similar protection, are: Finland, France, Greece and Portugal.

3. Workers who display the characteristics of both employees and the self-employed

It must be borne in mind that there are a number of situations where workers 'formally' fall within either category (subordinate employment/self-employmen) and, in such cases, where the work has characteristics of both categories, the legislation defines the category to which any given case belongs. Below are some examples:

FRANCE – French labour legislation includes the following types of workers in the subordinate employment (employee) category:

- travelling salesmen and sales representatives (Art. L. 751-1 labour code); commercial agents are self-employed, although they do similar work;
- journalists (Art. L. 761- 2 labour code) ;
- entertainment workers (Art. L. 762-1 labour code) ;
- persons whose occupation mainly involves receiving orders or the procurement, handling, maintenance or transporting of goods for one commercial or industrial company, who work in premises provided by the company and whose working conditions are determined by the company (Art. 781-1 labour code).

ITALY – Italy has “special” definitions of subordinate employment.

- Working from home: this is regarded as subordinate employment even if it lacks some of the features of this category, i.e. workers are not under the direct control of an employer and are not tied to fixed working hours;

- The legal definition of employment in sport (Act No. 91 of 1981) makes no reference to control by an employer, but great importance is attached to three other aspects: the existence of a contract for preparation and training; the sportsperson's work must not be limited to one event, meeting or match; the activity must occupy the sportsperson for more than eight hours per week.

SPAIN – The Spanish *Estatuto de los trabajadores* (Workers' Act) also defines "special" types of subordinate employment scenarios which do not fall under the general definition. These include work in sport, entertainment workers and persons involved in certain managerial capacities.

At the opposite end of the spectrum, Spanish law [art. 1.3, *g*), Workers' Act] states that road haulage contractors owning a vehicle with a capacity in excess of 2 tonnes and holding the required administrative licence shall be classified as self-employed.

Commercial agents

An example of a worker who belongs to the self-employed category but whose work closely resembles the legal and case law definition of a subordinate employee, is the commercial agent. Examples of the definitions used by the Member States help to clarify this matter.

For instance, the German commercial code (§ 84 art. 1, clause 1, HGB) defines a commercial agent as one who, as an independent person engaged in business, is regularly entrusted with procuring or concluding business on behalf of another person or for a company engaged in business (principal). A person is said to be self-employed if he/she is basically free to organise his/her activity and to determine his/her work schedule.

In the Italian civil code (Art. 1742-1753 c.c.), an agency contract is one where one party undertakes to promote the business of another on a continuing basis and in a given area in exchange for payment. The agent must carry out the work in line with the instructions given.

Spain regards a commercial agency contract as a self-employment contract, but the work is performed for the benefit of third parties and the agent must follow the instructions issued by the principal.

At Community level, the rules governing commercial agents were harmonised through Directive 86/653/EC of 31 December 1986 which, in line with the approach common to all Community legislation, does not take a position with respect to the classification of the relationship, but lists the agents' rights and obligations. However, in implementing the

principles contained in this Directive, the Member States retained the traditional classification of the commercial agent as a self-employed person.

On the subject of insurance agents and intermediaries a proposal for a directive has recently been put forward[38] to replace Directive 77/92/EC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers against compensation. The proposal excludes from "insurance mediation" the activities carried out by insurance companies and by employees of an insurance company acting under the responsibility of that company (Art. 2.3, second paragraph).

The exclusion from the scope of application of insurance agents who are employees and the implication that the insurance agents referred to in the proposal are self-employed has led many to maintain that economic dependence cannot be the key criterion for distinguishing between self-employment and subordinate employment, given that the Community legislation has classified insurance agents as self-employed in spite of their economically dependent status.[39]

Two conclusions may be drawn from this. First, as highlighted above, commercial agents belong to the self-employed category; the Community legislators agree with this as they, too, classify insurance agents as self-employed persons. Second, in this report, economic dependence is not regarded as a criterion for determining the difference between self-employment and subordinate employment. The criteria for this are employer control and a number of secondary indicators of subordinate employment (see Chapter 1, § 5). The Community legislation governing insurance agents must be seen as confirmation of the approach taken in this report.

4. Sectors, companies and types of jobs where economically dependent workers are found

Economically dependent employment is closely connected with the practices (new and not so new) of outsourcing and contracting out used by companies. These practices serve as organisational models which involve the use of forms of horizontal integration – through commercial contracts - between the various activities that are part and parcel of a business

[38] Common position defined by the Council on 18 March 2002 in view of the adoption of the Proposal for a European Parliament and Council Directive on insurance mediation EC No. 34/2002 of 18 March 2002, in OJ 2002 C 145 E/01 of 18 June 2002.

[39] Federal Association of Insurance Intermediaries (BVK), The German Direct Selling Association, The National Federation of German Trade Associations for Commercial Agencies and Distribution (CDH), The German Association of Chambers of Industry and Commerce (DIHK), Practical experience report on Economically dependent work / Parasubordination: legal, social and economic aspects, Bonn/Berlin 18.07.2002.

activity. It is where companies have made this organisational choice that we find the jobs and sectors where economically dependent employment is most common.

Research shows that the growth of outsourcing practices is accompanied by a rise in types of self-employment termed "dependent outsourcing" where, although the workers are officially considered as self-employed, the conditions for carrying out their activity are in many cases similar to those of employees (dependent self-employed workers). Empirical evidence confirms this: research in 10 European countries has shown that 13% of companies resorted to outsourcing for work formerly performed by employees[40].

Franchising contracts provide a good example of how outsourcing can lead to a rise in economically dependent self-employment.

German and French case law has examined the subject of the economically dependent status of franchisees, i.e. persons who sell goods or services for a company which grants them the right to use its brand name. The French judges chose to treat the franchisees as subordinate employees, ignoring the legal link of subordination and basing their decision solely on the workers' dependent status. In French law this assimilation/extension is made possible through Article 781-1 of the labour code, referred to above (see Chapter 1, § 6): once the conditions set out in this article are met there is no need to find a link with subordination in the legal sense[41].

It is probably not by chance that, as the table below shows, France and Germany are the European countries with the largest number of franchisees:

Table 21 – Number of franchisees (source: European Franchising Federations)

	1992/93	**1995/96**
Austria	3000	3000
Belgium	3500	3500
Denmark	500	2500
France	25700	25750
Germany	20000	22000
Italy	18650	21390
Netherlands	11975	11910
Portugal	23000	13161
Spain	23000	13616
Sweden	9000	9150

[40] V. K.P. O'Kelly, *Non-standard Work in Europe. Some Results From the European Foundation EPOC Survey*, in R. Blanpain (ed.), *Non-Standard Work and Industrial Relations, Bulletin of Comparative Labour Relations, The Hague: Kluwer Law International*, 1999, 35.

[41] V. Jeammaud, *L'assimilation de frachisés aux salariés*, in Droit social, 2002, n. 2, p. 158 ss.

United Kingdom	24900	25700

At present, no systematic, exhaustive comparative or national data are available on the production activities and sectors employing economically dependent workers.

