Vilnius University Press

Contents lists available at Vilnius University Press

Teisė
2025, Vol. 135, pp. 85–104

ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2025.135.5

The Applicability of ILO's Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally

Hans Lauschke

PhD student at the Institute of Private Law, Mykolas Romeris University
Ateities 20, LT-08303 Vilnius, Lithuania
E-mail: halauschke@stud.mruni.eu

The Applicability of ILO's Employment Relationship Recommendation No. 198 in Shaping Universal Approaches to Distinguish Work Relationships in Lithuania and Internationally

Hans Lauschke

(Mykolas Romeris University (Lithuania))

Summary. Nearly two decades have passed since the International Labour Organization (ILO) adopted the Employment Relationship Recommendation, 2006 (No. 198). This article explores the relevance and potential influence of the Recommendation, and, in particular, Sections 12 and 13 of its Chapter II on national work relationships. It investigates whether the Recommendation can assist in assessing the nature of employment relationships and new forms of work in Lithuania and internationally. Through an analysis of the documents and reports underpinning the Recommendation, the article concludes that, while it offers formal and methodical proposals, there is considerable room for misinterpretation regarding its significance for the content of national employment relationship concepts.
Keywords: Employment Relationship, Employment Contract, Subordination, Dependence, Indicators, Recommendation.

TDO rekomendacijos Nr. 198 dėl darbo santykių taikymas, kuriant universalų požiūrį į darbo santykių atskyrimą Lietuvoje ir tarptautiniu mastu

Hans Lauschke

(Mykolo Romerio universitetas (Lietuva))

Santrauka. Praėjo beveik du dešimtmečiai nuo Tarptautinės darbo organizacijos (TDO) išleistos Rekomendacijos dėl darbo santykių, 2006 m. (Nr. 198). Straipsnyje nagrinėjamas šios rekomendacijos, ypač II skyriaus 12 ir 13 straipsnių, aktualumas ir galima jos įtaka nacionaliniams darbo santykiams. Tiriama, ar rekomendacija gali padėti, vertinant darbo santykių pobūdį ir naujas darbo formas Lietuvoje bei tarptautiniu mastu. Dokumentų ir ataskaitų, kuriomis grindžiama rekomendacija, analizė leidžia daryti išvadą, kad nors rekomendacijoje pateikiami formalūs ir metodiniai pasiūlymai, ji vis dar gali būti netinkamai interpretuojama. Tai ypač pasakytina apie jos reikšmę nacionalinių darbo santykių koncepcijų turiniui.
Pagrindiniai žodžiai: darbo santykiai, darbo sutartis, pavaldumas, priklausomybė, rodikliai, rekomendacija.

Received: 03/02/2025. **Accepted:** 31/03/2025

Introduction

On 15 June 2006, the Employment Relationship Recommendation, 2006 (No. 198) was adopted by the *International Labour Organization* (ILO) (hereinafter referred to as the 'Recommendation') during the 95th session of the *International Labour Conference* (ILC).

Since then, it has been intermittently cited in academic publications, legal texts, and court rulings whenever universal answers are sought to the question of what constitutes an employment relationship in general. Probably one of the most famous examples is the *European Court of Human Rights* (hereinafter referred to as 'ECHR'), which in the case of Sindicatul "Păstorul cel Bun" v. Romania referred to the Recommendation in the absence of international definitions. Specifically, it cited the principle of 'primacy of facts' as outlined in Chapter II, Section 9, and concluded that: "the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties" (Sindicatul "Păstorul cel Bun", 2013, para. 142). The decision supports the argument that this principle holds a certain degree of universal significance in the international context. The *Court of Justice of the European Union* (hereinafter referred to as 'CJEU') also applies this principle in essence as part of its consistent jurisprudence when defining the EU's autonomous 'worker' concept[1], and individual ILO member states likewise follow it in principle when interpreting their national legal concepts[2] that determine an employment relationship[3]. Even in the ultimately unsuccessful draft directive and in the adopted version of the directive on platform work, a reference to the Recommendation is made (Proposal for a Directive…, 2021, recital 21; Directive (EU) 2024/2831, 2024, recital 27), suggesting a significance even beyond the traditional employment relationships to new forms of work.

