THE CONCEPT OF EMPLOYEE IN HUNGARIAN LAW IN LIGHT OF ITS BROAD INTERPRETATION IN EUROPEAN UNION LAW

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Abstract

The present paper analyses the broader concept of the employment relationship and the legal status of the employee in Hungarian labour law. In the relevant Hungarian regulation, the employment relationship can be established by a special private law contract, the employment contract, which contract is regulated by several employment-specific provisions. In the Hungarian legal system there is no alternate way to enter the "employee" status, therefore the employment-specific rights and obligations stem only from the employment contract. The employment relationship has some special legal characteristics, although from an economic point of view it is similar to other legal relationships regulated by civil law rather than labour law. The link between these similar legal relationships is the fact that a person is working under another person"s instructions and is paid for their tasks performed. However, the subordination is present only in the employment relationship, so according to the paper"s hypothesis it is important to determine the legislative framework of the employee (worker) status and the rights aiming at protecting the employee as well. The analysis focuses on the governing Hungarian labour law regulations and some aspects of the corresponding judicial practice compared to some recent developments in the regulation and legal interpretation of the European Union.

Keywords: *Employee, employees" rights, employment contract, Hungarian labour law, subordination.*

1. Introduction

"Employee means any natural person who works under an employment contract" [paragraph (1) of section 34 of Act I of 2012 on the Labour Code (hereinafter: LC)]. Without doubt, labour law deals with many complicated or complex concepts and rules that can have different interpretations in theory and in practice. Perhaps it is mainly caused by the "mixed" nature of labour law regulations.[1] Consequently, considering Hungarian law — as well as the regulations of the European Union and other regulations on an international scale —, it is not accidental in this field of law, which is "mixed" in nature, that the use and the interpretation of certain concepts are hindered by major changes and developments, besides the aforementioned complicatedness and complexity. In addition, the particularly dual structure of labour law legislation — i.e., it is classified on the border between contract law and the

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[1] György Kiss, "*Foglalkoztatás gazdasági válság idején. A munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)*", *Állam- és Jogtudomány*, Vol. 55. Issue 1 (2014), p. 39-42. and 63-64.

legal rules excluding diversity[2] — generates further questions regarding its level as well.

In contrast, the concept of employee — as it stands in a short form in the LC — is different, at first glance. The concept is not particularly complicated, the accuracy of its theoretical and practical interpretation cannot be disputed, and employment contracts and collective agreements in fact cannot rule differently from this static prescript. Moreover, the LC tends to define from various aspects the hypotheses of the legal status of employees working in accordance with the LC, such as the personal or material scope, or the employment of legally incapacitated employees.[3] Even so, I believe that the analysis of the concept of "employee", which is the starting point of this study, is important from a theoretical and legislative point of view, as well as on a practical level, because this concept — besides the above mentioned differences — is obviously influenced by the tendencies of legislation, legal literature and legal interpretation,[4] and novel perspectives will likely affect the ideas of the Hungarian labour law as well. I will discuss the relevant part of the EU"s labour law in a separate chapter, but I feel it necessary to mention here that a proposal for a directive on the creation of a unified concept has been adopted,[5] which is likely to bring about changes in the Hungarian labour law as well. In addition to assessing the developments of the EU"s social policy, I examine the terms and concepts of the Hungarian law. To the hypotheses and results of the research, I add international developments that may seem irrelevant from the point of view of the Hungarian law, but they are not if considering the current situation of the labour market. Moreover, since the borders of countries do not limit labour force, it is very important to clarify what is or what should be meant by an apparently simple basic term.

Consequently, this study concentrates on the complex and dynamic understanding of the concept of "employee", demonstrating in a new way the system of employment relationships, or more precisely, the legal structures of persons who work for somebody else in exchange for payment.[6] However, the conditions — those regarding age in particular — of becoming an employee within the meaning of the LC

[2] Tamás Prugberger and György Nádas, Európai és magyar összehasonlító munka- és közszolgálati jog, Wolters Kluwer, Budapest, 2015, p. 27-31.

[3] Nóra Jakab, *A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései, különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre*, Bíbor, Miskolc, 2014, p. 108-116.