However, a recent EIRO study[42] provides some useful information: the situation with respect to sectors, job types and conditions in EU Member States is rather varied, although a common denominator may lie, as mentioned earlier, in the convenience economically dependent work offers to employers in the form of outsourcing/contracting out.

The EIRO study shows that economically dependent work is most widespread in the services sector:

- hotels and catering establishments
- media (press, radio and television and publishing)
- education and training
- ICT
- marketing, telemarketing, advertising
- entertainment
- administration and book-keeping
- social services

But these practices are also used in more traditional sectors such as transport, building construction and home working.

One way of proceeding is to take an indirect approach and look at collective bargaining. In countries such as Italy, where this system is well-developed, we can find data other than those obtained from comparative analyses. In Italy, the collective bargaining concerning economically dependent workers takes place at company level. Only in rare cases is it country-wide. The types of companies that have signed agreements covering economically dependent workers are to be found in the following sectors:

- Call centers
- Market research companies
- Telemarketing companies
- Public authorities
- Non-profit organisations

[42] EIRO, *Comparative study on "Economically dependent workers"*, http://www.eiro.eurofound.ie

In Italy, at least, collective bargaining has shown how economically dependent employment affects the public as well as the private sector. In public sector economically dependent workers are often taken on to fill gaps until public competitive examinations have been held and the successful candidates given employment contracts.

The jobs and occupations covered by such agreements are extremely varied:

- Telephone operators, interviewers and market researchers
- Teachers
- Computer technicians
- Professionals (journalists, translators, chemists, biologists, engineers, etc.)

Attention should also be drawn to Austria where a collective agreement was signed in 1999 covering dependent journalists, including freelancers. For the latter, the contract provides for a minimum monthly salary for 14 months per year. Still on the subject of collective agreements, the Austrian trade union GPA (*Gewerkschaft der Privatangestellten*) recently launched a scheme for economically dependent workers called work@flex. Those joining the scheme not only become members of the GPA union, but can take out an insurance policy protecting them from loss of income in the event of illness.

A similar experience was recorded in Norway where the national union of journalists (*Norsk Journalistlag*) signed an agreement with the two major Norwegian television channels which also covered freelance workers. The main items dealt with under these agreements were payment terms and conditions and income protection in the event of illness.

A recent survey conducted in Italy[43] on the occupational breakdown of economically dependent workers confirmed the view that the world of economically dependent workers is very extensive and heterogeneous.

The data in the following table are taken from the data bank of the public institute, INPS, which manages the pension funds of economically dependent workers throughout the country.

[43] IRES, *Il lavoro atipico in Italia: le tendenze del 2001*, working paper n. 3, 2002, http://www.rassegna.it/2002/lavoro/documenti/rapporto-nidil.htm

Table 22 – Occupations of INPS fund members (10-13% per sex) (in percentages)

	North			Central			South			Islands		
	M	F	T	M	F	T	M	F	T	M	F	T
Undeclared	45.3	54.7	100.0	58.0	42.0	100.0	41.8	58.2	100.0	56.1	43.9	100.0
Administrator, mayor, auditor	76.8	23.2	100.0	75.7	24.3	100.0	82.7	17.3	100.0	81.2	18.8	100.0
Residential building administrator	70.4	29.6	100.0	68.8	31.2	100.0	77.2	22.8	100.0	72.8	27.2	100.0
Administrative, archiving, translation services	26.0	74.0	100.0	33.1	66.9	100.0	38.0	62.0	100.0	37.4	62.6	100.0
Technical assistants (machinery, plant)	87.6	12.4	100.0	85.7	14.3	100.0	89.2	10.8	100.0	86.3	13.7	100.0
Newspaper & other media contributors	55.4	44.6	100.0	56.7	43.3	100.0	63.6	36.4	100.0	71.4	28.6	100.0
Corporate, tax and administrative advisors	59.9	40.1	100.0	59.7	40.3	100.0	64.8	35.2	100.0	64.3	35.7	100.0
Beauty, hygiene	25.5	74.5	100.0	27.9	72.1	100.0	47.0	53.0	100.0	43.1	56.9	100.0
Training, education	45.2	54.8	100.0	41.9	58.1	100.0	41.6	58.4	100.0	44.6	55.4	100.0
Brokerage, loan recovery, serving of official documents	63.2	36.8	100.0	60.4	39.6	100.0	66.1	33.9	100.0	38.4	61.6	100.0
Fashion, art, sport	47.5	52.5	100.0	48.8	51.2	100.0	54.2	45.8	100.0	53.6	46.4	100.0
Membership of boards and committees	83.6	16.4	100.0	85.2	14.8	100.0	88.5	11.5	100.0	83.0	17.0	100.0
Health, welfare	24.0	76.0	100.0	30.0	70.0	100.0	26.0	74.0	100.0	17.3	82.7	100.0

Market research, marketing, advertising	26.2	73.8	100.0	27.0	73.0	100.0	34.2	65.8	100.0	25.4	74.6	100.0
Transport and haulage	81.3	18.7	100.0	86.9	13.1	100.0	77.8	22.2	100.0	90.6	9.4	100.0
Tourism, promotion, exhibitions, markets	35.3	64.7	100.0	37.8	62.2	100.0	34.6	65.4	100.0	29.6	70.4	100.0
Door-to-door selling	23.1	76.9	100.0	39.2	60.8	100.0	21.6	78.4	100.0	33.3	66.7	100.0
Other (unspecified)	58.8	41.2	100.0	57.4	42.6	100.0	59.9	40.1	100.0	58.1	41.9	100.0
Post-graduate research	49.4	50.6	100.0	53.1	46.9	100.0	40.7	59.3	100.0	100.0	0.0	100.0
Total	60.0	40.0	100.0	61.6	38.4	100.0	60.4	39.6	100.0	60.3	39.7	100.0

Source: prepared by IRES from INPS data, 1999

It is not possible at present to provide similar statistical data on the occupations and distribution of economically dependent workers in the other Member States. There has been no comparative research on the subject and, with the exception of the figures pertaining to Italy, there are no available national statistics. The only available study, to which we have already referred, is the one conducted by EIRO[44].

The main reason for this is that, until now, there has been a lack of legal, sociological and economic elements on which to base an operational definition of economically dependent worker and thence to proceed with a cognitive survey and collect homogeneous, comparable data.

It has been established that the term economically dependent employment covers a wide variety of occupations and that, from the legal viewpoint, in the absence of efforts to clarify the terminology and by systematically classifying jobs under the traditional categories of employment and self-employment, the exchanging and transfer of information between judicial systems and national experiences is proving extremely difficult.

[44] EIRO, *Comparative study on "Economically dependent workers"*, http://www.eiro.eurofound.ie

5. International comparisons

The problem of economically dependent employment was covered in the debate on what is termed "contract labour" which took place at the International Labour Organisation (ILO).

Here, the first and most obvious difficulty concerned terminology: for the ILO the term "contract labour" describes a number of different ways of employing workers other than under a normal employment contract between the workers concerned and the company for which they work, lying somewhere between labour law and commercial law.

