Diversifying Employment Patterns – the Scope of Labor Law and the Notion of Employees

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I. Legal Definition

1. German law differs between the contract of service (*"Dienstvertrag"*) and the employment contract (*"Arbeitsvertrag"*); both are contracts of service in a wider sense. Some rules are applicable to both types of contract, but a great number of laws is only applicable to employees. Most of the rules in sec. 611 – 630 BGB (Bürgerliches Gesetzbuch, Civil Law) are meant for both types of contract; but whereas sec. 621 BGB (periods of notice) is only applicable to a contract of service, sec. 622 BGB rules the same subject especially for employees. Some rules are only meant for employees, i.e. sec. 611 a, 611 b, 612 para. 3, 612 a, 613 a, 615 sentence 3, 619 a, 622, 623 BGB.

2. a) In a few cases there is a *definition of an employee in the statute*, like in *sec. 5 BetrVG* (Betriebsverfassungsgesetz, Law on Works Councils). But it says "employees meant by this statute," that means that some of the ideas of this section may be valid in general, others, however, only for the Law on Works Councils.

b) *Sec. 84 HGB* (Handelsgesetzbuch, Commercial Law) differs between an independent commercial agent (para. 1) – who can in general dispose of his work and of his time, para. 1 sentence 2 -, and a dependent commercial agent (para. 2). In legal theory it is common knowledge, that a definition given in a statute is only valid for this special statute. Whereas for sec. 5 BetrVG this is accepted, the BAG (Bundesarbeitsgericht, Federal Court of Labor) and a lot of scholars regard sec. 84 HGB as basis for an analogy in general (see references in *Wank* in Martinek/Semler/Habermeier, Handbuch des Vertriebsrechts, 2nd ed. 2003, § 8).

But not even the legislator of sec. 84 HGB himself imagined it as a general definition. Besides, it does not correspond with the general definition normally used in labor law, because it only contains two items, different from the general definition.

In fact, although the BAG and some scholars claim, that they apply sec. 84 HGB in analogy, they do not apply this section seriously, but follow their own definition.

c) There is a legal definition in *sec. 7 SGB IV* (Sozialgesetzbuch IV, Social Security Law Book IV). It says in para. 1 sentence 2:

"Employment is non-self-employed work, especially in an employment relationship. Items for an employment are work following orders and integration in the work organization of the person giving the orders." This corresponds with the generally used definition in labor law (see sub. III.).

From 1996 until 1998 sec. 7 SGB IV also contained an even more concrete definition in para. 4. Whereas sec. 1 para. 2 follows the prevailing opinion on the definition of an employee, para. 4 followed the definition given by *Wank*. As the new definition was rejected by employers, scholars and politicians, para. 4 was abolished in 1998, so that only para. 4 sentence 2 SGB IV is left. Although the definition refers to an employment contract, it is generally accepted that it deals only with social security law (see *Wank*, Zeitschrift der juristischen Fakultät der Armori-Universität, Japan 2002, 118-138).

d) In Germany *labor law and social security law* are regarded as two different materials. Labor law is part of the civil law, social security law is part of the administrative law. There are different courts for labor law and for social security law. Following this diversification, labor law and social security law have developed two different definitions of the employee. Concerning their relationship there are two different theories.

One theory says, that both materias have two genuinely own definitions. They may be similar, but each refers to another material (*Rolfs*, Erfurter Kommentar (ErfK), 4th ed. 2004, SGB IV, sec. 7 note 2 et seq.)