[4] For the Hungarian legal literature, see typically Tamás Gyulavári, "*Uber sofőrök és társaik: munkavállalók vagy önfoglalkoztatók?*", *Jogtudományi Közlöny*, Vol. 74. Issue 3 (2019), p. 114-118., Tamás Gyulavári, "*Az Európai Bíróság és a gordiuszi csomó: az Uber applikáció vagy taxitársaság?*", *Munkajog*, Vol 2. Issue 2 (2018), p. 8-12., Tamás Gyulavári, "*Internetes munka a magyar jogban – Tiltás helyett szabályozás?*", *Pro Futuro*, Vol. 8. Issue 3 (2018),p. 83-95., Nóra Jakab and Henriett Rab, "*A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében*", *Pro Futuro*, Vol. 7. Issue 1 (2017), p. 26-40., Erika Kovács, "*Regulatory Techniques "Virtual Workers"*", *Magyar Munkajog E-folyóirat/Hungarian Labour Law E-Journal*, Vol. 5. Issue 2 (2017), p. 1-15., Attila Kun, *Munkajogviszony és a digitalizáció – rendszerszintű kihívások és kezdetleges Európai Uniós reakciók*, in: Lajos Pál and Zoltán Petrovics (eds.), *Visegrád 15.0. A XV. Magyar Munkajogi Konferencia szerkesztett előadásai*, Wolters Kluwer, Budapest, 2018, p. 412-415., Ildikó Rácz, "*Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái*", *Pécsi Munkajogi Közlemények*, Vol. 10. Issue 1 (2017), p. 82-97.

[5] Proposal for a Directive of the European Parliament and the Council on transparent and predictable working conditions in the European Union. Brussels, 21 December 2017. COM(2017) 797 final (hereinafter: Proposal) p. 13.

[6] György Kiss, *"A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében*", *Jogtudományi Közlöny*, Vol. 68. Issue 1 (2013), p. 1-2. and 4-7.

are not involved in this research, because they have been widely discussed in the Hungarian literature,[7] and because my research is limited to the question of this status, namely whether it can be defined or not, and if yes, then who are involved in this group which is endowed with the rights determined in the LC, also considering the extensive approach of the EU and other countries.[8] I do not aim to extend my analysis to a global or international level,[9] as that would be beyond the frame of my study. Instead, I draw general conclusions, starting with the Hungarian legal situation and examining the EU"s recent legal developments.

2. The importance of the legal status of employees

Continuing the above mentioned introductory thoughts, it is necessary to mention that at first glance it may not be evident who can be considered an "employee" and who is self–employed.[10] In fact, paragraph (1) of section 42 of the LC resolves this apparent contradiction, as the LC defines the employment contract, at least in an implicit way,[11] by determining the essence of work contracts[12] and thus establishing that an employee is any person who works in an employment relationship determined by the LC.[13] It is supported by the legislator"s clear definition of the *essentialia negotii* of work contracts,[14] and the catalogue of prevailing rights and duties of such legal relationships suggests that no employee exists without an employment contract[15] and the rights and duties coming

[7] Nóra Jakab, *A margón és azon túl: Az intellektuális és pszichoszociális élő emberek cselekvőképességéről*, Novotni, Miskolc, 2013 and Jakab, ibid. 2014, p. 131-214.

[8] It means the need for extending the personal sphere protected by labour law. See: Miriam Kullmann, "*Work-Related Securities: An Alternative Approach to Protect the Workforce?*", *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 38. Issue 4 (2018), p. 399-400 and 409-412.

[9] Regarding this perspective, it is Recommendation no. 198 of the International Labour Organisation (hereinafter: ILO) that has primary importance and approaches the basic legal protection of employees through the conceptual elements of the legal relationship. However, this legal document can hardly become relevant in international legislation, due to its soft law character. See Tamás Gyulavári, *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*, Pázmány Press, Budapest, 2014, p. 35-37. In my opinion, despite the latter concern, this international labour law guidance, intended to be comprehensive, can help orientation regarding international conceptualisation.

[10] Gyulavári, ibid. 2014, p. 61-67., Kiss, ibid. 2013, p. 11-13. and Tamás Prugberger, "*Az önfoglalkoztatás intézménye a nyugat-európai és a magyar munkajogban*", *Magyar Jog*, Vol. 61. Issue 2 (2014), p. 65-71.

[11] For this concept see Zoltán Petrovics, *A biztonság árnyékában. A munkajogviszony megszüntetésével szembeni védelem alapkérdései*, doctorate (Ph.D.) dissertations, Eötvös Loránd University, Faculty of Law, Doctorate School of Law at ELTE University, Budapest, 2016, p. 35.

[12] Kolos Kardkovács (ed.) and Anna Kozma and György Lőrincz and Lajos Pál and Róbert Pethő, *A Munka Törvénykönyvének magyarázata*, HVG-ORAC, Budapest, 2016., p. 115-120.

[13] Despite this naturally strong conceptual bond, there is difference between employee and employment relationship; although it is not sharp contrast due to the above mentioned contextual connection.

[14] Lajos Pál, *A munka értéke, avagy a szőlőmunkás egy dénárja*, in: Zoltán Bankó and Gyula Berke and Erika Tálné Molnár (eds.), *Quid juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára*, Curia of Hungary, University of Pécs, Faculty of Law, National Committee of Labour Law Judges, Budapest – Pécs, 2018,p. 337.