The 85th Session of the ILO Conference (1997) proposed a Convention which covered persons performing work personally under conditions of dependency on or subordination to the user enterprise, where such conditions are similar to those that characterise an employment relationship under national law and practice, but where the person who performs the work does not have a recognised employment relationship with the user enterprise (art. 1).

Although research conducted by the ILO concluded that in most of the countries surveyed there is no legal intermediate category between subordinate employment and self-employment, the view is that dependency within independence does exist and is very widespread.

The suggested criteria on which to base a definition of dependent self-employment (dependency within independence) basically concern links between contractors and principals, conditions of access to or use of basic and specific equipment for the job or means of production, the ownership or non-ownership of such equipment or means, and the authority to organise and manage work or activities carried out by third parties, or work performed for only one or a small number of clients[45].

The ILO's aim is to extend a number of guarantees beyond the traditional limits of labour law by identifying those forms of work which lie somewhere between employment and self-employment, where workers find themselves in a situation of socio-economic dependence and in need of adequate protection. The following two strategies have been proposed:

a) To extend the scope of application of labour law so that it covers relationships other than subordinate employment;

[45] ILO, *Meeting of Experts on Workers in Situations needing Protection (The employment relationship: Scope)*, Basic technical document, Geneva 15-19 May 2000, website: http://www.ilo.org/public/english/dialogue/govlab/papers/2000/mewnp/mewnp.htm

b) To introduce a number of basic protection measures for all forms of work where a person provides a service for another person, irrespective of the legal arrangement under which the service takes place.

The proposed Convention prepared by the ILO set out the rights of workers under a "contract labour" arrangement (art. 5):

- freedom to join a union
- right to collective bargaining
- freedom from discrimination
- age limits
- pay
- health and safety at work
- protection against occupational accidents and diseases
- social security

However, the aforementioned proposed Convention was not approved, although it was agreed (1998) that further thought and research should be focused on the question of economically dependent self-employment at a future session of the ILO Conference with a view to the adoption of a Convention on the matter.

6. Concluding remarks

In the EU Member States, the demarcation between subordinate employment and self-employment remains unchanged. None of the States have a proper third category of workers somewhere between the two. Despite the fact that there is clearly a need to update the distinction between the two legal categories to bring it into line with changes in work organisation and in production activities, there are at present no indications that the binary system will give way to a system based on three categories of workers.

However, now that note has been taken of this 'element of stability' in European legal systems, the wide diffusion of different forms of work that we define as economically dependent, must be recognised.

Some countries have a legal definition of an economically dependent worker. In many other countries, however, economically dependent employment is well-known and debated. Once this has been acknowledged it is possible to arrive at some conclusions which help identify economically dependent employment.

THE CONCEPT

The state of *subordination* does not exist in legal terms, but the state of economic *dependence* does, although it needs to be defined. The factors used by Member States to define that state are:

- in the main the work is done personally and the workers do not employ anyone themselves
- continuity in time
- the work must be coordinated with the client's activity
- the work is done for one principal only, on whom the worker relies for most of his/her income.

On the basis of these factors, economically dependent work would seem to be a form of self-employment, although it differs from that of an entrepreneurship.

Another important factor that helps not only to identify, but to explain the rise in economically dependent work is the frequently-used practice of outsourcing or contracting out. This means that many company activities once done by subordinate employees are now increasingly entrusted to self-employed persons under conditions which give rise to that state of economic dependence which the countries are trying to describe through the use of the factors listed above.

There is some uncertainty about the definition of economically dependent employment. First of all, the legal framework is weak and fragmented, but there is also some confusion about the actual name given to the phenomenon and about how it compares with the different problem of false self-employment.

The approach taken by national legislators and the social partners alike appears to be fairly empirical, with the focus on practical requirements, such as how to respond to demands for protection wherever these might appear, and not abstract ones, like the classification of work in one category rather than another.

PROTECTION

Comparative analyses show that the main area of regulatory intervention is social security, especially the extension of pension rights to persons who fail (fully or in part) to qualify on the basis of the traditional distinction between subordinate employment and self-employment.

It is not surprising that the few legal definitions of economically dependent workers are to be found in laws governing social security.

Another area where protection for economically dependent workers has been introduced is procedural law, where the rules governing the legal process applicable to subordinate employees have been extended.

Significant progress can also be seen in the area of industrial relations, where economically dependent workers have been given recognition and protection under collective agreements: collective bargaining is now more prevalent in matters concerning economically dependent workers, with new types of protection introduced or subordinate employees' rights extended to them.

Table 23 – Economically dependent workers

ECONOMICALLY DEPENDENT WORKERS	
Identification criteria	
Negative criterion	Absence of subordination
Positive criterion	Situation of economic dependence
Indicators	❑ work performed personally ❑ continuity and coordination of work ❑ income (all or the greater part thereof) received from one principal
Legal protection	❑ social security (pension) ❑ procedural rules (*processo del lavoro*) ❑ trade union and collective bargaining rights

Chapter 3

ECONOMICALLY DEPENDENT EMPLOYMENT: CURRENT PROBLEMS AND FUTURE PROSPECTS

This final chapter shall, on the basis of our analysis so far, examine: part I), the major problems involved in defining and establishing a category covering economically dependent self-employment; part II) current trends and possible legislative solutions de jure condendo.

Part I

1. Introduction

As shown in our analysis so far, modern labour law in all the European countries is founded on a distinction between two main categories of contracts covering the performance of work or a service for another person, either in a situation of subordination, or in a self-employed capacity. The protection provided under labour law was designed to cover the most widespread form of supply of labour in the economic and production system: subordinate employment. The traditional exclusion of self-employment from the scope of application of labour law is explained by the marginal role attributed to independent work in the industrial system of goods and services provision and, consequently, in the social structure. In its traditional form, self-employment has been denied every type of protection, with a wide gap developing between subordinate employment and self-employment in this respect.

The changes in the forms of organisation of production (with a sharp increase, in economic terms, in the different forms of self-employment), the characteristics of demand and the individual propensities in terms of supply were the main causes of the crisis facing the traditional legal arrangement based on the binary distinction between subordinate employment and self-employment. The post-Ford restructuring operations - re-engineering, outsourcing and downsizing – have given rise to a labour market in which the distances between the two categories have shrunk: the number of subordinate workers in a position of technical and operational independence is rising and a new generation of self-employed displaying the characteristics of economic dependence is emerging (see Chapter II, para. 4.). Among the factors contributing to this situation are the structural ones mentioned above plus "cultural" and "anthropological" ones: the changes under way in the labour markets place greater emphasis on the people and their sense of responsibility, and suggest that work is a personal investment. The importance of independence, the focus on mobility, the importance

of skills, responsibility and cooperation are the personal and social assets of this segment of the workforce.

The ILO World Employment Report 1996/97 stated that it was not only likely that a certain number of jobs would disappear, but that employment as we know it would be replaced by mainly new forms of self-employment where individual workers would be taken on by individual companies offering a variety of jobs and services to a number of clients. Furthermore, the distinction between entrepreneur and employee would disappear, a development that would have dramatic implications for work organisation and social security schemes.

2. The dynamics of economically dependent work and the problem of identifying it

Self-employment displaying features of economic dependence is characterised by its complexity and ambiguity, both in terms of individual propensity and the co-existence, within the same area, of different levels of autonomy and very heterogeneous professionalism.