However, some voices in the literature take this a step further by attempting to draw universal conclusions about the characteristics of an employment relationship based on the example factors mentioned in the Recommendation's Section 12 (namely, 'subordination' and 'dependence') and the example indicators outlined in Section 13. Such approaches are sporadically found in Lithuanian literature, where these example factors and indicators are also used in attempts to refine the understanding of national definitions.

T. Davulis proposes assessing subordination, which constitutes the basis for the existence of an employment contract according to Article 32 of the Lithuanian Labour Code, using indicators and providing a list of non-exhaustive examples in his 2018 Commentary on the Labour Code (Davulis, 2018, p. 133–134). A considerable number of these indicators appear to draw from Chapter II Section 13 of the Recommendation[4], prompting scrutiny of the Recommendation's role in interpreting Lithuania's national concept of the employment relationship.

---

[1] Judgment of the CJEU of 14 October 2010, Union Syndicale Solidaires Isère, para. 29; Judgement of the CJEU of 11 November 2010, Danosa, C-232/09, para. 46; Judgement of the CJEU of 9 July 2015, Balkaya, para. 37.

[2] e.g., in Lithuania: Ruling of the Supreme Court of Lithuania of 31 January 2001; in Germany: Section 611a of its Civil Code (BGB); in the UK: Autoclenz Ltd v Belcher [2011] UKSC 41.

[3] Only in principle, because this concept can take different forms in practice. E. Kocher highlights that, e.g., in German law, there is debate over whether the aim in its national definition is to give effect to the actual intentions of the parties to the contract which would represent a specific application of the 'falsa demonstratio non nocet' principle. On the other hand, the purpose of this principle in the Recommendation appears to be to prevent attempts at 'creative compliance' with employment law obligations (Kocher, 2021, p. 614).

[4] Even if T. Davulis does not explicitly indicate this, the majority of the example indicators he lists are so similar to those outlined in Section 13 of the Recommendation that it can be assumed with great certainty that he has taken them from the Recommendation.

Previously, I. Povilaitienė had already referred to Section 13, by claiming that Section 13 (a) serves to define subordination (Povilaitienė, 2012, p. 40, 73). However, she adds that the Recommendation does not identify the specific indicators and their quantities that would give rise to a legal presumption of the existence of an employment relationship (Povilaitienė, 2012, p. 74).

Similar universal conclusions were also drawn by V. Granickas from Section 13 of the Recommendation (Granickas, 2010, p. 321). In his opinion, it sets out the qualifying features of an employment relationship and establishes a connection to the definition of an employment contract valid at the time and outlined in Articles 93 and 98 para. 1 no. 1 of the old Lithuanian Labour Code which ceased to be in force in 2017 (Granickas, 2012, p. 1595). V. Granickas further argued that the main criterion for the entitlement of an employee to fair remuneration is the work actually performed in the light of the Recommendation's Section 13 (a) (Granickas, 2010, p. 321). Unlike T. Davulis and I. Povilaitienė, however, V. Granickas argues that the example indicators do not merely define some form of subordination, but rather the employment relationship as a whole. However, it is evident that all these approaches attempt to relate the example factors and indicators to each other and assign them inherent substantive meaning without further context, which can then be used to also develop an understanding of the national concept of the employment relationship.

Also internationally, the Recommendation is occasionally referenced when universal approaches to discussing the employment relationship are sought. Z. Hajn concludes from the Recommendation that subordination or dependence are necessary conditions for establishing the existence of an employment relationship. According to him, ILO member states should list specific indicators of the existence of an employment relationship by law, as exemplified in Section 13, in such a way as to cover all forms of contractual arrangements that place the worker in an unequal bargaining position and, therefore, require the protection of an employment relationship. He derives from the Recommendation that the reason for this unequal bargaining position is the existence of subordination or dependence (Hajn, 2024, p. 43).

