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The Notion of "Worker" for the Purpose of EU Social Policy and its Interpretation by the Court of Justice of the European Union[1]

Abstract: Social policy is one of the EU policies shared by the EU and the Member States. The aims of EU rules in the field of social policy include protection of the working conditions of workers, on the one hand, and prevention of social dumping between undertakings from different Member States on the other hand. The EU primary and secondary law relating to social policy uses the term "worker." However, contrary to the national laws of the Member States, there is no definition or explanation of this concept. National laws of Member States provide different definitions of the term "worker" or "employee" which can lead to different levels of protection for workers under the national legislations of EU Member States. For this reason, the concept of "worker" for the purpose of EU social policy may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law.
Keywords: EU social policy, free movement of workers, interpretation, national law, worker

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Introduction

Social policy is one of the policies that the EU shares with the Member States. One of the objectives of the EU and the Member States with respect to social policy is the promotion of employment and improving living and working conditions in order to make their harmonization possible. The competencies of the EU institutions to act in social policy, including the adoption of acts of secondary law, are defined by Article 153 and 154 of the Treaty on the Functioning of the EU (hereafter the Treaty). According to the first of these provisions, the EU shall support and complement the activities of the Member States in the enumerated fields that include, in particular, improvement of the working environment to protect workers' health and safety, working conditions, social security and social protection of workers and combating social exclusion. EU primary and secondary law contains the term "worker." However, there is no definition of a worker or an employment relationship in EU law. The only exception is the Occupational Health and Safety Directive stating that a worker is any person employed by an employer, including trainees and apprentices but excluding domestic servants[2]. Contrary to provisions on free movement of workers, creating part of the internal market, the EU secondary legislation concerning social policy makes references to a definition of a worker in national law or practice[3]. In its caselaw, the CJEU ruled several times that the *sui generis* legal nature of an employment relationship in national law can in no way whatsoever affect whether or not the person is a worker for the purposes of EU law[4]. The present paper analyses the interpretation of the concept of "worker" for the purpose of EU social policy in the caselaw of the CJEU. Attention is paid, in particular, to the position of volunteer firefighters, members of boards of directors of commercial companies, and persons providing their activities under a scheme of vocational training or integration into the labor market.

2 Article 3(a) of Directive 89/391/EEC of the European Council of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (O.J. L 183, 29.06.1989, pp. 1–8).

3 See e.g. Article 2(1)(d) of Directive 2001/23/EC of the European Council of 21 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (O.J. L 82, 22.03.2001, pp. 16–20). This provision states that "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

4 See e.g. Judgment of CJEU of 20 September 2007 on the case of Sari Kiiski v. Tampereenkaupunki, C116/06, point 26 or Judgment of CJEU of 6 March 2015 on the case of Gérard Fenoll v. Centre d'aide par le travail 'La Jouvene', Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon,C316/13, point 31.

1. Social Policy in the EU

Social policy as one of the EU policies shared with the Member States was introduced by the Amsterdam Treaty adopted in 1997[5]. However, certain rules concerning the protection of workers, in particular in the event of collective dismissals, an employer's insolvency and transfer of undertakings or businesses, became part of Community law in the 1970s. It is worth noting that the main objective of directives on the social protection of employees was to prevent social dumping between undertakings from different Member States rather than the protection of workers. "European competition rules, in particular, has a significant influence on social protection development while keeping the aims at harmonizing the working conditions in the EU, or avoiding any kind of social dumping and at seeking for the optimum between economic freedom (enshrined in the Treaties) and social (including trade union) rights"[6]. The protection of the social rights of workers became part of EU law after the adoption of the Charter of Fundamental Social Rights of Workers signed in 1989. At he present time, EU social policy regulates selected fields of labor law, in particular, health and safety at work, working time and rest periods, the reconciliation of family life and professional life, precarious forms of work, the right to equal treatment in employment and social protection of employees.

2. The Interpretation of the Term "Worker" for the Purpose of EU Social Policy

As mentioned above, the EU primary and secondary law regulating social policy, including certain fields of labor law, does not define the term "worker." The definition provided by the Occupational Health and Safety Directive that regards workers, e.g. apprentices, does not recognize remuneration as one of the characteristic features of an employment relationship. The meaning of the term "worker" was interpreted in the caselaw of the CJEU, which has decided many times that the concept of "worker" for the purpose of EU social policy may not be interpreted differently according to the law of the Member States but has an autonomous meaning specific to EU law[7]. It is noteworthy that the CJEU interprets the notion of "worker" for the purpose of EU social policy in a similar way as for the purpose of the free movement

5 The Treaty amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Rules entered into force on May 1, 1999.

6 J-M. Servais, To be a Worker in the XXIst Century, (in:) J. Pichrt, K. Koldinská, J. Morávek (eds.), Obrana pracovního práva; The Defence of Labour Law.Pocta prof. JUDr.Miroslavu Bělinovi, Csc. Prague 2020, p. 465.