2. 1. It is particularly difficult to determine which self-employed persons have knowingly chosen to be self-employed and which have been forced to endure the situation. Data and research on the subject are fragmentary and do not make for any general conclusions[46]. If we follow traditional international literature, the longitudinal analyses carried out on the factors influencing the probability of a worker entering, staying in or leaving self-employment highlight the significance of some factors (for instance, a married, older, male is more likely to choose self-employment) and the weakness of others (such as occupational qualifications or level of education) in determining whether or not a person chooses an independent occupation[47]. More recent analyses show that there are various other links between individual characteristics (occupational skills, previous work history, age and sex and level of education) and the numbers coming into and leaving self-employment. For instance, we can state with authority that the diversity of self-employment activities help to mobilize the workforce by enabling workers to stay in contact with the labour market (most new self-employed are young people and women, categories which contribute significantly to the ranks of the unemployed) and ensuring a degree of fluidity therein.[48].

Two contrasting rationales account for why people become self-employed: one is the unemployment push, based on the rationale of economic need, the other is the entrepreneurial

[46] Cf. *EIRO comparative study on "Economically dependent workers"*, 15.
[47] Blanchflower, D.G, Oswald, A.J. *What makes a Young Entrepreneu*r? in NBER Working Paper, n. 3252, 1990.

pull, based on the rationale of independence and self-realisation. The two positions may be regarded as the essential elements of a combination of opportunities and obligations causing a person to become self-employed.

In some cases, self-employment is a situation that is endured; it is not a choice. In Germany, for instance, the term "third generation" self-employed (*Selbständige dritten Generation*) is used to describe ex-GDR workers who were obliged to try self-employment after unification and the de-industrialisation which occurred in the East German *Länder*. (In a matter of a few years millions of salaried jobs were lost in industry and in public enterprises, both in the service and agricultural sectors). These workers fall into the category of the "need economy" (*Ökonomie der Not*), not the self-realisation economy. Surveys carried out by the Berlin Institute of Socio-Economic Studies[49] show that 70% of the "new self-employed" were formerly employed, whereas the proportion of unemployed, low-skilled workers and persons claiming benefit was small. Virtually none belonged to entrepreneurial or trade union organisations, confirming an almost total lack of representation for new generation self-employed.

Somewhat similar remarks may be made with respect to the growth in France of something similar to self-employment, in particular the new form of work organisation, termed "portage salarial" (temporary salaried work for the self-employed)[50]. This concerns senior management, persons who have been employed for about 50 years or more and who find that they have been affected by the cut-backs being undertaken by their companies. In an attempt to avoid having to comply with the "Contribution Delalande"[51], many companies sacked their managerial staff shortly before the deadline. For these persons "portage" became virtually the only way open to them to sell their skills to the companies. However, one would be mistaken in thinking that "portage" concerned this category of worker alone. On the contrary, analyses show that a wide variety of workers in different social and economic situations are affected by "portage". The reasons for this are : the worker finds it impossible to find subordinate employment, he/she wishes to get out of a classic employment situation or he/she wants to work as a self-employed person. What is clear is that the worker accepts the economic risk (related to the result of the work performance), the work risk (related to the precariousness of the work situation in a production organisation) and the clientele risk (related to the need to find new clients or contracts).

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[48] R. Semenza, *Nuove forme del lavoro indipendente*, Stato e mercato, 2000, 145 ss.
[49] Final report, *Neue Selbständige im Transformationsprozess: Herkunftswege, soziale Charakteristika und Potenziale*, Berlin, 1995.
[50] Grep, Final Report January 2001, *Le portage salarial*
[51] This provision prescribes a stiff fine for employers who sack an employee with more than 50 years seniority.

Furthermore, it is rather difficult to make reliable comments based on individual national contexts, given the importance of the territorial/regional factor within each national context. In Italy, for instance, whether or not a person becomes self-employed depends on how the production base is organised and, especially, on the number of businesses in a given area: where the business climate is particularly good, one finds a social and cultural climate favourable to the growth of self-employment. Increased economic well-being is one outcome of self-employment at local level: if we take per capita added value and per capita expenditure for end consumption as our parameters, we find that when the two indicators increase the proportion of self-employed in the workforce increases[52].

2.2 Pinpointing with any accuracy the characteristics of economically dependent work within self-employment in general is a most difficult task. The first aim should be to distinguish between the various types of self-employment that exist in the present-day labour market in European countries. The literature, and national and international research provide some clues, but we are a long way from having one tried and tested methodology. Some authors have identified three main indicators for defining self-employed workers: the provision of a non-negligible level of investment by the workers themselves, a degree of autonomy in the labour market and, finally, whether or not the workers employ anyone themselves[53]. OECD includes the provision of risk capital and the degree of control and responsibility exercised by the individual as self-employment criteria[54]. Other authors point to four defining criteria for self-employment: do self-employed persons have employees of their own, do they have control over the organisation of the work they do, do they have a say in working conditions and pay, and, finally, how stable is their employment situation[55]? There is no lack of examples in the literature.

The criteria proposed in the literature confirm that when we speak of self-employment we are referring to a complex situation comprising very different economic, social and occupational components. We could almost speak of separate worlds of self-employment peopled by players who do not necessarily share any common or interconnected features.

One may also say that economic dependence, like subordination (or personal dependence), must be regarded as an empty formula (in German legal theory this is called Leerformel), in other words, an abstract factor *in se* and *per se*, which must be given practical significance through factual indicators (as occurs in the German legal tradition: a single client,

[52] Istat data, Inps, Professional categories, Cnel, Ailt
[53] Hakim C., *Self-Employment in Britain: Recent Trends and Current Issues*, in Work Employment Society, 1988, 2, 4, Dec.
[54] OECD *Employment Outlook*, 1992, Paris
[55] Reyneri E. , *Sociologia del mercato del lavoro*, Bologna, 1996.

weakness in the market) or legal technical indicators (as occurs in the Italian tradition: continuity of the work, functional coordination, the work is mainly done personally by the worker).