The other theory, which is more convincing, says that social security law follows labor law. It is the aim of social security law to address approximately the same people as labor law. Therefore in the inner core the definition of an employee in labor law and that in social security law is the same. There are only differences at the brim, following the different logic of private law and administrative law (*Wank*, Arbeit und Recht (AuR) 2001, 291, 297 et seq.). Then sec. 7 SGB IV reads like this: "An employee in social security law is a person which is an employee in labor law, as far as the different aim of these two materials do not require a differentiation."

e) As far as *tax law* is concerned, there is also a difference between self-employed (Einkommensteuer, income tax) and employee (Lohnsteuer, employee's tax). There is no legal definition. But the definition given by the BFH (Bundesfinanzhof, Federal Court of Finance) is very much similar to that in labor law. The problem is the same as between labor law and social security law. Tax law follows the labor law, and there is no reason for a difference. But there is a strong opinion that there are two genuinely different definitions of an employee in labor law and in tax law, which only by chance are similar.

II. Legal Circumscriptions

1. Besides these legal definitions in a lot of statutes in labor law there is something which cannot really be called a definition but rather a circumscription. The employee is not defined by items, but by enumeration, like sec. 1 para. 2 EFZG (Entgeltfortzahlungsgesetz, Law on Sickness Payment).

"Employees meant by this statute are *workers and employees as well as people in vocational training*." For a long time there has been a difference in German law between workers and employees, meaning blue color work and white color work. Although this difference has today almost no more significance, the "definitions" have kept this difference. As far as people in vocational training are concerned, sec. 3 para. 2 BBiG (Berufsbildungsgesetz, Law on Vocational Training) says, that labor law is generally applicable, as long as specialities of the vocational training or of the BBiG do not require differences. Therefore the definition in sec. 1 para. 2 EFZG does not really give any information about who is an employee. There is quite a lot of circumscriptions like this in other statutes.

Even if there is a definition by enumeration, like in sec. 5 BetrVG, the law always says that this definition is only valid for this special statute. Another example is sec. 2 ArbSchG (Arbeitsschutzgesetz, Health and Safety Law). Besides there are statutes which refer to the *employee*, but do not give any definition (like sec. 1 KSchG, Kündigungsschutzgesetz, Law on Dismissals).

In all these cases the "definition" only says who is excluded or who is included, but does not give a real definition of what are the criteria for an employee.

2. There are different *methodological ways* to come up with this. One is to use the same definition of an employee throughout labor law (*Preis*, ErfK, sec. 611 note 45). The other way is to say, as every statute has its own aim, there can be a different definition for each statute.

In general there is the same definition of an employee in all parts of labor law. But the special aim of a certain statute may require a minor different definition.

III. Criteria for the Definition of an Employee

1. The BAG and the majority of the scholars use a definition like "*Employee* is who is on the basis of a contract in civil law obliged to work in the service of somebody else" (*Preis*, ErfK, sec. 611 BGB, note 45). Similar is the definition generally used by the BAG (latest judgement August 20th 2003, Neue Zeitschrift für Arbeitsrecht (NZA) 2004, 398; see also NZA 2000, 385; NZA 2002, 1412). This does not show which is the difference between working for somebody else as self-employed or as employee.

2. What is really important is which *sub-criteria* are used. It is remarkable that the BAG until today declares itself unable to give a definition; everything depends on the circumstances of the single case. It leads to the result that up to 36 (!) sub-criteria must be taken into account, without any preference or logical order. If one takes the jurisprudence seriously, it has no workable definition at all but only offers an unsorted number of sub-criteria.

On the other hand, if one tries to give this jurisprudence more sense than the BAG itself is willing to give, it reads like this: "Employee is who is *personally dependent*." "Personally dependent is who is bound by orders."

a) There is no clear statement in jurisprudence whether "dependence from orders" is the only relevant criterium or if there are the two criteria "*dependent from orders*" and "integration" (mixture in BAG, NZA 2004, 398).