[15] It is confirmed by the qualifying marks explained in the joint directive of the Ministry of Employment Policy and Labour and the Ministry of Finance no. 7001/2005. (MK 170.) [hereinafter: Joint Directive 7001/2005. FMM-PM] that deals with the characteristics to be examined when classifying employment contracts and the principle of adjudication based on essence.

from the employee status determine the type of the legal relationship. Consequently, the employee concept of the LC is determined in an indirect way, and it has delineated the legal entity of any working person, on the condition that the legal relationship is within the meaning of the LC. Therefore, a question to answer — at least hypothetically — is what rules are applied for the legal status of the employees who do a work that is identical with the work of this group, but have an irregular legal status, for example self–employed workers, platform workers, etc.

At this point, however, it is arguable that according to the converse it is not evident that there is a real employment contract between the parties, and yet the subordinate party works for the other party for payment. Moreover, although the legal definition of employment relationships can be deduced from the analysis of the aforementioned connections, it is not convincing to connect the existence of the employee status exclusively to the employment contract concept of the LC. Not to mention a dogmatic difficulty that the terms of employment contract and employment relationship can sharply separate from each other,[16] even though the only real *causa* of an employment relationship is the employment contract.[17] As a result, it is still necessary to answer the question — which is apparently and "traditionally" already answered — whether the rights[18] guaranteed by the LC belong to this relatively narrow circle of persons only or, considering the aforementioned dilemmas, there is a more extensive interpretation of the law for these terms. Hereinafter I will seek the answer.

All this means that the labour law regulations are to be applied only in the case of persons who have this status, and every other worker[19] is excluded from this presumably more efficient kind of legal protection, strictly speaking from the point of view of labour law. Although it is the contractual intention and the contractual principle to be considered dominant when determining legal relations,[20] I believe that in this round it is the interpretation of the law instead, because the contractual principle, which is applied in the judicial practice too, has the same basis,[21] though, having a different legal dogmatic origin.

To sum it up, it is clear that as a result of the employment concept of the LC, which covers a rather narrow circle, the legislator has created a sort of arbitrary distinction between the persons who work in some kind of hierarchy, although highlighting the freedom of contract as the organising

[16] In fact, based on section 44 of the LC, an employment relationship can be established even without a lawfully concluded employment contract, although this rule appears to be only subsidiary besides the main rule of the obligatory conclusion of the contracts in writing.

[17] Kozma and Lőrincz and Pál and Pethő, ibid., p. 115.

[18] In fact, the guarantees of the social security provisions, which are strongly connected to it, are also questionable. See Tamás Gyulavári, "*A gazdaságilag függő munkavégzés szabályozása. Kényszer vagy lehetőség?*" *Magyar Munkajog E-folyóirat*, Vol. 1. Issue 1 (2014), p. 12-13.

[19] It does not include the persons employed in the public sector, as they are undoubtedly qualified as "employees" in this sense.

[20] Bill no. T/4786. on the Labour Code, p. 83 and 85., https://www.parlament.hu/irom39/04786/04786.pdf (8 July 2021).

[21] Regarding the most recent practice of the Curia of Hungary, see judgment no. BH2018.13. In point 42 of this judgment, the Curia of Hungary establishes that the contract between the parties shall not be judged based on its name, but of its content (Joint Directive 7001/2005. FMM-PM) and what has to be examined most importantly when judging the legal relationship between the parties is whether their contractual intention was aimed at establishing the employment relationship. The above mentioned qualifying marks can help this examination.

principle.[22] Of course, it is true that it would also be arbitrary if I handled every relationship related to working the same way, based on the same characteristics, but it is exactly my aim to demonstrate this potential diversity of terms and to make suggestions regarding the future.

To highlight this artificial contradiction, I take as an example the opinion number 384/2/2008. TT. of the Consulting Committee for the Prevention of Discrimination on the interpretation of the principle of equal wages for the same work. In connection with this principle, which is considered to be one of the fundamental rules for legal protection in the field of employment,[23] the Committee claims that the principle of equal wages for the same work cannot be discarded for the sole reason of the conceptual — legislative — difference between the legal relationships of working legal entities.

It is also clear from this parallel that the contractual principle is necessarily limited by restrictions that in fact reflect the legislator"s intentions in relations to labour market processes and therefore this kind of discrimination is arbitrary. However, on the other side of the legitimacy dilemma are the clear rules of the LC that I have cited several times and go beyond the freedom of contract of the parties on the one hand and impose strict substantive criteria on the other, when it comes to classifying the legal relationships of workers. In addition, it is not disputable, of course, that all employment relationships fall within the material scope of Act CXXV of 2003 on Equal Treatment and on the Promotion of Equal Opportunities, regardless of their conceptual classification,[24] from which it can be concluded that certain fundamental rights are applicable even in the case of legal relationships that are excluded from the scope of the LC.