Legal theory, collective bargaining and case law provide a number of criteria of economic dependence (or quasi-subordinate status) which highlight the similarities between working in a quasi-subordinate capacity and subordinate employment, and the differences between quasi-subordinate work and self-employment (see Chapter II, para. 6). The most common criteria are:

1. The need for social protection (soziale Schutzbedürftigkeit) similar to that enjoyed by subordinate employees. A quasi-subordinate or economically dependent employment relationship is one where the service or work provider does the work mainly personally, without the help of dependent workers, in other words, with rather limited equipment and human resources. A well-organised and coordinated organisation is a sign of the entrepreneurial quality of the individual and usually excludes him/her from the quasi-subordinate employment category.
2. No direct contact with the market. Quasi-subordinate workers perform their work for their principals whose task it is to place the goods on the market. The absence of a link with the market is, for a certain part of German law, an indication of economic dependence, which is, at the same time, a prerequisite and a consequence of economically dependent workers' lack of real independence.
3. Number of contractual relationships on which workers depend for their monthly or annual income. Empirically, this can be seen in terms of the number of principals an individual works for or in terms of the difference between having one's own clientele and being a sub-contractor. This distinction is regarded as fundamental, not only for the effects it has on the labour market, but also for analysing changes with regard to inequality and social stratification[56]. Ideally, a self-employed person with clients is a professional person doing skilled work, who may or may not be regulated by a professional body. Professionals are classified by the number of clients they have and, often, by the territorial scope of their client network. These types of multi-client professionals are usually ensured independence, autonomy and security in the market. At the other end of the scale, a sub-contracted self-employed person has no clients and very few principals or, perhaps, just one. More important than the type and nature of the work done, or the quality of the human resource, it is the difference in terms of occupational independence between the two which makes for radical differences in

[56] Cf. Arum R., *Trends in male and female self-employment: growth in a middle class or increasing*

social status and position in the marketplace. Professional and economic independence, and job security are the key factors distinguishing professionals from the self-employed with few principals. The ability to independently manage and organise their professional activity is the key distinguishing factor and provides a valuable safeguard against an economic downturn.

4. Even though quasi-subordinate workers can use all their principal's equipment and human resources, they are not viewed as forming part of the organisation (as are subordinate employees). This merely serves as a point of reference or as a means of linking the person to the firm. German case law has coined the term *betriebsbezogenheit*, which may be translated as "functional association".
5. The principal does not issue instructions, but is responsible for coordinating the work. This is a factor that is not easy to analyse from the technical and legal points of view. The question is where does an employer's control and authority over subordinate workers end and where does the coordinating power held by the principal in a quasi-subordinate work relationship begin? Italian case law shows how difficult it is to make the distinction. Indeed, Italian case law tends to confuse coordination with continuity, using terms such as: "functional connection with the principal's organisation for the purpose of achieving the ends thereof", or "coordination with business management policy". Such a functional connection is easily identifiable when the principal is a company. In such a case the work performed by the quasi-subordinate worker is seen rather as a period or tool in the main production process.
6. Duration of relationship. Duration is a fairly flexible criterion and, because of this, has often been used by German and Italian labour judges, as well as for collective bargaining purposes. For example, the Federal Court likened a work relationship lasting more than a year to quasi-subordinate employment, but refused quasi-subordinate status to a festival organiser and a conjurer because it considered the work relationship too short. Italian case law regards duration as a key factor in that the service provided or work performed is expected to respond to a durable need on the part of the principal. Collective agreements often mention the duration of the project or tasks concerned. For instance, some Italian collective agreements state that in order to be coordinated and continuous, a relationship must last at least 2 months.

marginalization of the labour force? in Research in Stratification and Mobility, 1997, 15.

3. The size of the category

The size of the economically dependent employment category is directly determined by a number of institutional regulatory factors, such as case law, legislation and collective agreements.

3. 1. Case law

The role of case law is important in that it seeks to revise the concept of subordination through interpretation and this makes the passing of new legislation to cover economically dependent work less urgent. As case law extends the scope of subordinate employment, there is a decline in the numbers of self-employed and/or quasi-subordinate workers who fall into the "grey area" (workers classed as dependent workers). In recent years, the case law of the major European countries has developed flexible classification methods in an effort to include in the subordinate employment category increasingly diverse cases of dependent employment which do not easily meet the original characteristics (in particular the personal or technical subordination) and where the workers are in need of protection. This is one of the aims, often described as the "trend towards the expansion of labour law"[57] of the case law rulings (and the legal theory) of many countries. For instance, the use by Italian and German case law of typological methods to classify work relationships as subordinate employment or self-employment has certainly led to many doubtful cases being classed in the subordinate employment category. This has resulted in a reassessment of the self-employment in general and quasi-subordinate work in particular.

Acting in a similar vein, English case law has devised the "economic reality test", using various conceptual and operational tools in order to classify a contractual relationship. The test involves determining where the financial risks lie and whether the worker is in a position to benefit from this. It also considers other factors, such as who owns the equipment and what the method of payment is. These are useful ways to determine whether the worker is working for his/her own account, organising the work and, thus, taking the risks or whether, on the contrary, he/she is integrated in another person's business. The use of this test has enabled the courts to class many casual or temporary workers as subordinate employees

[57] Cf. T. Treu, *Il diritto del lavoro: realtà e possibilità,* in ADL, 2000, p. 467 ss.; P. Davies, *Lavoro subordinato e lavoro autonomo,* in DRI, 2000, p. 210 ss.; A. Supiot, *Lavoro subordinato e lavoro autonomo,* ibid p. 220 ss.; R. Wank, *Tipi contrattuali con prestazioni di servizi nella RFT,* in Ld, 1997, p. 217 ss.

whereas, if other methods based on formal criteria (especially the criterion of mutuality of obligation = continuity and duration of contract) had been used, these workers would have been classed as self-employed and deprived of protection. The test has highlighted the economic weakness of some workers. Because they are not subject to control, they end up, on the basis of the control test, being classified as self-employed. From this perspective, the economic reality test may be regarded as a precursor of the concept of "worker", which has led (see Chapter II) to some elements of worker protection legislation being extended beyond the subordinate employment category in the strict sense of the term.

3. 2. The legislators

When reviewing self-employment, Member States' legislators generally take into account the following three factors which are regarded as crucial: policies to stimulate and support self-employment and, therefore, the removal of obstacles to self-employment; the inclusion and participation of the self-employed in the social security system; prevention of illegal forms of self-employment which often mask subordinate employment relationships.

In only a few European countries is the political and legislative debate wider-ranging and more advanced, involving the drawing up of a genuine legal protection statute for the self-employed who display certain characteristics of economic dependency. The differences encountered when examining the problem are probably due to more than one reason: the system of industrial relations, the system (more or less strict) of regulating the labour market, which differs from country to country, and the number of workers involved (for instance, in Italy, where discussions on the matter are more advanced than elsewhere, the number of self-employed is greater than in other countries, whilst the growth of atypical employment practices, such as temporary, part-time work etc., is a more recent phenomenon).

National legislators usually follow one or the other of the following rationales: A) assimilation, or B) selective extension of protection measures.

A) Assimilation is covered in some national laws (especially in Germany, France and Italy). This may be full assimilation or, as is often the case, partial assimilation (i.e. covering rights prescribed only in specific acts). The French system provides an almost unique example of full assimilation in Europe (see Chapter II, para. 2.2.).

Examples of partial assimilation: faced with an unprecedented rise in the number of self-employed, German legislators introduced a system of "presumption of subordinate employment" which, at least insofar as social security law was concerned, aimed at extending the scope of subordinate employment (see Chapter II, para. 6 and Chapter II, par.2.1). This step received more criticism than support. Some complained that it tackled only part of the

problem (i.e. from the point of view of the borderline self-employed), others that the procedure lacked transparency, giving rise to confused criteria for subordinate employment and very weak classification system on the whole.

Under United Kingdom taxation and benefit legislation, some workers classified as self-employed on the basis of common law tests are regarded as subordinate employees (e.g. contract workers).