7 See e.g. Judgment of CJEU of 14 October 2010 on the case of Union syndicale Solidaires Isère v. Premier ministre and Others, C428/09, point 28 or Judgment of CJEU of 21 February 2018 on the case of Ville de Nivelles v. Rudy Matzak C518/15, point 28.

of workers, that is, according to criteria distinguishing an employment relationship. According to the settled caselaw, the defining feature of an employment relationship is that for a certain period of time a person performs for and under the direction of another person a service, in return for which he receives remuneration[8]. As we can see, the CJEU defines three characteristic features of an employment relationship: (1) performance of work, (2) a relationship of the worker's subordination and the employer's superiority and (3) a remuneration. Subsequently, the CJEU excluded from the concept of an employment relationship activities on a small scale that can be regarded as purely marginal and ancillary, and defined that the activity provided by the worker must be real and genuine. In this respect, it may raise a question whether the EU primary and, in particular, secondary law relating to social policy applies to relations excluded from the scope of the application of national labor law.

2.1. A Person Providing an Activity as a Volunteer Firefighter

In its recent caselaw, the CJEU dealt with the position of a person providing an activity as a volunteer firefighter. In the Matzak case (C518/15), the CJEU decided on the scope of application of the Working Time Directive, in particular, on the definition of working time[9]. The dispute before the national court related to on-call time undertaken at the home of the worker on condition that the worker was obliged to remain physically present at the place determined by the employer and to reach his place of work within eight minutes. According to national law, the volunteer firefighter did not have the status of a professional firefighter and was not regarded as a worker. Contrary to professional staff remunerated in accordance with the conditions laid down by the financial rules governing the staff of the town of Nivelles, volunteer staff received allowances set out in specific rules calculated prorate a on the hours worked. In the judgment, the CJEU made reference to the settled caselaw and noted that the concept of "worker" within the meaning of the Working Time Directive may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law[10]. In its judgment, the CJEU noted that the fact that under national law a person does not have the status of a professional firefighter, but that of a volunteer firefighter, is irrelevant for his classification as a "worker" within the meaning of the Working Time Directive[11]. The CJEU decided that a person in the circumstances of the claimant in the main proceedings must be

8 See e.g. Judgment of CJEU of 3 July 1986 on the case of Deborah Lawrie-Blum v. Land Baden-Württemberg C66/85, point 17 or Judgement of CJEU of 31 May 1989 on the case of I. Bettray v. Staatssecretaris van Justitie C34487, point 12.

9 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of organisation of working time (O.J.L 299, 18.11.2003, pp. 9–19).

10 See e.g. Judgment of CJEU of 14 October 2010, on the case of Union syndicale Solidaires Isère, *op. cit.*

11 Judgment of CJEU of 21 February 2018 on the case of Rudy Matzak…, *op. cit.*, point 30.

classified as a "worker" within the meaning of the Working Time Directive insofar as he was integrated into the Nivelles fire service where he pursued, genuine activities were under the direction of another person for which he received remuneration[12].

2.2. A Member of a Board of Directors of a Commercial Company

Particular attention should be paid to the position of members of the boards of directors of commercial companies. The CJEU was asked several times whether such persons should be classified as workers for the purpose of EU social policy. In national laws of the Member States, members of boards of directors of commercial companies are usually not regarded as workers or employees and their function is governed by commercial or civil law. In the Danosa case (C232/09), the CJEU dealt with the position of a pregnant member of the board of directors of a public limited company who was removed from her post by the general meeting of the shareholders. The claimant in the main proceedings argued that since she had received remuneration for her work and had been granted the right to take holidays, it was reasonable to assume the existence of an employment relationship. She claimed protection against dismissal as a pregnant employee under the EU Maternity Protection Directive[13]. The company argued that a member of the board of directors of a public limited company was not in the position of a worker because she was not in the relationship of subordination there.

With respect to this characteristic feature of an employment relationship, the CJEU noted that the answer to the question of whether a relationship of subordination exists within the definition of the concept of "worker" must, in each particular case, be arrived at on the basis of all the factors and circumstances characterizing the relationship between the parties[14]. The CJEU examined all the conditions of the performance of the related function. In the Court's opinion, board members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can at any time be removed from their duties without such removal being subject to any restriction, satisfy prima facie the criteria for being treated as workers within the meaning of the caselaw of the Court[15].

A few years later, the CJEU dealt with the position of a member of the board of directors of a commercial company for the purpose of the protection of employees

12 *Ibidem*, point 31.

