



## UvA-DARE (Digital Academic Repository)

### The Notion of 'Employee' in EU-Law and National Laws

*A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation*

Verhulp, E.

#### Publication date

2017

[Link to publication](#)

#### Citation for published version (APA):

Verhulp, E. (2017). *The Notion of 'Employee' in EU-Law and National Laws: A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation*. 1-10. Paper presented at Annual conference: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation, Frankfurt, Germany.

#### General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

#### Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



# **The Notion of 'Employee' in EU-Law and National Laws**

Professor Evert Verhulp, University of Amsterdam,  
Netherlands

A Thematic Working Paper for The Annual Conference  
of the European Centre of Expertise (ECE) in the field  
of labour law, employment and labour market  
policies:

## **The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation**

Directorate-General for Employment, Social Affairs and Inclusion  
European Centre of Expertise (ECE)

Written by Professor Evert Verhulp  
April 2017



The European Centre of Expertise (ECE) in the field of labour law, employment and  
labour market policies

**LEGAL NOTICE**

The contents of this publication are the sole responsibility of the author(s). The contents of this publication do not necessarily reflect the position or opinion of the European Commission. Neither the European Commission nor any person/organisation acting on behalf of the Commission is responsible for the use that might be made of any information contained in this publication.

This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020).

More information on the European Union is available on the Internet (<http://www.europa.eu>).

# THE NOTION OF 'EMPLOYEE' IN EU-LAW AND NATIONAL LAWS

Professor Evert Verhulp\*

## 1 Introduction

Most EU member states regulate employment on the basis of an obligatory contract, the employment contract. I will use the term "employee" to indicate someone working under a contract of employment and the term "self-employed person" to indicate someone operating under a contract for services.<sup>1</sup> In most legal systems the employment relations are distinguished into two categories: employees and self-employed persons. It is a binary system, if you will: someone is either an employee or self-employed. The employment contract is obligatory in the sense that whenever a person performs services for and under the direction (or subordination) of another party in return for which he receives remuneration, this person must be deemed an employee and the other party his employer.

The employment contract of an indefinite duration is legally considered to be the norm. In the preamble of the framework agreement on fixed-term work, Directive 1999/70, the parties stipulate: *"Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance,"*. This shows that there is more at stake than only the protection of the employee. There is also a collective interest: the quality of life and the improvement of performance. The legal presumption is that an employment contract contributes to a healthy and happy workforce, resulting in high levels of productivity.

Around the obligatory employment contract the states have created massive structures of regulations to protect the economically weaker party, the worker. The worker's employment relationship is also the entrance ticket to another fortress, that of social security. And as beautiful as these structures may be from an employee's perspective, they seem to become increasingly inaccessible. In this context, it is striking that second on the list of new status symbols for Germans is the 'employment contract for an indefinite period'.<sup>2</sup> Employers seem reluctant to enter into employment contracts, for fear of only being able to dismiss an employee, if possible at all, after paying a huge severance payment and in the meantime suffering from the many obligations towards the employee. In some countries the obligations of the employer are quite onerous indeed. In the Netherlands, for instance, in the event of illness, the employer must continue to pay wages for a period of two years and is obliged to reintegrate the employee, regardless of the cause of the illness. In the Netherlands, employers have developed a preference to have the work done by self-employed persons or agency workers. Recent years have shown a significant growth of self-employment, up to 15% of the workforce in 2016.

There seems to be a contradiction in the legal notion that the employment contract is an obligatory contract and the statement that parties to an employment relationship are

---

\* Evert Verhulp is a Full Professor in Labour Law at the University of Amsterdam, the Netherlands. [verhulp@uva.nl](mailto:verhulp@uva.nl)

<sup>1</sup> I am aware that the term 'employee' in the British context, and thus different from its use in this text, is construed very restrictively.

<sup>2</sup> Welt am Sonntag, 4 August 2013, see also <https://www.welt.de/wirtschaft/article118660732/Die-Statussymbole-der-Deutschen-sind-unbezahlbar.html>.

able to avoid entering into an employment contract. The basis of this contradiction is the presumption that an employee has an interest in the enforcement of an employer's legal obligations. This presumption is increasingly lacking foundation. The consequence is that we now have several workers who are legally entitled to an employment contract, but not willing or able to exercise this right. In other words: there is a gap between the (applicable) regulation and the labour market behaviour of the worker and the employer.