Similarly, T. E. Coleman and L. G. Mpedi argue that Recommendation 198 "further outlines a range of factors that ought to be considered when ascertaining whether there exists an employment relationship between an individual and an employer" (Coleman and Mpedi, 2023, p. 63). However, they refer to the example indicators from Section 13 when discussing these 'factors'.

P. Schoukens, E. De Becker, and C. Bruynseraede, on the other hand, write that Section 12 of the Recommendation points towards subordination and dependency to determine what constitutes an employment relationship, and that Section 13 provides additional guidance in determining what constitutes an employment contract by describing, in a non-exhaustive manner, the indicators relating to subordination and dependency (Schoukens *et al*., 2024, p. 5). P. Schoukens and A. Barrio describe one of the goals of the Recommendation even as ensuring "a more stable definition of the concept of employment relationship" (Schoukens *et al*., 2017, p. 309). Although P. Schoukens, E. De Becker, and C. Bruynseraede further note that while the Recommendation itself does not provide a universal definition of the notion of 'employment agreement', it does set out – in their opinion – a set of indicators that offer guidance to determine whether a particular arrangement constitutes an employment relationship (Schoukens *et al*., 2024, p. 5).

The UK's case law attributes an even somewhat binding effect to the example factors and indicators. In the case of the Independent Workers Union of Great Britain v Central Arbitration Committee[5] in the UK, the Court of Appeal, when dealing with the autonomous definition of the employment relationship within Article 11 of the European Convention on Human Rights, mentioned that the Recommendation

[5] Commonly referred to as *Deliveroo*.

provides no "(recommended) definition" (The Court of Appeal, 2021, para. 58). However, the UK's Supreme Court later followed the statement of Underhill LJ in the Court of Appeal that the Recommendation recognizes an underlying concept of subordination and identifies "a number of familiar indicators" of the existence of such a relationship, and that it relied in its decision heavily on some of the example factors and indicators (The UK Supreme Court, 2021, paras. 41, 60, 61 (3), 68 (3), 71)[6]. Although the case has been discussed, and certain aspects of the case have been critically evaluated by scholars such as A. Bogg (Bogg, 2019, p. 13) and N. O'Connor (O'Connor, 2024, p. 75), there appears to be no critical assessment of whether taking INTO account the example factors or indicators at all was, in fact, appropriate. This seems to open the door for the example factors and indicators to be used for the autonomous definition of employment relationships in international contexts. All these approaches attempt to find answers to the question of what typically characterizes classical employment relationships by drawing on Sections 12 and 13, and thus serve as criteria for distinguishing them from genuine self-employed relationships.

A different approach is followed by E. Kocher. She also references the example factors and indicators but uses them just as a starting point for an interdisciplinary analysis, to explore how employment law could systematically consider the character of platform work (Kocher, 2021, p. 607–633). For this, she grouped individual indicators from the Recommendation into the following five subcategories: subordination or hierarchy, organizational integration, economic dependence, lack of entrepreneurial opportunities, and personal performance. According to E. Kocher, subordination or hierarchy can serve as overarching terms for the Recommendation's indictor that the work "is carried out according to the instructions and under the control of another party" (Kocher, 2021, 615). In her view, organizational integration is mentioned in the Recommendation with the indicator that the work "involves the integration of the worker in the organization of the enterprise". E. Kocher notes that this criterion is applied in some legal systems independently of the organizational power that comes with integration, while, in other legal systems, it serves merely as an indicator of subordination (Kocher, 2021, p. 615). Economic dependence, according to E. Kocher, is described in several indicators of the Recommendation, such as the fact that the (periodically paid) remuneration "constitutes the worker's sole or principal source of income" (Kocher, 2021, p. 615–616)[7]. Entrepreneurial opportunities would concern the potential for profit and the economic or financial risks that the legal relationship would entail for the working persons. E. Kocher notes that in English-speaking countries, such criteria are also referred to as 'business realities' or 'economic realities' (Kocher, 2021, p. 616)[8]. Finally, according to E. Kocher, the aspect