To sum it up, it is evident that the employee status is a central element of the concept of employment, and since these are usually judged based on similar conceptual criteria, it is definitely appropriate to infer from the former to the latter. Another important consequence of the aforementioned regulatory and legal interpretation principles is that the qualification as an employee is of great importance for the legal status of the person performing the work in general, for every right that the worker has, as well as for the form and content of the contract. Even so, the idea of the freedom of contract can overshadow these aspects, as the contractual autonomy of the parties is limited in this sense, and it is also important that the definition of the employee status is a central conceptual element of employment. Therefore, I will take into account this interpretation hereinafter.

3. Autonomy of the subjects of the legal relationship — a cause or an effect?

Before discussing a potentially new concept, or at least the question of definability at EU law level, I will briefly outline the duality between the freedom of contract of employees and the specific type constraint governing labour law.[25] In my opinion, both the above reasoning and the

[22] Gyula Berke and György Kiss (eds.), *Kommentár a munka törvénykönyvéhez*, Wolters Kluwer, Budapest, 2014, p. 192-194.

[23] Conventions no. 100, 111 and 156 of the ILO.

[24] Gyulavári, ibid. 2018 (*Internetes munka…*), p. 92-93.

[25] György Kiss, "*Új foglalkoztatási módszerek a munkajog határán – az atipikus foglalkoztatástól a szerződési típusválasztási kényszer versus típusválasztási szabadság problematikájáig*", *Magyar Jog*, Vol. 54. Issue 1 (2007), p. 7-8.

extension of the conceptual scope — as well as the personal scope as a result — of the employment relationship are a matter of today"s scientific discourse, which, according to some, makes this dilemma virtually obsolete due to the idea of the freedom of contract prevailing in labour law, and, according to others, forces the parties to form an employment relationship within a strict framework and in this respect the legal cogency is in fact based on the already mentioned conceptual system of the LC. We can also say that the freedom of contract within the LC competes with that outside the LC, so although the parties are free to decide on their legal relationship, its content is significantly limited by the law, thus it is almost automatically designated who can be an employee and who cannot.

The basic paradigm of labour law regulation is that although the LC leaves no room for dispositivity in many cases and regulates the conduct of the parties towards each other or the way, in which they make their legal declarations with imperative norms that exclude differing, it is not dominant considering the overall character of the regulation.[26] Consequently, one of the important sources of the regulation of the employment relationship is the employment contract itself, which in this sense can be supplemented by the collective agreement,[27] and overall, the LC regulates the contractual relations of the parties using a kind of special authorization. Therefore, all this falls within the field of private contractual autonomy,[28] i.e., the agreement between the employer and the employee is free within the legal framework, with a few exceptions. In fact, the LC presupposes that the intention of the parties at the time of concluding the contract is aimed at concluding the contract and establishing an employment relationship, since the status of employer and employee can only be established this way, and it is established *ex lege*, if there is a consensus between them regarding the scope of duties and the basic wage. In other cases, however, no one may assume the position of employer or employee.

However, the latter context points to a potential contradiction too, as the freedom of contract — based on the classic employee status in relation to the rights of the parties — is in fact limited to a free agreement within the LC, but since it is of outstanding importance, the legislator has only settled the basic criteria regarding the contracting and has left room for the parties for settling numerous points in agreement. Of course, this does not mean that the parties cannot agree on elements outside the LC, but it does mean that a differing agreement cannot be brought within the scope of the LC. In this regard, it will gain importance what conceptual elements and specific features of legal status are attached to the employee status, since the mere fact that the parties do not conclude an employment contract but a different type of agreement does not mean without doubt that they intend to ensure the most basic labour guarantees. However, as I have pointed out several times above, the "employee" can only gain its status through the legal legitimacy of the employment contract, but the question is whether the nature of the work or the relationship between the parties as a conceptual criterion excludes the classification of a looser dependency this way. It does not, according to the principle of the freedom of contract, but the personal and material scope of the LC does, as we do not necessarily consider as a decisive factor the substantive reality of

[26] Kiss, ibid. 2014, p. 59-60 and 72-75.
[27] Kozma and Lőrincz and Pál and Pethő, ibid., p. 67.
[28] György Kiss, *Munkajog*, Osiris, Budapest, 2005, p. 89-90.

individual legal relations and legal statuses, but the exclusivity of the employment. In my opinion, this is exactly one of the disputed situations that may have been resolved by the conceptual category of the "person similar to an employee" in the LC,[29] but its absence points to the conclusion that the concept of "employee" must be interpreted restrictively. In connection with the importance of this legal status, it is necessary to mention that the number of persons working in this form is quite great and that such a regulation would have created a great opportunity for the expansion of labour law regulations.[30]

To sum it up, the private autonomy that is complemented with the parties" freedom of contract is both a cause and an effect, because within the framework of the LC the parties do enjoy a high level of freedom, but not the freedom of shaping the employee status. It is significant, because even using the principle of adjudication based on essence; it is not necessarily possible to clearly identify the conceptual features that characterize only the persons who work under or outside the scope of the LC (regularity, availability, remuneration, etc.). In any case, the LC and the judicial practice are strict and consistent in this respect, but for further reflection, I will briefly review the employee concept of the EU law that is (almost) at a directive level and highlight the possibility of a broader approach to the legal understanding of the employee status.