As far as the dependence from orders is concerned, the BAG has no systematic approach, but refers somehow to a number of sub-criteria. If one tries to get a system into the sub-criteria of a definition, there should be, on a second level, a division between orders concerning the aspect of time, the aspect of the working place and the aspect of the contents of the work (the BAG in NZA 2004, 398 refers to contents, implementation, time, duration and place).

aa) A further systematic approach shows e.g. concerning the aspect of the *time* on a third level: hours per week/hours per day/beginning and end of the working day/the freedom to choose the working time in general/the degree of freedom according working time.

bb) There is also no distinction between constraints that come from the *kind of the work* (if school starts at 8 o'clock, teachers must also appear at 8) and others due only to the organizational orders of the employer. To summarize: There is not even a systematic approach concerning working time, let alone to the other sub-criteria. As far as the kind of work is concerned, it is remarkable that in some cases the BAG declares this main criterium as irrelevant. There is also no systematic approach which kind of orders are meant. So the orders can refer to minor details like which tool to use as well as to orders like which curricula are to be dealt with at school.

b) The sub-criterium of dependence on orders is completed by the sub-criterium "*integration*," which is divided into: the necessity to work together with other employees of the other party to the contract and the necessity to use his rooms and materials. As an example, a TV producer who is either self-employed or employee: In the second case he is forced to use the organization of the TV studio.

c) It is further accepted that this is no *optional law*. The way the contract is fulfilled in praxis is a circumstantial evidence (BAG, NZA 1998, 873; NZA 2000, 447; NZA 2001, 210).

IV. Disputes on the Definition

The definition shown in III. is the one generally used by the BAG and by most scholars, with differences in detail but with agreement in general. This definition has been critized by some LAG (Landesarbeitsgerichte, Labor Courts of the "Länder") and by some scholars (see *Wank*, NZA 1999, 216, note 18). Whereas the critics agree in most parts in their critic, there are different proposals for an alternative.

1. The basic reason for the prevailing definition is that is has been *used for a long time*. Not even this correct. In the past, the RAG (Reichsarbeitsgericht, Reichs Labor Court) referred to personal and economic dependence and gave up this second criterium by reasons never explained.

2. a) A definition worth called a juridical definition to be taken seriously must be *teleological*. That means: Definitions cannot be created nearly from arbitrariness. But they fulfill a task in a legal rule consisting of "Tatbestand und Rechtsfolge" (elements of the rule/legal consequences). A definition is correct, when it is justified to apply the legal consequences. E.g. lively imprisonment as the most severe punishment is justified for murder as the most severe crime.

But if you try to find a connection between the legal element "dependence on orders" and the consequence "labor law is to be applied," this connection does hardly show. What has the order to use a certain tool to do with the consequence that this person gets sickness payment? The defenders of the prevailing theory have so far been completely unable to answer this crucial question.

b) There is a connection between the dependence on orders and those legal consequences which help the employed person against arbitrary orders, like the rule that orders must regard the personality of the employed person or that a works council must be heard. As far as labor law looks for the *protection in the job*, the sub-criterium personal dependence is right.

c) As far as the *personal existence* of the employed person is concerned (like rules concerning the risks of sickness, old age, work accidents, maternity etc.), labor law must refer to the *economic dependence* and not to the dependence on orders. Therefore the right definition can only be: An employee is a person who is personally and economically dependent.

3. During the past ten years there has been an intensive *debate* in Germany about the right definition of an employee. It has ended by a victory of the defenders of the prevailing definition. But from a methodological point of view, theses defenders have not been able to produce convincing arguments.

Most of the defenders deny their duty to give a teleological definition. Those who go into this subject accuse the critics that they argue in a vicious circle – but to mistake teleological thinking for false thinking shows a lack of basic legal reasoning.

V. How to Avoid the Problem of Definition

1. One of the aims of the critics and of the former sec. 7 para. 4 SGB IV was – besides a teleological approach – to give an *operational definition*. As the dispute has shown, the defenders of the prevailing opinion, instead of being ashamed that they have not been able during the last decades to produce operational criteria, are even proud that they do not care about the practicability of the definition at all.

2. If one wants to get an operational definition, one must refer to personal dependence and to economic dependence as well, and one has to proceed by criteria, sub-criteria and sub-sub-criteria. The new definition produced by the critics refers to *economic dependence*. Economically dependent is a person who

- works only for one party to the contract,
- without the help of other persons,
- without own capital or own organization.