In this paper I will address the definitions of the employee and self-employed person in both national and EU law and go into more detail on the labour market developments (such as digitalisation and platformisation) that influence the definition of the employee. I will conclude with a few remarks about the effects of these developments on the notion of employee.

## **2 The definition of the employment contract in the member states**

The legal definition of the obligatory employment contract is to be found in the legislation of the member states of the EU, there is no unified EU definition of employee. In the Netherlands, art. 7:610 DCC stipulates: "*An employment agreement is an agreement under which one of the parties ('the employee') engages himself towards the opposite party ('the employer') to perform work for a period of time in service of this opposite party in exchange for payment*". Subordination is the key point in this definition: if there is no subordination, there is a contract for services.<sup>3</sup> The evaluation as to whether there is subordination and thus an employment contract, or a contract for services is made on the basis of an evaluation of all circumstances of the case, which in the Netherlands is called the 'holistic consideration'.<sup>4</sup> Article 45 TFEU does not prohibit the member states from expanding the employment law protection to employment relationships in which the authority relationship is lacking. If they do so, they do run the risk of impeding the freedom of establishment and the freedom to provide services (articles 49 and 56 TFEU). One solution for the 'all or nothing' character of the employment contract could be to create an intermediate form of contract, in between an employment contract and a contract for services. As far as I know, only the UK has made a legal distinction in the scope of legislation by defining 'employee' and the rather broader definition of 'worker'.<sup>5</sup> In some other European countries, distinctions in legal protection are made between 'blue collar workers' and 'white collar workers', which to some extent, had the same effect. In Belgium, this distinction was abolished by agreement of 5 July 2013.<sup>6</sup>

## **3 The definition of the employment contract in the EU**

There is no unified European definition of employee, or 'worker' which is the more common term in European legislation, as in art. 45 TFEU and Regulation 492/2011 ("Freedom of movement for workers shall be secured within the Union"). The Court of Justice of the European Union also uses the elements mentioned above to identify an

---

<sup>3</sup> Luca Nogler, *The Concept of Subordination in European and Comparative Law*, University of Trento, Italy 2009, pp. 21-72, states that 'subordination' fits within a continental European tradition.

<sup>4</sup> A-G Verkade for the Netherlands Supreme Court 14 April 2006, NJ 2007, 447. The German Bundesarbeitsgericht has done the same: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2013&anz=59&pos=4&nr=17008&linked=urt>

<sup>5</sup> See for these definitions A. Neal, *The Protection of Working Relationships under United Kingdom Law*, in; Frans Pennings and Claire Bosse, *The Protection of Working Relations*, Kluwer International Law 2011, pp. 153-159, see also e.g.

<sup>6</sup> <https://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/agreement-gives-equal-status-to-blue-and-white-collar-workers>

employee,<sup>7</sup> and reviews all circumstances of the case when doing so.<sup>8</sup> The CJEU has had several occasions to decide upon the applicability of EU treaties and directives on employees and also on the opposite term, 'undertaking' (e.g. in art. 101 TFEU). Whether an individual is an employee must be evaluated on the basis of the concept of an employee in European law within the meaning of article 45 TFEU. The term 'employee' comes up frequently in the case law of the Court of Justice of the EU. It is remarkable that the term is often pragmatically defined in that case law and consequently no clear definition can be given. What is clear is that the term employee encompasses essential features: performing of labour, receiving remuneration, and subordination.<sup>9</sup> In the words of the CJEU: "*The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.*"