4. The possibility of creating a uniform employee concept at directive level

Considering the previous examples of labour law in the framework of EU social policy, it seems that a unified regulation is in fact impossible and, in many cases, undesirable as well. Even so, the common labour and constitutional traditions, as well as EU labour law rules together form a solid base that is further strengthened by the relevant case law of the Court of Justice of the European Union (hereinafter: CJEU), which provides a common, consistent and recurring definition of this concept.[31] All this seemed to be quite a starting point when the EU decision–maker decided to create a single concept, and this basis was further strengthened by the legislative desire that cross–border, rapid and significant changes in the labour market actually urged a common interpretation of the concept, for which it was necessary to have a regulation at the directive level to serve as a compass.

If we compare the recently adopted definition[32] with the one that has been recently overwritten,[33] we can immediately draw two conclusions. On the one hand, it is clear that although such a concept in itself is of great importance for the employment

[29] Kiss, ibid. 2013, p. 11-13.

[30] Attila Kun, *Az új munka törvénykönyve*, in András Jakab and György Gajduschek (eds.), *A magyar jogrendszer állapota*, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016, p. 406.

[31] Martin Risak and Thomas Dullinger, *The concept of "worker" in EU law. Status quo and potential for change (Report 140)*, ETUI aisbl, Brussels, 2018, p. 26-39. https://www.etui.org/Publications2/Reports/The-concept-of-worker-in-EU-law-status-quo-and-potential-for-change (8 July 2021).

[32] Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union – Analysis of the final compromise text with a view to agreement Paragraph (2) of Article 1 [28 April 2019] https://data.consilium.europa.eu/doc/document/ST-6188-2019-ADD-1/en/pdf, Directive (EU) 2019/1152 (20 June 2019) of the European Parliament and Council on transparent and predictable working conditions in the European Union (hereinafter: Directive (EU) 2019/1152), paragraph (2) of Article 1.

[33] Proposal p. 13, and point *a)* of paragraph (1) of Article 2.

rules of the Member States, it actually gets its real meaning in conjunction with the concept of employer and employment relationship,[34] since the former has an extensive interpretation, while the latter, understood as the result of the former, is a real novelty. On the other hand, compared to the previous concepts of the Directive,[35] such a regulation can be a radical innovation, as it can regulate basic labour law concepts at the supranational level, i.e., in some cases contrary to national law, but at least not in exactly the same way, which, on the one hand, faithfully reflects the current social aspirations of the European Union,[36] and on the other hand, highlights the contradictions in current practice.

Presumably, this was the intention of the legislator, i.e., throughout the codification process the European Commission sought to create a concept that is truly widely applicable and consistently enforceable and that can provide a positive impetus to the functioning of the labour market, in particular raising the level of legal protection. It is not disputed that if such a uniform use of a term were to become permanent in the EU law, then the Member States would have their hands tied in terms of its interpretation, and in that case restrictive interpretations, such as those developed by the Hungarian law, would have to be reconsidered. It is not a question either that such a regulation in itself would lead to difficulties due to its power and significance as a novelty, so it is worth outlining the judicial practice behind the concept.

The CJEU has and will continue to have a key role to play in this unification process, as the concept, which originally intended to be introduced by the Directive"s Proposal, is largely based on its consistent legal interpretation on the one hand,[37] and on the, other the final text almost entirely identifies consistent European case law as the source of the concept, though doing it in essence and in an implicit way only.[38] The significance of this step is undisputable, even though in this wording the developments of the CJEU may necessarily fall behind the employment contract as interpreted based on national law, as well as behind the employees who are employed under that contract.[39] Even if, in my opinion, these circumstances alone make it more difficult to achieve the goals set by Directive (EU) 2019/1152, I find it remarkable that the case law of the European Court is emphasized in the wording of Directive 2019/1152 in connection with creating such a key concept of employment law that spans

[34] Points b) and c) of paragraph (1) of Article 2 of the Proposal.

[35] See for example the concept based on paragraph (1) of Article 1 of Directive 91/533/EEC of the Council (14 October 1991) on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, which includes paid employees who are employed in accordance with national law, or see paragraph (2) of Article 2 of Directive 96/71/EC of the European Parliament and Council (16 December 1996) concerning the posting of workers in the framework of the provision of services (hereinafter Directive 96/71/EC) that connects the concept of employee to the Member States' laws (manifesting a functional approach from the viewpoint of *posting*).