13 Directive 92/85/EEC of the European Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (O.J.L 348, 28.11.1992, pp. 1–7).

14 Judgment of CJEU of 11 November 2010 on the case of Dita Danosa v. LKB Līzings SIA, C232/09, point 46.

15 *Ibidem*, point 51.

in the event of collective redundancies. In the Balkaya case (C29/14), the CJEU answered a question of whether to include a member of the board of directors of a limited liability company in the category of workers normally employed by the employer. Under national legislation, these persons were not regarded as workers or employed persons and their rights and duties were governed by law on limited liability companies[16]. In the judgment, the CJEU examined the existence of all the characteristic features of an employment relationship, in particular the relationship of subordination. The CJEU took into consideration the fact that a director of the capital company in question in the main proceedings was appointed by the general meeting of shareholders of that company, which might revoke his mandate at any time against the will of the director. Furthermore, in the exercise of his function, that director was subject to the direction and supervision of that body, and, in particular, to the requirements and restrictions that were imposed on him in that regard. In addition, the CJEU took into consideration the fact that the member of the board of directors did not hold any shares in the company for which he carried out his functions[17]. Subsequently, the CJEU underlined that such a member of the board of directors of a capital company received remuneration in return for the services provided[18].

2.3. A Person Placed in a Work Rehabilitation Centre

With respect to the notion of "worker," the CJEU decided on the position of persons providing their activities under a scheme of sheltered employment. In the Fenoll case (C316/13), the CJEU dealt with the question whether a person placed in a work rehabilitation center for persons with disabilities could be classified as a worker within the meaning of Article 1 of the Working Time Directive. According to national law, such centres accepted disabled adolescents and adults who cannot work, temporarily or permanently, either in ordinary undertakings, in a sheltered work environment for a centre distributing work to be done at home, or pursue an activity as a self-employed person. These centres offer opportunities for various work activities, medico-social and educational support, and living arrangements which encourage personal development and social integration. Under national law, persons placed in a work rehabilitation centre did not have the status of an employee for the

16 The national law distinguished the status of a director as an officer on the one hand from the rights and obligations of the director vis-à-vis the company on the other hand. The status of director was acquired upon the appointment of the director by a general meeting of the shareholders, the most powerful body in the company. The rights and obligations of the director as regards that company were governed by the director's service contract. That contract was a contract for services in the form of a business management contract and did not constitute an employment contract, according to national caselaw.

17 See Judgment of CJEU of 9 July 2015 on the case of Ender Balkaya v. KieselAbbruch – und Recycling Technik GmbH, C229/14, point 40.

18 *Ibidem*, point 42.

purpose of the Labor Code. In the dispute before the national courts, a person with a disability performing activities in such a scheme of social aid claimed financial compensation for annual paid leave[19].

In the Court's opinion, the fact that persons admitted to a rehabilitation centre are not subject to certain provisions of the Labor Code, creating a legal situation for those persons that must be treated as *sui generis*, cannot be decisive when the employment relationship between the parties to the proceedings is assessed[20]. For classifying seriously disabled persons placed in the scheme of sheltered employment as workers, the CJEU examined the existence of three characteristic features of an employment relationship. With respect to the performance of services for a certain period of time, the CJEU took into consideration that for at least five consecutive years Mr. Fenollhad provided various services for which, moreover, he had obtained annual paid leave[21]. With respect to the relationship of the employee's subordination and the employer's superiority, the CJEU noted that those services, together with support of a medico-social nature, were assigned and directed by the staff, as well as by those in charge of the CAT "La Jouvene," who sought to provide Mr. Fenoll with a way of life adapted as best might be to his needs[22]. As regards the remuneration, the CJEU took into its consideration the fact that the activities performed by Mr. Fenoll within the economic and social programme of the rehabilitation centre were carried out in return for remuneration. In the Court's opinion, the fact that his remuneration was substantially less than the guaranteed minimum wage in France cannot be taken into account for the purpose of classifying Mr. Fenoll as a "worker" within the meaning of EU law[23].

It is apparent that the Court's approach in the Fenoll case makes it clear that the status of "worker" does not depend on the level of productivity attained[24]. However, for the purpose of the classification of a person as a worker within the meaning of EU law, the CJEU requires that the activity of a person is effective and genuine, and not purely marginal and ancillary.

It is worth noting that the CJEU dealt with the position of persons providing their activity under the scheme of sheltered employment in its previous caselaw. In the Bettray case (C344/87), it ruled that activities performed under a work rehabilitation scheme for drug addicts, designed to enable an individual to recover

19 It is worth noting that Article 7(2) of the Working Time Directive entitles the worker to an allowance in lieu of replacing the minimum period of annual paid leave where an employment relationship is terminated.