The jurisprudence of the CJEU leads to the following: The terms "worker" and "activity as an employed person" may not be defined by reference to the national laws of the member states but have a Community meaning. The meaning and the scope of the terms "worker" and "activity as an employed person" should thus be clarified in the light of the principles of the legal order of the Community."<sup>10</sup> Moreover, as the concept of 'worker' and an "activity as an employed person" define the field of application of the fundamental freedoms guaranteed by the Treaty to workers, this definition may therefore, as such, not be interpreted restrictively.<sup>11</sup> Also when the worker earns an income lower than that which, in a member state, is considered as the minimum required for subsistence, provided that the worker pursues an activity as an employed person which is effective and genuine, he is covered by the provisions of community law relating to freedom of movement for workers.<sup>12</sup> Even if the worker claims financial assistance payable out of the public funds of the member state in order to supplement the income he receives from those activities, it does not exclude him from the provisions of Community law relating to freedom of movement for workers.<sup>13</sup> Also the motives which may have prompted a worker of a member state to seek employment in another member state are of no consequence as regards his right to enter and reside in the territory of the latter state provided that he pursues or wishes to pursue effective and genuine activities.<sup>14</sup>

#### **4 The distinction between an employee and a self-employed person under European law**

The CJEU also assumes a binary system: an employment relationship is an employment contract or, if the subordination requirement is not satisfied, a contract for services: "*any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Article 52 of the Treaty*".<sup>15</sup> In the FNV Kiem case<sup>16</sup> the CJEU considers that: *It follows that the*

---

<sup>7</sup> Lawrie Blum (1986) ECR 2121, para. 17, CJEU 13 January 2004, C-256/01 (Allonby)

<sup>8</sup> CJEU 14 December 1989, C-3/87 (Agegate), "*The question whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterizing the arrangements between the parties, such as,, for example, the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants.*"

<sup>9</sup> CJEU 3 July 1986, C-66/85 (Lawrie/Blum)

<sup>10</sup> CJEU 23 March 1982, C-52/81 (Levin)

<sup>11</sup> CJEU 23 March 1982, C-52/81 (Levin)

<sup>12</sup> CJEU 23 March 1982, C-52/81 (Levin)

<sup>13</sup> CJEU 3 June 1986, C-139/85, Jur. 1986, 1747 (Kempf)

<sup>14</sup> CJEU 23 March 1982, C-52/81 (Levin)

<sup>15</sup> CJEU 20 November 2001, C-268/99 (Jany and others)

<sup>16</sup> CJEU 4 December 2014, C-413/13 (FNV KIEM) ECLI:EU:C:2014:2411, under 36.

*status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in Allonby, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in Agegate, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in Becu and Others, C-22/98, EU:C:1999:419, paragraph 26).*

The CJEU previously considered that the assumption of employment does not prevent the person from sharing in the revenue or profit of the principal: *In any event, the sole fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker.*<sup>17</sup> With regard to assuming there is a contract for services, the CJEU not only sets the condition that there may not be subordination, but sets additional conditions: *It is for the national court to determine in each case, in the light of the evidence adduced before it, whether the conditions allowing it to be concluded that prostitution is being carried on by the person concerned in a self-employed capacity are satisfied, that is to say: — outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration; — under that person's own responsibility; and — in return for remuneration paid to that person directly and in full.*<sup>18</sup> A self-employed person is thus someone who performs work in a position where he or she is not subordinated, for which he or she is responsible and for which he or she is paid directly and in full. If this latter element were to be applied strictly, many self-employed persons would not fall under the term 'self-employed' under European law.

## **5 False self-employed?**

A-G Wahl describes 'false self-employed' as follows: *"(...): employees who are disguised as self-employed in order to avoid the application of some specific legislation (for example, labour or fiscal regulations) which is considered unfavourable by the employer. Another example is the case of self-employed persons who are economically dependent on a sole (or main) customer."*<sup>19</sup> The CJEU shares this definition of the Advocate General, thereby creating a new definition in addition to employee and self-employed person. The CJEU uses the term 'false self-employed' in connection with free competition as regulated in art. 101 TFEU. This provision does not mention the term employee. The CJEU describes 'false self-employed' as follows: *On a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU.*<sup>20</sup> The question is whether the interpretation of the term 'false self-employed' given for the application of this article also plays a role in the interpretation of the term employee as referred to in art. 45 TFEU. Although there is no uniform definition of employee in the EU, such a definition would be logical because it is undesirable that the term employee were to have a

---

<sup>17</sup> CJEU 14 December 1989, C-3/87 Agegate.

<sup>18</sup> CJEU 20 November 2001, C-268/99 (Jany and others).