[36] Sára Hungler, "*Nemzeti érdekek és szociális integráció az Európai Unióban: az Európai Jogok Szociális Pillérének kísérlete az integrációra*", *Állam- és Jogtudomány*, Issue 2 (2018), p. 39-42.

[37] Proposal p. 13.

[38] According to the definitive text, i.e., paragraph (2) of Article 1 of Directive 2019/1152, any person to whom the Directive is to be applied shall have an employment relationship or an employment contract based on the national law, but the case law of the CJEU in this matter shall be taken into consideration.

[39] Although it cannot be certainly concluded from the wording, but the new directive text gives this impression by referring to the national law of Member States as primary source and incorporates the case law of the CJEU as a sort of subsidiary source.

the law of the Member States. Of course, it is easier at this moment to see the difficulties or challenges of this conceptualization as a sort of positive benefits, but since the employee concept of the CJEU is still evolving because of an evolutionary interpretation of the law, the problem remains the same.[40] That is to say, how to define in a uniform way, in a way that can be accepted by the national legislators and that can also be applied advantageously from the point of view of the labour market, which group of people is entitled to the most fundamental labour law rights.

As the final version of the directive can be seen as a major step backwards in this respect,[41] we are in a difficult position when it comes to judging the concept, but I believe that its substance can remain with an open reference to CJEU practice. It is also presumable that the Member States are reluctant to use the original approach due to the conceptualization that is somewhat different from the traditional understanding — though similar in its essence[42] — and developed by the judicial practice to be extensive. This reluctance is understandable in some perspectives, such as the economic and labour market differences between the Member States, but in other aspects, it is incomprehensible. In my opinion, all the EU decision-maker tried to codify a law enforcement solution that is no longer necessarily 100% up-to-date, but is certainly better at "following" economic changes than the exclusive dominance of national rules, when it comes, for example, to the — often not even physical[43] — movement of the labour force across the Member States. To put in other words, the original concept of the Directive was intended only to make the common understanding of labour law in the Member States to find solutions to the labour market, which are already largely present in national law in some form but may not be uniformly regulated or practised from the point of view of labour law and social policy. As a further concern, in addition to the "incomprehensibility" of the Member States" reluctance, I recall that if the Member States reach a consensus on the need for a common and particularly strong regulation of transparent and predictable working conditions,[44] then how can it be argued that the part of the Directive which designates the recipients of these rights should not enter into force?

Of course, to answer this question, one would say that although the common intention of the Member States encompasses the employees" fundamental rights, the States would feel that their legislative freedom would be undermined if they could not decide who should be the recipients of these rights. However, I do not find this answer convincing enough, because if the Member States" legal perceptions do not differ from the traditional employee concept when applying Directive (EU) 2019/1152, then this Directive will become obsolete in

[40] Risak and Dullinger, ibid., p. 40-41.

[41] Bartłomiej Bednarowicz, "*Workers' rights in the gig economy: is the new EU Directive on transparent and predictable working conditions in the EU really a boost?*", U Law Analysis – Expert insight into EU law developments [28 April 2019], http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html (8 July 2021).

[42] Because the work performed for another person, under their control (on a regular basis), in return for remuneration reflects mutatis mutandis the essence of the traditional idea of the employment relationship.

[43] Martin Risak, *Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level*, Friedrich Ebert Stiftung, Berlin, 2018, p. 5-7 and 12-19., http://library.fes.de/pdf-files/id/ipa/14055.pdf (8 July 2021).

[44] It is suggested by the regulations of Directive (EU) 2019/1152 regarding the probationary period (Article 8) and regarding the quasi protection of employees from dismissal (Article 18).

many aspects, as the difficult applicability of the original, nearly three–decade long rules can be supported by — among others — a drastic change in the forms of work,[45] and thus the question of the way and the methodology of the regulation will remain. In my opinion, the Member States want to create a specific structure of labour law for the protection of the employees" rights that is essentially lacking in its fundamental nature, because — for the most part — it remains unclear to which persons these rights shall belong.