20 See Judgment of CJEU of 6 March 2015 on the case of Gérard Fenoll, *op. cit.*, point 30.

21 See *ibidem*, point 32.

22 *Ibidem*.

23 *Ibidem*.

24 See M. Bell, Disability, Rehabilitation and the Status of Worker in EU Law: Fenoll, "Common Market Law Review" 2016, vol. 53, no. 1, p. 204.

his capacity to take up ordinary employment, did not constitute effective and genuine economic activity[25]. Contrary to the Bettray case relating to free movement of workers, with respect to the right to stay in the territory of the host Member State, the Fenoll case relates to EU social policy, with respect to the right to annual paid leave that is a fundamental working condition of workers. It is apparent that the context of interpreting the term "worker" in the Fenoll case was not freedom of movement of workers as one of the cornerstones of the internal market but health and safety at work as a traditional part of labor law.

In the Court's opinion, in the Fenoll case, a person placed in a rehabilitation centre can be classified as a worker for the purpose of the Working Time Directive. However, the national court should determine whether the services actually performed by Mr. Fenoll can be regarded as forming part of the normal labor market. For that purpose, account may be taken not only of the statute and practices of the rehabilitation centre concerned in the main proceedings as a care facility, and of the various aspects of the aim of its social aid program, but also of the nature of the services and the manner in which they are performed[26]. Some authors state the view that the requirement that the work performed by a person has an economic value is considered because it appears to allow the market to guide the assessment of what constitutes work rather than alternative considerations; for example, a test based on social utility might accord greater weight to the benefits derived by individuals and society from the activities performed. The requirement of economic value is also problematic for other types of socially useful work performed outside the open labor market such as unpaid caring[27].

2.4. A Person Working under a Scheme for Training and Reintegration into the Labor Market

In the abovementioned Balkaya case (C229/14), the CJEU analysed the position of a person who was undergoing training within the company to re-qualify as an office assistant funded by the public employment office. In fact, a grant, which was equivalent to the whole of the remuneration due to a worker for work done in the context of the training, was paid to such a person directly by the state. The purpose of the activity of such a person in the company was to acquire or improve skills and complete vocational training. It should be noted that in the preceding caselaw, the CJEU dealt with the concept of "worker" in the case of persons who served a traineeship or periods of apprenticeship in an occupation for the purpose of the free movement of workers and the prohibition of discrimination based on nationality in employment. In the settled caselaw, the CJEU stated that such persons

25 See Judgment of CJEU of 31 May 1989 on the case of I. Bettray, *op. cit.*

26 *Ibidem*, point 42.

27 See M. Bell, Disability, Rehabilitation…, *op. cit.*, p. 205.

performing activities under named schemes should be regarded as workers, provided that the periods of practice are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer[28]. In the decision in the Balkaya case, the CJEU noted that neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship was carried out, nor the origin of the funds from which the person concerned was remunerated and, in particular, the funding of that remuneration through public grants, could have any consequence in regard to whether or not the person was to be regarded as a worker[29]. Contrary to the decision in the abovementioned Bettray case, the CJEU decided that a person who, while not receiving remuneration from his employer, performed real work within the undertaking in the context of a traineeship with financial support from, and the recognition of, the public authority responsible for the promotion of employment, in order to acquire or improve skills or complete vocational training, must be regarded as a worker[30].

Conclusion

As has been mentioned throughout this paper, the concept of "worker" for the purpose of EU social policy may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. The interpretation of the term "worker" or employment relationship in the caselaw of the CJEU concerns EU social policy or its particular fields. The CJEU takes into consideration the purpose of the act of secondary law, stating the minimum level of protection of workers. In practice, a person, e.g. a member of a board of directors of a limited liability company, may be regarded as a worker for the purpose of the right to maternity leave but not for the purpose of the transfer of rights and duties arising from labor relations or the protection of an employee's rights in the event of an employer's insolvency. The authors of this paper state the view that the interpretation of the concept of "worker" in the caselaw of the CJEU is not entirely applicable in the fields of labor law not regulated by EU social policy such as the remuneration of workers or the right to strike.

28 See e.g. Judgment of CJEU of 3 July 1986 on the case of Deborah Lawrie-Blum, *op. cit.*, points 19–21, Judgment of CJEU of 26 February 1992 on the case of M.J.E. Bernini v. Minister van Onderwijsen Wetenschappen, C3/90, points 15–16 or Judgment of CJEU of 17 March 2005 on the case of Karl Robert Kranemann v. Land Nordrhein-Westfalen, C109/04, point 13. All these cases relate to the free movement of workers and the prohibition of discrimination on the grounds of nationality in employment and occupation.

29 Judgment of CJEU of 9 July 2015 on the case of Ender Balkaya, *op. cit.*, point 51.

30 *Ibidem*, point 52.

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