These criteria have also been named in sec. 7 para. 4 SGB IV, which is meanwhile abolished.

As these are formal criteria they may lead to a result not intended by the idea of labor law. Therefore they can be controlled by the teleological idea of

- *combination of chances and risks*.

This means: If the employed person can make entrepreneurial decisions, he has the chance to earn more money, but also the risk to earn less. Therefore, another criterium must be added:

- the person works *on his own account*.

As far as the two requirements of a definition are concerned – teleological and operational – the dispute shows:

- So far the defenders of the prevailing opinion have not been able to prove the teleological connection between dependence on orders and those laws that protect the existence of the employee.
- They refer to "orders" as orders of any kind. Teleologically thinking, only entrepreneurial orders matter, at least as far as the protection of the existence is concerned.
- The common definition does not give any help concerning the weight and the number of criteria, it does not offer any operational definition.
- The criterium of "entrepreneurial risk" is said to be too uncertain. But the prevailing opinion

accepts orders of any kind. The new definition asks for entrepreneurial orders in opposition to entrepreneurial freedom combined with entrepreneurial risks. This is less uncertain than the prevailing opinion, because it indicates the direction where to look.

- There is the reproach, that "economic dependence" and "entrepreneurial risks and chances" refer to circumstances outside the contract. This reproach is based on deliberately false citation. It has always been argued, that only the entrepreneurial risks and chances as given by the contract itself matter.
- Finally the reproach that a new definition violates the legal system of labor law, because it omits the third category of quasi-employees, violates the basics of logic and of correct citation: According to the new definition, there are, of course, still quasi-employees. Only the number of employees is greater than according to the prevailing definition, because it also includes those people falsely called self-employed. By consequence there is a smaller number of quasi-employees.

VI. "Arbeitnehmerähnliche" (employee-likes, quasi-employees)

In German labor law, there is the fundamental division between self-employed on the one hand and employees on the other hand. Whereas a lot of protective laws exist for employees, self-employed must, as the general idea, care for themselves. Among the category of self-employed, however, there is a division between "Arbeitnehmerähnliche" (literally "employee-likes") and other self-employed.

Reference: *Frantzioch*, Abhängige Selbständigkeit im Arbeitsrecht, 2000; *Neuvians*, Die arbeitnehmerähnliche Person, 2002; *Schubert*, Schutz der arbeitnehmerähnlichen Person, 2004.

1. The quasi-employees are only *mentioned in a few laws*, sec. 12 a TVG, Tarifvertragsgesetz, Law on Collective Bargaining, sec. 5 para. 1 sentence 2 ArbGG, Arbeitsgerichtsgesetz, Law on Labor Conflicts, sec. 2 sentence 2 BUrlG, Bundesurlaubsgesetz, Law on Paid Leave, sec. 2 para. 2 no. 3 ArbSchG, Arbeitsschutzgesetz, Health and Safety Law, sec. 1 para. 2 no. 1 BeschSchG, Beschäftigtenschutzgesetz, Law on Sexual Harassment.

These laws include quasi-employees when they address employees. As a definition they use "economic dependence".

2. Besides, there are special categories of quasi-employees in special laws.

a) There is a special law for *homeworkers*. It is remarkable, that it is only applicable on few people. Telework, e.g., is not covered by it.

b) *Commercial agents* working only for one enterprise and with a low income, sec. 92 a HGB, may sue at labor courts, sec. 5 para. 3 ArbGG.

c) The question is, how in the cases named above and besides for other laws, quasi-employees can be defined.

aa) There is (only) one real definition, meaning an operational definition, which is in *sec. 12 a TVG*. It allows quasi-employees, although they are self-employed, to conclude collective agreements. In practice, this rule is meant for people working in broadcasting, newspapers and in art, and there are only collective agreements in these areas.