Despite all these contradictions in the application and interpretation of the law, it is therefore worth briefly addressing the concept developed by the CJEU. Without giving details on the origins or the reasons, there is a general criticism of the concept, namely that it has virtually no regulatory basis or that it can be applied primarily in connection with the right of free movement of workers, and it is difficult to be considered as a general employee concept.[46] At the same time, judicial interpretation has from time to time necessarily revealed cases in which the CJEU had to use a uniform interpretation,[47] thus creating a kind of compromise between the autonomy of the Member States" regulations and the responses to specific practical problems. Its immediate consequence is that the concept itself reflects compromises, as it cannot necessarily cover every category of persons working for remuneration, but still seems to represent in a sufficiently abstract way the conceptual components, which are traditionally cited in relation to the employee concept, thus creating the theoretical and practical foundations of the "uniform" use of the concept. The core of the concept is regular work for another person, under their control, in return for remuneration,[48] and these conceptual elements, on the one hand, truly reflect the traditional approach, but on the other hand, they highlight that it is difficult to judge individual legal relationships on a case-by-case basis, therefore, again, this concept can be considered as an employee concept at the level of EU law only through compromises. It should be noted that the original text of the Proposal for a Directive (EU) 2019/1152 in fact would have solved this problem in a short way by revolutionizing the common use of the concept, as no further legitimacy would be needed in the case of a directive-level concept.

Although the legitimacy base of the concept developed in the judicial practice is indeed questionable,[49] it may be misleading to refer to this concept as a kind of legal definition, as the CJEU originally used it as guide for the cases processed exclusively by the CJEU, and in my opinion it early became obvious that the importance of the common use of the concept goes beyond this.

[45] Valerio De Stefano and Antonio Aloisi, *Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers*, p. 2-6., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125866&download=yes (8 July 2021).

[46] Risak and Dullinger, ibid., p. 17-20.

[47] See typically judgment no. C-270/13. Iraklis Haralambidis v Calogero Casilli [ECLI:EU:C:2014:2185] of the CJEU announced on 09.10.2014, judgment no. C-232/09. Dita Danosa v LKB Līzings SIA [ECLI:EU:C:2010:674] of the CJEU announced on 11.11.2010, points 45-51 and the final conclusions.

[48] Judgment no. C-66/85. Deborah Lawrie-Blum v Land Baden-Württemberg [ECLI:EU:C:1986:284] of the CJEU announced on 07.03.1986, points 12-22.

[49] Stefano Giubboni, "*Being a worker in EU law*", *European Labour Law Journal*, Vol. 9. Issue 3 (2018), p. 225 and 234.

Nothing shows this duality better than that, although it took nearly four decades[50] to recognise the importance and common value of the concept at legislative level, the European Commission has openly undertaken harmonisation,[51] however, in the end, it had to step back from pressure from Member States to revolutionise the concept of employee through direct regulation. Although, the practice of CJEU remained the final legal basis and model for the Member States, holistic modernisation in this respect was lacking. In terms of content, perhaps the regularly recurring nature of work and work under the direction of others should be emphasised.[52] Since they – even starting from the Hungarian practice – are really such special features of employment relationship that they can be crucial when judging the legal relationship of a given person.[53] In any event, the CJEU, using these conceptual elements establishes an employment relationship, either for purely private law,[54] or for a type of legal relationship that is otherwise barely labour relationship[55], which is therefore a guarantee for a sufficiently broad interpretation of the law and an approach different from the current Hungarian legal conception. The concept is less dogmatic and rigid, and focuses more strongly on the person carrying out the work and the rights attached to her or his legal status,[56] which may also be a different approach from the current ones. It should be noted that even the original concept the Proposal for the Directive (EU) 2019/1152 could be criticized, since in terms of its content components, it would indeed have provided a high degree of freedom to interpret the term "employee", but it was not structurally detached from the traditional concept, which can be traced back to the imbalance in the parties" contractual position.[57] This is because working under the direction of another raises the issues of legal status of the self-employed, those who do not work for only one employer, or do entirely online, platform work, etc. since Directive (EU) 2019/1152 intended primarily to bring the legal relationship of those working this way within the scope of the legislation.[58] As the text of the Proposal for the Directive has changed in the meantime, and as the reference to European judicial practice alone is likely to be less important than the stand-alone legislation analysed earlier, the step backwards on the legislative side may delay a dynamic interpretation of the concept, and it will perhaps cover only the legal relations of those working in the traditional form, leaving open, of course, the possibility of conceptual extension on the basis of the CJEU legal interpretation cited.

Although, regulating the legal relations of platform workers at EU level in itself raises legitimacy concerns,[59] in my view, a consistent, extensive interpretation of the concept of employee can only benefit national legislatures and labour markets if it

[50] The relevant test, which is still applicable to this day, was established by the CJEU in 1986 in judgement Lawrie-Blum, cited above.

[51] This can be applied only to this Directive, but thus implicitly to all areas of law governed by EU law.

[52] György Lőrincz, "*Kommentár a Munka Törvénykönyvéről szóló 2032. évi I. törvényhez. Munkajogi SCI-FI*", *Munkajog*, Vol. 2. Issue 4 (2018), 8-9.

[53] Although in the case of the self-employed, working for others may also be questionable.

[54] Judgment no. C-232/09.

[55] Judgment no. C-270/13.

[56] Kullmann, ibid., 402-408.