In Spain, the right to join a trade union, risk prevention legislation and the rules on the minimum wage (the latter in the agricultural sector only, for farmland tenancies) have been extended to self-employed persons.

B) Selective extension. United Kingdom legislators have used at least two different selective extension criteria. The first mechanism for extending protection measures involved identifying the various scopes of application of the legislation, based on the aims of that legislation. Alongside the traditional definition of employee which gives entitlement to protection against unfair dismissal, a wider definition of worker was used for entitlement to the National Minimum Wage Act 1998, the Working Time Regulations 1998 and the Part-time Workers Regulations 2000. Anti-discrimination legislation has been extended to cover an even wider group (all those undertaking to perform work personally), whilst the safety at work legislation has been given maximum extension, covering even dependent entrepreneurs.

The second extension technique empowers the Secretary of State to confer some employment rights to categories of individuals who cannot at present benefit from them.

3.3 Collective bargaining

Economically dependent work has been regulated to a small degree through collective agreements which have, traditionally, focused on protecting the interests of traditional subordinate employees. Only recently have the social partners taken more interest in atypical workers generally and in quasi-subordinate workers in particular.

In England, collective agreements have traditionally sought to protect the central core of the dependent labour force. A much lower level of protection is offered to atypical workers and there is little in the way of collective agreements for sub-contracting situations. The trade unions have not been able to ensure that the employment agencies give their workers employee status. This is a major problem in the construction sector.

In Germany, thanks to a legal provision (para. 12 Tarifvertragsgesetz=TVG), the right to enter into collective agreements is, as far as possible, given to every category of quasi-subordinate worker. The historical reason for this provision can be found in the rise in the sixties and seventies in the number of freelancers in occupations connected with the mass

media (authors, editors, film producers, radio and television, and programming technicians, artists, etc.). Consequently, by joining a trade union, a significant number of quasi-subordinate workers have, theoretically, had the opportunity to have their working conditions negotiated through collective agreements which, in Germany, are as effective as if they were laws and cannot be revoked, insofar as minimum conditions are concerned. In practice, however, there is little room for action. Collective agreements were concluded only in the media sector, for which the law was "made to measure" and, with State-run broadcasting stations. In the private sector collective rules exist only for journalists. Moreover, there are no specialised trade unions for these categories. As there has been no knock-on effect to sectors outside the media, we can safely say that para. 12 TVA has not been a model of success[58]. Unions operating in other sectors have shown little interest in this particular category of worker. Of course, the temptation to include the quasi-subordinate workers in existing contractual and organisational structures through a broad definition of subordinate worker is still too strong.

In terms of organisation, the Italians have made more progress. The Italian trade union confederations have set up organisations specifically for quasi-subordinate workers (NIDIL, ALAI, CPO) which have produced collective agreements covering some aspects of the quasi-subordinate employment relationship (pay, cancellation of contract, reasons for suspending the relationship and union rights), or protocols of intent and agreements with the regional and local authorities covering vocational training, local tax relief and relief on some public service charges. On the other hand, it is not clear whether the signed agreements can be regarded as a first step towards the development of widespread, hard-nosed bargaining or whether Italian trade unions will opt for a representation model more akin to mutual aid organisations. A typical example of this is to be found in the services sector where, in order to promote unionisation, schemes such as assistance in the field of taxation, law and benefits geared to respond to the new "individualisation" of the workforce are used.

The trade unions are often faced with a dilemma: the measures that they must take in order to protect the hard core of subordinate employees often end up operating at the expense of the quasi-subordinate workers (usually the atypical ones). Indeed, it will be difficult to provide protection to the latter at no cost to the remainder of the workforce. It is not by accident that German trade unions have adopted an extremely reserved attitude to the "new self-employed". It is significant that some statutory regulations do not allow the trade unions to accept quasi-subordinate or semi-independent members. Interest in maintaining the standard subordinate employment relationship is often greater than the interest in creating an

[58] Cf. Otto E. Kempen, R. Kretzschmar, *I problemi e le difficoltà di organizzare sindacalmente i lavoratori*

intermediate level social security for quasi-subordinate workers: the trade unions are probably afraid that this could lead to a "second class" labour law. What is more, the same problem faces the legislator who may wish to extend social rights to the self-employed who have fewer guarantees. However, even maintaining the status quo incurs social cost. If the social security burden and related costs are shifted to the individuals and to the family support systems, the new forms of economically dependent self-employment will eventually end up being the means of reproducing former social inequalities.[59].

Furthermore, available research shows that few quasi-subordinate workers are trade union members. A recent CENSIS study on self-employment in Italy showed that 63.4% of those surveyed said that they provided their own protection, thereby suggesting that the traditional trade union organisations were unable to put forward suitable schemes and measures[60]. In the media sector where, traditionally, quasi-subordinate workers have been well-represented, it is now appears that young people in particular have little interest in joining a union (although they may well change their minds as they get older). This attitude is all the more common in sectors other than the mass media: union membership is hardly compatible with the image of the sales representative or with the "self-awareness" of the small entrepreneur in the building or transport sectors. In practice, however, there are signs that quasi-subordinate workers are setting up associations whose aims are similar to those of the trade unions. For instance, an association has been set up in Germany's franchising sector whose aim is to represent the interests of the franchisees. Experiments of this kind have shown that only those types of organisations created specifically for quasi-subordinates are able to meet the social protection requirements of these workers or provide independent and individual status for potential members.

In brief: quasi-subordinate workers reject traditional types of representation, but not representation *per se*. This segment of the labour market is probably awaiting new offers of innovative representation in terms of both content and scope. The quasi-subordinate sector needs a system of representation that can facilitate the flexible, non-standard requirements of these individuals. This poses a crucial organisational problem for the unions whose inflexible structures, designed to deal with standard requests, are unable to respond to requests for flexibility and increasingly personalised solutions. The trade union organisations probably also need to make better use of their skills, to be willing to update and prepare themselves to deal with new requests from their members.

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semiautonomi in Germania, LD, 1999, 593 ss.

[59] Carroll, G. R., Mosakowski, E. (1987), *The Career Dynamics of Self-Employment*, Administrative Science Quarterly, n. 32.

[60] Censis, *Gli italiani al lavoro: un'impresa individuale*, Rome, May 2002.

Part II

1. Proposals de jure condendo

In the context of the binary system of classification, subordinate status is the factor which ensures that some, not all, jobs are covered by labour legislation, i.e. the workers are entitled to protection. It is widely felt in the field of European legal theory that subordination, taken as a political justification for discriminating between protected jobs and market-led jobs is less and less tolerated. This does not emerge only from the legal debate, but from the trends in legislation within many Member States, not to mention Community legislation.

From the current debate on the inadequacy of the protection provided to economically dependent workers four proposals have emerged, all under review in the various European countries involved (especially Germany and Italy).

1. 1. The first proposal involves maintaining the status quo. The traditional concept of a subordinate employee (based on the factors of employer control and personal dependence) and a self-employed person fits in with the current protection system and reflects rational interests. Under current laws, a new approach is neither justified, nor advisable. This is generally the view put forward by self-employed workers' associations and companies in those countries where legislators are beginning to turn their attention to economically dependent employment. For instance, the National Crafts Confederation and the Association of Chambers of Commerce in Italy tend to be hostile to any legislative moves to extend labour laws to the quasi-subordinate sector. Some German Associations of the Chambers of Commerce and Industry (BVK, CDH, DIHK) have taken a similar stance.