[6] The Supreme Court referred to the previously mentioned decision of the ECHR in the case of Sindicatul "Păstorul cel Bun" v. Romania [GC] and thereby justified the possibility of incorporating the example factors and indicators of the Recommendation to assess whether an employment relationship exists. However, while the ECHR had broadly stated that it "will apply the criteria laid down in the relevant international instruments", with reference to the Recommendation, it only referred to the principle of 'primacy of facts', and not to the content of the example factors and indicators (Sindicatul "Păstorul cel Bun", 2013, paras. 57, 142). In this respect, the Supreme Court's interpretation is more likely to be seen as a misinterpretation of the ECHR's decision.

[7] E. Kocher rightly points out that this criterion must be treated with caution in comparative law, as legal systems that do not follow the binary logic of employment contracts and self-employment often do not use economic dependence as a defining element of a traditional employment relationship. Instead, it is considered an element of a third intermediate category. She refers to the Spanish category 'TRADE', the Italian category 'parasubordinazione', and the German 'arbeitnehmerähnliche Person' as examples (Kocher, 2021, p. 615–616).

[8] She also refers to R. Wank, who argues that a lack of entrepreneurial opportunities can, in turn, be an indicator of organizational integration. However, it should be noted that in the case of R. Wank, he derives his concept of a lack of entrepreneurial opportunities from the content of the German legal text and does not necessarily attribute it universal significance, even though this concept has also resonated internationally (cf. Transformation of labour and future …, 1999, p. 7 et seq.).

of personal performance is addressed in the Recommendation when it is required that the work "must be carried out personally by the worker" (Kocher, 2021, p. 616).

Unlike the previously mentioned authors, it becomes clear that E. Kocher does not focus on a universal constellation of the individual example factors and indicators in relation to one another. None of the previously mentioned authors claims that the Recommendation contains a conclusive definition, yet some still read a universal significance and interrelationship into individual example factors and indicators. Instead, E. Kocher differentiates by using specific factors and indicators from the Recommendation just as a basis for the interdisciplinary analysis, while explicitly emphasizing that it is the respective national legal systems that determine their significance, function, and relationship to one another[9].

This logic is also followed by two guides to the Recommendation published in 2007 and 2013. The guide "The Employment Relationship: An Annotated Guide to ILO Recommendation No. 198" (hereinafter referred to as the 'Annotated Guide'), which could easily be perceived as a commentary on the Recommendation, aims actually to provide user-friendly and practical information about how member states are dealing with the issues of the employment relationship as set out in the Recommendation (cf. The Employment Relationship: An Annotated …, 2007, p. 4). In this sense, it does not offer an interpretative aid regarding the originally intended understanding of the example factors and indicators, but instead provides a best practice overview of how various member states are addressing the individual topics of the Recommendation at the date and uses the example factors and indicators only as headlines. The guide "Regulating the Employment Relationship in Europe: A Guide to Recommendation No. 198", published in 2013, builds upon this and aims to monitor the status quo in the individual member states (Risak *et al*., 2013, p. 36–52). Both guides follow a similar methodology to that of E. Kocher and, with regard to the example factors and indicators, start with the individual terms of the Recommendation but seek their meaning across different legal systems. This is done by taking the terms from the Recommendation and using examples from various legal systems to illustrate their possible interpretation (The Employment Relationship: An Annotated …, 2007, p. 33–46; Risak *et al*., 2013, p. V ff.). It is pointed out that some of the example factors and indicators, at least by name, overlap in certain legal systems to some extent. For instance, a kind of a minimal common denominator could be found in the concepts of dependence or subordination (Risak *et al*., 2013, p. 36). However, it is not claimed that the individual example factors and indicators of the Recommendation have in itself any universal meaning that would allow for universal conclusions regarding the understanding of an employment relationship or could serve for interpreting national or international autonomous definitions.