<sup>19</sup> Opinion AG Wahl Case C-413/13, 11 September 2014, *FNV KIEM* ECLI: EU:C:2014:2215, para. 52

<sup>20</sup> CJEU 4 December 2014, C-413/13 (FNV KIEM) ECLI:EU:C:2014:2411

different meaning depending on the applicable arrangement and it may be assumed that the CJEU realises this too.<sup>21</sup>

When evaluating the question whether a person is self-employed, an employee or 'false self-employed', it is thus relevant whether i) there is legal subordination between the parties, ii) whether the person runs a financial and commercial risk and 3) to what extent the person forms part of and is embedded in the economic unit or business of the employer. In my opinion, it ensues from the foregoing that in the evaluation of the employment relationship it is of great importance who acquired the assignment to carry out the work and who acts as contracting party with the (first and original) principal. The evaluation should also review whether the person carrying out the work has a great degree of freedom in determining the time and place of the work and whether the person carrying out the work forms part of the principal's organisation. With regard to a substitute (which was the issue in the FNV KIEM case) he or she will in any event under European law (but probably also under Dutch law<sup>22</sup>) have to be deemed an employee. From this it follows that the notion 'false self-employed' refers to an abusive situation in which position the person is self-employed based on formal grounds, but in fact performs his or her services in a subordinated relationship. In my opinion, the 'false self-employed' person will virtually always be deemed an employee within the meaning of the EU regulations.

## **6 In summary: employee or self-employed?**

Although on the basis of the considerations of the Court of Justice of the European Union no clear definition can be given of the term 'employee' in European law, frameworks can be set for the answer to the question whether a working person is self-employed or an employee under European law. It ensues from the case law of the CJEU first of all that an evaluation of all circumstances of the case is always necessary when determining whether there is an authority relationship between employer and employee or between principal and contractor. In the case of *FNV Kunsten Informatie en Media*, the CJEU fleshes out the authority relationship by looking at the freedom a working person has to choose his time schedule and the place and the contents of his work. Compared to an employee or a 'false self-employed' person, a self-employed person enjoys greater freedom and flexibility in determining his time schedule, place and contents of his work. The CJEU states as the second element that a self-employed person runs a commercial and financial risk. Employees and 'false self-employed' persons do not. It is of great importance that employees and 'false self-employed' persons form part of the employer's economic unit. This 'economic unit' comes back in the *Suikerunie* case<sup>23</sup>, whereby the CJEU considered that '*an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions*' is not self-employed/an entrepreneur within the framework of the competition regulations. I think that this 'organisational embedding' of labour, in addition to subordination, is an important element in presuming there is an employment contract in the case law of the CJEU. If the labour is carried out in a subordinated relationship in the organisation or as part of the employer's organisation and belongs to the core of the employer's activities, an employment contract will quickly be presumed.

---

<sup>21</sup> In this sense, see also: F. Temming, *Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektive*, *Sociales Recht* 4, 2016, s. 160-161.

<sup>22</sup> Court of Appeal The Hague 1 September 2015, ECLI:NL:GHDHA:2015:2305

<sup>23</sup> CJEU 16 December 1975, cases 40-48, 50, 54-56, 111, 113 and 114/73, *Coöperatieve vereniging Suiker Unie UA e.a. v Commissie*, *Jur.* 1975, p. 1663, point 371, under 476



## 7 Labour market developments

I will focus on the developments of the employee, labour and the labour market since the introduction of the national and EU regulations by giving a rough outline.<sup>24</sup>

For some groups of employees, due to the introduction of social security and other income provisions, the economic dependency on the employer has become less relevant. Although for large groups of employees income still has priority, for other groups on the labour market another labour dependency has arisen. A dependency that is based on the status of having work, the satisfaction derived from work. After all, labour is part of an individual's identity. This identification with labour seems to have increased with the differentiation of labour which coincides with the shift from an economy based on industry and agriculture to a service economy. The Canadian Supreme Court considered in this respect in a case of 9 April 1987: *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.*<sup>25</sup>