Thus, the legal channels that currently exist in individual legal systems could be developed and used to help identify protection mechanisms for economically dependent workers. For instance, some German authors have suggested using the general principles of civil law, especially the general clause of correctness and good faith contained in para. 242 of the BGB. The principle of good faith could also be applied to quasi-subordinate workers in cases where a principal decides to rescind a contract arbitrarily and for discriminatory reasons. However, protection based simply on the application of general clauses of civil law could turn out to be too weak, especially for working conditions which one expects to be dealt with through legislation. A similar interpretation could be made of the rules governing subordinate home employment, also in need of the same social protection as that given to subordinate employees and quasi-subordinate workers.

1. 2. The second proposal involves creating a new kind of employment relationship (tertium genus) lying somewhere between employment and self-employment. There would then be three different employment models, all equal in functional terms: self-employment, where an individual makes his/her own provisions for protecting his/her professional and personal life; subordinate employment, where the employer undertakes to provide such protection; and, finally, quasi-subordinate or "coordinated" employment, where the burden is equally divided between the person performing the work and the principal.

The suggestion is that once this new model has been created some protection should be extended to it. For instance, in Germany, part of the theory proposes to extend the protection measures for home workers, especially those contained in para. 6, II of the works council constitution act (Betriebsverfassungsgesetz), to quasi-subordinate workers. This Act grants works councils a number of rights of co-determination in certain areas. From the operational viewpoint, supporters of this approach want either action by the legislator or a case law ruling. They cite, in particular, certain rulings of the Federal Constitutional Court based on the principle of self-determination contained in the Grundgesetz, whereby it is the duty of the legislator to intervene in order to protect the weaker party in a contract. On the basis of this approach by the constitutional judge, should the legislator fail to act, case law must intervene to sort out the differences between the parties to the contract, usually by applying general civil law principles.

A debate on the new employment relationship (tertium genus) has also taken place in Italy. A group of jurists expressing views very similar to those of Confindustria[61] suggested that a new type of employment contract be established, through legislation, in line with the company's requirements. It would cover individuals falling within the typical subordinate employment category (e.g. work which, despite involving significant amounts of independence, is classified as subordinate employment: integrated work (work in self-managed teams, etc); some cases of atypical work (temporary work); and work performed for the account of the company on a self-employed basis (advisory services, agency work, sales representatives, service provision, etc.). Thus, whilst providing a minimum network of protection for quasi-subordinate work, the aim would also be to make the protection provided to subordinate employees more flexible.

In February 1999, the Italian Senate passed a bill (No. 2049) laying down the regulations governing protection for atypical workers. Under this bill, quasi-subordinate

[61] De Luca Tamajo, Flammia, Persiani, *La crisi della nozione di subordinazione e della sua idoneità selettiva dei trattamenti garantistici. Prime proposte per un nuovo approccio sistematico in una prospettiva di valorizzazione di un tertium genus: il lavoro coordinato*, in Lavoro e Informazione, 1996, p. 75 ss.

workers are granted a number of new rights (right to information, training and contract terms, and termination, social security protection and trade union rights). The bill has remained frozen in the second house.

1. 3. The third proposal involves redefining and extending the subordinate employment concept (extending the criterion of legal subordination).

The aim of such legislation should be to update the concept of subordinate employment, bringing it into line with the changing economic and social context, using other criteria of subordination. It should seek to prevent the spread of "borderline self-employment" and to encourage "genuine self-employment". German doctrine (Wank) also takes this view. According to this view, for the purpose of classifying the subordinate employment/self-employment relationship, it is appropriate to adopt the criterion of "entrepreneurial freedom", i.e. the possibility to make a profit while taking some of the risks. The view in Italian legal theory (Roccella) is similar: an employee would have to be considered as "dependent", even in the absence of control exercised by the employer.

These remain the views of the minority and would involve an over-extension of the concept of subordinate employment and of the protection devices toward those currently classified as self-employed. The biggest contraindication of these positions is the lack of selectivity and an over-eagerness to treat quasi-subordinate workers as subordinate employees in the strict sense.

1. 4. The fourth proposal involves creating a hard core of social rights applicable to all employment relationships, whatever their formal classification as self-employment or subordinate employment. This solution is gaining credibility in European legal theory. One suggestion, in line with similar suggestions from the economic and social spheres, is that we should replace the strict distinction between subordinate employment and self-employment by a continuum of activity to which would be attached a number of graded and variable guarantees, beginning with a minimum number of guarantees for all, moving gradually towards a higher level of protection.

Such a proposal was put forward in the report prepared for the European Commission (under the direction of A. Supiot)[62] which imagined an initial circle of universal social rights, i.e. rights guaranteed to all regardless of the type of work performed; a second circle of rights based on non-professional work; a third circle of rights applicable to professional occupations,

[62] Au-delà de l'emploi, Paris, 1999.

some of which are already enshrined in Community law (e.g. health and safety); and finally, a fourth circle of rights for subordinate employees.

A similar proposal is currently being debated in political and trade union circles in Italy. It is in the form of a bill entitled the "Workers' Rights Charter", based on a minimum of general principles, universally applicable to every employment contract (rights include freedom, dignity and confidentiality, equal rights and the right not to be discriminated against; health and safety in the workplace; protection against sexual harassment in the workplace; fair pay for work; protection in the event of unfair dismissal; the right of mothers and fathers to protection and support; the right to family care and to a fair division of working time and leisure time; the right to life-long learning; free access to employment services; the right to types of social security appropriate to each individual's career path; the right to freedom and the right to join a union, including freedom to negotiate and to collective self-protection). More specific rules, applicable to self-employed persons, follow (health and safety at work, fair pay and mothers' rights), the right to receive a pension, the right to be given notice in permanent contracts; and the right to join an occupational union. For economically dependent workers, defined as persons having an "employment relationship the purpose of which is to perform mainly personal coordinated and continuous work", the rules governing contract terms apply (such contracts must contain information about payment times). Also included is the right to protection against sexual harassment and mobbing, the right to equal treatment and to protection from discrimination, the right to fair pay, protection in the event of the relationship being suspended for reasons of illness, pregnancy, maternity, parental leave or training, the right to information, social security, dismissal, the right to join a trade union and the right to strike.

1. 5. Concluding note. The four proposals above each have some merits and demerits. The first, maintaining the status quo, is not acceptable as some form of regulation is essential and the decisions cannot be left to the marketplace (with the risk of economically dependent workers being under-protected and the problems of social dumping which could stem from such a situation).

The second proposal (the creation of a new category of employment relationship) is also to be ruled out, as this would lead to a number of legal problems (e.g. the classification of the relationship) and social risks (the reduction in numbers in subordinate employment). Economically dependent work must be maintained under self-employment and identified by means of the indicators of the conditions under which the work is carried out (continuity, the mainly personal nature of the work, coordination, a single principal, etc.).