The quasi-employee is here defined as:

- working on the basis of a contract of service
- for only one other person
  or getting from one person half of his income
- working for himself, without the help of others.

Sec. 12 a TVG shows, that economically dependence can be transformed into an operational definition. But it is also acknowledged that this definition is especially meant for the TVG and cannot be used for other laws.

bb) Therefore the problem is left how to define a quasi-employee *in general*. If the authors

defending the prevailing opinion are to give a definition, it runs like this:
- An employee is personally dependent, and not economically dependent.
- An "employee-like" (quasi-employee) is economically dependent.

This obviously does not make sense. An "employee-like" is, following this theory, ruled by the same laws as employees, because he has some criteria in common with an employee. But as the employee is qua definitione not economically dependent, this cannot be the criterium.

The comparable criterium also cannot be a personal dependence, because a quasi-employee is, as is generally accepted, a self-employed, and they are defined as personally independent. To summarize: an "employee-like" is like an employee, because he has a special criterium that the employee himself does not have and because he lacks a criterium that the employee has.

To make a systematic scheme the alternative is:
"Employee": personally dependent and economically dependent
"Employee-like": personally independent, but economically dependent
"Other self-employed": personally and economically independent.

This is only a rough scheme. In reality, it is not a matter of dependent or independent, but of more or less dependent.

3. As no special law other than those mentioned above exists for employee-likes, some rules can be applied on them *by analogy*, which is accepted by the BAG and by scholars.

VII. People Working for Non-profit Organizations and Unpaid Workers

There are no special labor laws for non-profit organizations. An employer is defined as someone who employs at least one employee. Therefore the access to this problem must start from the definition of the employee.

1. There is a dispute whether it is a necessary criterium of the definition of an employee that he has the *intention to earn money*. To my opinion there are three questions:
- How far are labor statutes optional?
  Does it depend on the fact, that the employee does not intend to earn wages?
  E.g. the millionaire woman who wants to get to know working in an enterprise and does not need salary – can she dispose of health and safety law? Of maternity leave? Of protection against dismissal?
  Almost all scholars agree that labor law is mandatory and does not refer to the special situation of the person employed, neither in an objective way (has the person other income?) nor in a subjective way (does the person intend to earn money?)
- There is a second question, and the two must not be mixed:
  Are some areas exempt from labor law in which the person employed does not get money?
  This is especially a matter of people working in *religious organizations*. If, e.g., a nurse of the Red Cross works for little or no salary because of her religion – shall labor law interfere? So far four cases of Red Cross nurses have been ruled by the BAG; in each case the argument was different. This shows that the BAG has no concept in this question. It is a matter of concurrence between two areas of law.
- Unpaid work may be accepted in special situations, where the employed person works for *other purposes than to earn money*.
  The typical situation is vocational training. These persons earn money, although far less than employees; in most areas of labor law they are equal to employees (see Berufsbildungsgesetz etc.).
  Other kinds are the so called "Eingliederungsverhältnis" in social security law, sec. 74 SGB V or the trainee.

References: Scholars in favor of the prevailing definition are to be found in the common textbooks of labor law.
A different definition is developed in *Wank*, Arbeitnehmer und Selbständige, 1988; Freie

Mitarbeiter und selbständige Einzelunternehmer mit persönlicher und wirtschaftlicher Abhängigkeit, Hrsg. Bundesministerium für Arbeit und Sozialordnung, 1997; Wank in Blanke u.a., Handbuch Neue Beschäftigungsformen, 2002, p. 1 et seq.; Die “neue Selbständigkeit”, Der Betrieb 1992, 90; Telearbeit, NZA 1999, 225; Ridefinire la nozione di subordinazione?, Giornale di diritto del lavoro e di relazioni industriali 86 (2000), 334; § 7 Abs. 1 und 4 SGB IV, AuR 2001, 291; 327 (also Zeitschrift der juristischen Fakultät der Armori-Universität, Japan 2002, 118 – 138).