The increased individualisation of the employee has led to a different approach to employment. The view that employers deem labour a trade commodity, a production factor, which can be deployed with no consideration for the employee as a person, was leading in creating the legislation relating to employment contracts. This view now seems to be outdated in significant parts of society. The employee is increasingly seen as human capital, a person who carries out an activity which can be individually measured and valued and should therefore not be approached as part of a group. As a professional, the employee provides labour over which the employer no longer can and wants to exercise any substantive influence: the employee is increasingly less subordinated in the performance of his work.<sup>26</sup> Entrepreneurship, including when it involves a person's own labour, sometimes aligns better with this approach to labour. Even by employees who appear to need the mandatory protection connected with an employment contract, this protection can be deemed an impediment for their labour market position. This applies all the more now that many employers only offer labour to people who are willing and able to carry out that labour as a self-employed person. As a self-employed person, the worker is not covered by the collective arrangements that apply to employees, which can be financially favourable. Certainly, if entrepreneurship is fiscally encouraged, as it is in the Netherlands,<sup>27</sup> both the employer

---

<sup>24</sup> This topic is not particularly novel, see e.g. Janice R. Bellace, *Labor Law for the Post Industrial Workplace: Breaking the New Deal in the USA*, in: J.R. Bellace & M.G. Roos, *Labour Law at the Crossroads: Changing Employment Relationships*, Kluwer Law International, 1997, pp. 11-26. For an excellent and more complete overview, see: Manfred Weiss: *Re-inventing Labour Law?* in: Guy Davidov & Brian Langille: *The Idea of Labour Law*, Oxford University Press, 2011, pp. 43-56

<sup>25</sup> Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, see for Germany:

<sup>26</sup> This determination led the Dutch state secretary of Finance to announce an investigation into the definition of the employment contract and the options which align better with the labour market, see Tweede voortgangsrapportage Wet DBA, <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/18/kamerbrief-tweede-voortgangsrapportage-wet-dba>.

<sup>27</sup> The fiscal advantages for self-employed persons in the Netherlands are considerable, see the investigation of the national government on the matter (IBO 2015): <https://www.rijksoverheid.nl/documenten/rapporten/2015/10/02/eindrapport-ibo-zelfstandigen-zonder-personeel>, pp. 118 – 122.

and the self-employed person who offers his labour, can have an interest in doing so as a self-employed person rather than as an employee.

Employers and the organisation of labour have also been changing rapidly, certainly in the last few years. More than previously, work is carried out on a project basis (on demand labour)<sup>28</sup>, while sometimes the hierarchical organisation of labour is replaced by networks and joint ventures.<sup>29</sup> The legal literature pays a lot of attention to the digitalisation of labour and the way in which the law should deal with it.<sup>30</sup> The possibility of offering work via internet platforms also offers the possibility of offering labour in small sub-tasks to an almost unlimited number of people who want to carry out that labour (crowd work). These people all have the freedom to work at any time of their choosing, but also the choice not to carry out that work. The question is whether the notion of the employment contract and the related subordination still aligns with this working method. Many employers see employment contracts for an indefinite period as a heavy burden, because of the employee protection connected with such a contract. If an employer has the option of not having the work carried out by means of a subordinated relationship and engaging a self-employed person rather than an employee, he will quickly lean in that direction due to the lower costs and lower employment law obligations and risks.

## **8 The changed labour and labour market and the consequences for labour law**

In Recommendation 198, the ILO tried to present a further demarcation of the employment contract, partly to prevent bogus constructions. This recommendation was determined after long discussions in 2008.<sup>31</sup> The recommendation calls on the members to deem the factual circumstances under which the labour is carried out decisive for the evaluation of the question whether an employment contract exists and thus for the question which rules apply, regardless of the question how the parties themselves call or refer to the contract concluded between them (clause 9) and provides some guidelines in that respect. As apparent from the above, this 'holistic consideration' of all circumstances is the starting point. Nevertheless, to date the recommendation has not been ratified by any member of the ILO.

The basic premise is that labour is approached with legal definitions of which it is unclear whether these still align with the changes briefly outlined above and that consequently the employment contract must be redefined. Freedland, for example, assumes different dimensions to evaluate whether there is an employment contract, being (i) that of the worker, (ii) that of the employing organisation, (iii) that of duration and continuity, (iv) that of personal labour and replaceability, and (v) that of the goal and the motivation for carrying out the labour.<sup>32</sup> Supiot previously argued in favour of the introduction of a uniform definition of employee with a broader scope.<sup>33</sup> The pressure of various business

---

<sup>28</sup> See e.g. V. de Stefano, *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'*, *Comparative Labour Law & Policy Journal*, 2016.