The third proposal is not very realistic and follows a “maximalistic” rationale, i.e. the almost full extension of labour laws to cover economically dependent workers who would become, basically, employees.

The fourth proposal is the one I consider the most realistic: to identify the basic social rights applicable to all types of employment, subordinate, independent and quasi-subordinate, and then grade the protection to be provided from minimum to maximum (the latter only applicable to subordinate employment in the strict sense).

2. Concluding remarks

It is certainly not easy to provide an unambiguous solution to the problem of regulating independent (non-subordinate), but economically dependent work. If it is left for the market to sort out, we risk creating or intensifying social inequalities and discrimination and, in the European context, increasing social dumping. If the legislators intervene, the likelihood is that they will “obstruct” the labour market with inflexible and, perhaps, inappropriate rules. It does not appear that collective bargaining alone will be able to provide an appropriate and universal solution given the difficulty of organising economically dependent workers into homogeneous categories and the weaknesses of the industrial relations systems.

The most appropriate solution is probably the one that will involve intervening at European level by prescribing flexible rules and leaving the Member States free to adapt them to their national contexts. I believe that it will be up to the social partners to produce appropriate rules and to provide a network of appropriate protection for the economically dependent self-employed. The Agreement on Social Policy, annexed through the appropriate protocol to the Maastricht Treaty (now incorporated into the EC Treaty), calls on the social partners to play an active role in drawing up the European Union’s social legislation, particularly within the scope of the institutional social dialogue procedures. It is certain that collaboration between the social partners can help coordinate public policy between the various Member States and between them and the European Union.

Furthermore, it would not be necessary to start from scratch in order to find a European level solution to the question of economically dependent self-employment.

Already there is an osmosis between the self-employment and subordinate employment. There is a tendency in some areas to "transfer" the rules governing subordinate employment to self-employment. This concerns mainly the following areas: 1. Social security, especially pensions; 2. Active employment policy tools (vocational training, employment services and job creation incentives); 3. Health and safety at work.

1. Here, the tendency is to have a common pension scheme (through the merging of labour laws) covering all types of occupations, whether classified under self-employment or subordinate employment. This is not only the trend in various individual European countries, but it is also the approach taken by the European Union. These trends are backed by a number of welfare schemes, some based on the principle of universal application and on the need to encourage the free movement of labour. This can be seen in Community Regulations Nos. 1408/1971 and 1390/1981 laying down common rules for calculating, for pension purposes, the earnings pertaining to various periods of work in different countries regardless of whether the work is done on an self-employed or employed basis (see Chapter I, para. 8). The Community's Court of Justice made a decisive contribution to this position by stating that the principle of solidarity of the social security system also applied to the self-employed and to craftsmen as well as to employed workers.

The gradual merging of pension schemes and the costs thereof will have a considerable impact on the distinction between employment and self-employment and on the labour market. On the one hand, this distinction will become less important (because the two categories will be treated roughly the same) and, on the other, indirect labour costs will fall, thereby reducing the need to resort to false self-employment relationships in an effort to avoid employment costs.

2. The second area that is sensitive to any reorganisation of employment concerns legislation and active labour policy instruments: vocational training, employment services and job creation incentives. Here, the perceptible trend is not a merging of the legislation, but convergence of its aims and instruments. The common element where training is concerned is that it is a constant factor for work integration in an effort to meet market requirements and to sustain employability. The most widely disseminated method for sustaining employment is the reduction of the contribution burden. Governments have adopted similar incentives to promote types of self-employment, micro-enterprises and crafts. Within this framework there is the tendency to use incentives to promote the development of job opportunities, not only in subordinate employment, but also self-employment and entrepreneurship, particularly in weak areas and for weak individuals. This explains the merging of two components of European employment policy: support to employability and entrepreneurship. This is exactly the purpose of extending the incentives to all types of employment – employment, self-employment and entrepreneurship – which can all contribute in varying degrees to providing jobs and which all need help in order to gain access to the labour market.

3. Health and safety at work, in the broadest sense - covering different forms of work and company organisation, protection and the security obligations of employers and workers

alike - attract a further set of rules and regulations which apply to the various occupations without distinction. Putting the onus of safety and the related costs on the entrepreneur or the head of the organisation is justified, not because of their hierarchical position, but because they have an absolute and objective responsibility to all those who in one way or another may be involved in a dangerous activity. Similarly, it is worth drawing attention to the laws of countries, such as the United Kingdom, where the entrepreneur is responsible for taking the necessary steps to ensure the health and safety of all those who, in any way whatever, are involved in the company's activities, and of those countries where the principals, sub-contractors and entrepreneurs are subject to rules designed to prevent them from eluding their responsibilities in this area. Such latitude of the health and safety legislation is generally found in the laws of developed countries, and the European Union is no exception to this rule. Harmonisation has reached its most advanced stage in the area of working environment protection. It involves a combination of hard and soft legal instruments (see the preliminary Council Recommendation concerning the application of health and safety legislation to self-employed persons), and non-legislative measures centred on protecting working people from the risks to which they are exposed, regardless of the specific legal forms in which the activity is carried out.

The trends in the rules directly concerning individual employment relationships are not so easy to define.

One perceptible trend is the extension of basic, individual or collective rights of employees to self-employed persons, the importance of which is currently highlighted by the proposal for a European Rights Charter. This defines the widest scope of application of labour law and coincides with worker-citizen protection. The various aspects of health and safety, discrimination and equality legislation have been shown to be among the most innovative in recent decades, overriding even common law provisions, traditionally not disposed to covering these principles in law. The main aim of the protection is not the work itself, or even the subordinate (or independent status), but the person considered in the various aspects of his/her legal relationship.

What most appears to be lacking is a contract designed to reflect a fair contractual balance and not excessively skewed in favour of the economically dependent self-employed. It is in this area of the regulation of self-employment relationships that a more determined effort should be made to reshape protection measures. An organic reshaping of protection measures necessarily presupposes the intervention of national legislators. In view of this, quasi-subordinate employment contracts would have to provide for, first and foremost, certain requirements, some of form (in writing) and some of substance (identification of the

professional aims, the main purpose of the relationship, indications of the self-employed characteristics of the service). The contract should also include the criteria for determining the rates of pay, which must be assessed using a criterion of proportionality with the quality and quantity of the work performed. It must also cover payment times, providing for a financial penalty for late payment that is stiffer than that prescribed in civil or commercial law (e.g. default of a creditor). The contract should make provision for the right to suspend the relationship in the event of maternity, sickness, accident or serious family reasons. Such rights could involve keeping the post open with payment of compensation or merely keeping the post open. The contract should cover termination, making it compulsory that notice be given or the principal provide a justified reason for terminating the contract early (e.g. in the event of serious breaches of the contract, or failure of the relationship of trust with the service provider, or in the event of the post no longer being economically viable). The right to continuing training to ensure an adequate professional standard should also be included. Finally, basic trade union rights should be guaranteed. In particular, workers should be entitled to organise themselves and to join trade union associations, and be given every other trade union right compatible with the nature of the relationship (e.g. the right to participate in meetings called by company union representatives).