[57] Otto Kahn-Freund, *Labour and the Law*, Stevens and Sons, London, 1977, p. 6.

[58] Proposal p. 13-14.

[59] Risak, ibid., p. 10-11. and p. 13-17.

actually covers all currently known legal relationships of employment, moreover, it induces such flexible regulation that perhaps "looks to the future" to eliminate such legal dogmatic anomalies as the present ones. However, all this has in practice returned to the competence of the Member States and to the area of consistent, legal developing legal interpretation of the CJEU. I only mention the new *posting directive* [60] which also contains a quasi-concept of worker, but it does not attempt to achieve legal harmonisation, since by the nature of the *posting* regulation it is essential that the conceptual definition would cover only the specific cases of working between the Member States, consequently, it leaves scope for the standards of the Member States.[61] In any case, the fundamental right to free movement of workers links these rules of the Directive to those discussed above, although, the approach is, of course, different.

5. Conclusion

„Employee means any natural person who works under an employment contract."[62] Referring to what was written in the introduction, whether at first glance, is this quoted concept as clear as the concept outlined there? Although the comparison is somewhat hypothetical, as Directive (EU) 2019/1152 by taking a significant step backwards, merely refers to the CJEU"s *concept of "worker"*, yet I believe that a scientific discourse on employee (or worker) status might not be more relevant. It is clear that actors of the labour market are gradually, but firmly, going beyond the legal dogmatic boundaries based on pure theoretical foundations artificially created by the legislator in order to be able to carry out their economic activities in the most useful, efficient (legal) form for them. This process may even lead to that the legislator, placing the often seemingly redundant labour law rules entirely on a private law basis, even more definitely opens the door to absolute private law will autonomy and contractual freedom based on it, which could affect our current knowledge and thinking on labour law from two directions.

On the one hand, the level of the protection of employees in the traditional (social) sense may decrease significantly; on the other hand, the employment relationship or the concept of employee within a strict legal framework may be pushed into the background. According to the present situation, the EU"s labour and social law aspirations are intended to provide conflicting answers to the former phenomenon, while in the latter case labour law thinking may already be at a disadvantage compared to economic reality. Although, in my opinion, the recognition of these connections can really put some parts of the Hungarian labour law system on new funds, I do not think that we need to talk only about real novelties or a 180-degree turnaround right now. However, we can talk about a different, new (labour) legal point of view, since in my opinion the above mechanisms do not contradict each other, but should act as complements to each other (that is, stable social protection combined with effective contractual but not strict status-dependent contractual freedom).

[60] Directive (EU) 2018/957 of the European Parliament and of the Council (28 June 2018) amending Directive 96/71 /EC concerning the posting of workers in the framework of the provision of services.

[61] Paragraph (2) of Article 2 of Directive 96/71/EC links the concept of worker to the legislation of the Member State concerned.

[62] Paragraph (1) of section 34 of the LC.

In my view, it follows from the above that a creative attitude of legislators and law enforcers is needed to understand and resolve the dilemma outlined in this study, because in many respects it may seem that we want to solve a – for the time being – non-existent or only marginally present problem with legal instruments that are either at our disposal, only in the traditional way, or not in the right place. Nevertheless, the divergent national and EU – and international – approaches certainly culminate in breaking down the strict, dogmatic barriers, which may not, of course, lead to the legal impossibility or narrowing employee status, but to the extension of the personal scope of labour law rules, strengthening basic social protection instruments. Naturally, the search for new paths is always risky and uncertain, so it can be argued that the traditional toolbox may in fact be appropriate to achieve the goal, but this would necessarily result loosening the traditional catalogue of criteria (such as FMM-PM Joint Directive 7001/2005). Namely, the new regulatory paths may not be entirely new in fact, but hitherto unknown branches of the old ones, as it was already observed in labour law during the period of atypical employment, but the legislative support of self-employment as a legal status allows a similar conclusion. In any case, a dynamic conception of the concept of employee could certainly be part of this solution instead of the current static approach.

Finally, I would like to point out that it is conceivable that due to the apparent withdrawal of Directive 2019/1152 and the small presence of various "modern" types of legal relationships in Hungary, the thought experiment of the present study is distant. Just as the idea of introducing, an "intermediate" legal status has already arisen during the codification of the current LC and as we regard the content components of labour relationship, similarly, we may soon take the not-too-big step of replacing "employee" status with "worker" status in response to real, dynamic changes in this concept in the labour market. In conclusion, I believe that it is perhaps time to unfold the other side of the idea of contractual freedom, which is central to LC and to general labour law thinking today, that is, not only in the strictly "employment relationship" but also in the "legal relationship of work" in general, to give the contracting parties the opportunities offered by the labour law toolkit. The 21st century labour market changes are likely to make this phenomenon inevitable in the coming years.

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