<sup>29</sup> See Anne Meier, *The New Employment Relationship*, DIKE, Zurich, 2014

<sup>30</sup> There is really a 'mer a boire' to read on this topic. See e.g. Wolfgang Däubler, *Digitalisering und Arbeitsrecht*, *Soziales Recht* July 2016, M. Houwerzijl, *Arbeid en arbeidsrecht in een digitale platformsamenleving: een verkenning*, TRA 2017, 14,

<sup>31</sup> See Frans Pennings and Claire Bosse: *The protection of working relationships*, Wolters Kluwer, 2011, pp. 15-29.

<sup>32</sup> M. Freedland, *From the Contract of Employment to the Personal Work Nexus*, *Industrial Law Journal* 35, no. 1 (2006), 12. See: Frans Pennings and Claire Bosse: *The protection of working relationships*, Wolters Kluwer, 2011, p. 10. See also M. Freedland and Nicola Kountouris: "The Legal Characterization of Personal Work Relations and the Idea of Labour Law, in: Guy Davidov and Brian Langille: *The Idea of Labour Law*, Oxford University Press 2011, p. 190 et seq.

<sup>33</sup> Alain Supiot, *Beyond employment. Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, 2015.

organisations to adjust the definition of the employment contract is strong. The concept of flexicurity can be traced back to this wish.<sup>34</sup>

The question is whether the current definition can be maintained for a while, in any event until the changes on the labour market have played out and it is clear what direction the developments are heading. What is clear is that there is a certain dissatisfaction among groups of employees who fall under an employment contract against their will, and conversely, groups of employees who are deprived of the protection of employment law to which they are entitled in accordance with societal norms. In order to serve those groups better, the definition of the employment contract could be adjusted. A review of the economic or social position of parties to the contract could be included.<sup>35</sup> An adjustment means that the protective working of the employment contract will be offered in differentiated form and this also entails substantial disadvantages. In that case too some groups will fall outside of the protection they deserve or protection will be imposed precisely on those groups that do not want it. It is also important to be aware that a differentiation in the working and accessibility of protective or other provisions considerably complicates the application of the law. Earlier attempts to achieve a definition of employee which better aligns with the labour market, came to nothing. There is no reason to assume things will be different now.

## 9 Conclusion

We now have to do with the current definitions in a changing labour market. Are the current arrangements inadequate? The *FNV Kiem case* has been discussed above. It ensues from the said case that if a member state does not provide an employee working in a subordinated relationship the protection to which he or she is entitled under employment law, European law will come to that employee's aid. Uber is the almost iconic example of the new labour market. The 'old' definition of the employment contract is sometimes successfully applied to the 'new employees' of Uber. In its decision of 28 October 2016 the London Employment Tribunal held the Uber drivers to be 'workers' (according to UK law).<sup>36</sup> A further study of the facts accepted by the English court makes me suspect that Uber under Dutch law too (Uber BV is based in the Netherlands) concludes employment contracts with the drivers, but this is not completely certain.

Although such 'successes' of the current arrangements may occur more often, it is worth recommending to have the definition of the employment contract, certainly in European law, better aligned with the ways of organising work on the labour market which have arisen in many member states.

---

<sup>34</sup> Green Paper: Modernising Labour Law to meet the Challenges of the 21<sup>st</sup> Century, Brussels, 22 November 2006 COM (2006) 708.

<sup>35</sup> In the Netherlands this is one of the options under study: see footnote 27 and the report of the Boot Committee on the self-employed: <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/18/rapport-commissie-boot>

<sup>36</sup> Employment Tribunal London, case no. 2202552/2015 Aslam a.o. vs Uber BV, 28 October 2016. In Brazil too the court presumed an employment contract between Uber and a driver:

<https://www.usnews.com/news/technology/articles/2017-02-14/brazil-judge-rules-uber-drivers-are-employees-deserve-benefits>, while in Switzerland Uber drivers are deemed employees for the purpose of social security insurance: <http://www.srf.ch/news/schweiz/uber-blitz-ab-fahrer-sind-angestellte>.