Accordingly, N. Countouris describes that Section 13 provides a non-exhaustive list of possible indicators of the existence of such a relationship, which "should therefore be seen as directory, not mandatory, and inclusive, not exclusive" (Countouris, 2019, p. 17). V. De Stefano highlights that it is "[not] possible to find a universal definition of the contract of employment in the Employment Relationship Recommendation" (De Stefano, 2021, p.3), and that the list of example indicators in Section 13 is not an exhaustive list so that the absence of one of them should prevent the employment relationship from being one. Though, this at least leaves the impression that some of the indicators must be given[10].

[9] She highlights the Recommendation as an excellent tool for cross-national analysis (Kocher, Digital work platforms at …, 2022, p. 37).

[10] It is also worth noting that, according to the ILO Committee of Experts, "the elements set out in the Recommendation leave room for the establishment of others at the national level" and that the "[c]urrent indicators may no longer be useful in determining the existence of future employment relationships. Member states should therefore consider the need to establish new criteria and disregard existing criteria when they are no longer useful" (ILO Committee of Experts, 2020, p. 113).

Against the backdrop of these divergent perspectives regarding the significance of the example factors and indicators, the question arises as to the extent to which these, as viewed particularly by some Lithuanian authors, inherently carry universal significance and stand in an intended relationship to one another, which alone can be used to support the interpretation of the national (Lithuanian) concept of an employment relationship.

This article therefore aims to examine the capacity and limitations of the Recommendation in supporting the understanding of national and international autonomous concepts of employment relationships, as suggested by some authors[11]. While the example factors and indicators are occasionally referenced in both literature and case law, they are seldom critically analyzed. In this sense, the article represents a novel contribution.

To achieve its aim, the article pursues the following objectives:

1. To determine the significance, function, and interrelationship of the example factors and indicators outlined in Articles 12 and 13 of the Recommendation.
2. To assess whether, and to what extent, the Recommendation can be utilized to interpret the concept of the national (Lithuanian) employment relationship and international autonomous concepts.
3. To explore whether, and to what extent, the Recommendation can be used to understand the criteria for distinguishing new flexible and atypical forms of work, such as platform work, from genuine self-employment.

To achieve these objectives, the study utilizes legal research methods, including document and information analysis, comparative and analogical reasoning, as well as systematic, teleological, and generalization approaches. Particular attention is given to the evolution and historical development of the Recommendation to explore the original intended purpose of the example factors and indicators. Insights derived from documents and reports related to the Recommendation's development process inform this investigation.

The Lithuanian employment contract concept serves as the starting point for analyzing how this intended purpose operates in practice, by focusing on its interpretative structure and limitations. The discussion critically engages with the commentary on the Labour Code issued by T. Davulis in 2018, which provides the most comprehensive exploration of the example indicators in relation to the national definitions' factor of subordination. Additionally, the analysis incorporates selected national contexts where the documents and reports from the Recommendation's development process reveal notable particularities.

1. The Employment Relationship in Lithuanian Employment Law

The term 'employment relationship' generally describes a legal relationship between a worker or employee and an employer in its various forms and meanings, and is known in many countries worldwide (Report (V) The scope of …, 2003, p. 7).

In Lithuania, the terms 'employee' and 'employer' are defined in the Labour Code. The employee in Lithuanian law is legally defined in Article 21 para. 2 of the Lithuanian Labour Code. The employer as the counterparty to the employee is legally defined in Article 21 para. 3 (Labour Code …, 2016).

[11] In reference to the Recommendation, the term 'employment relationship' is used, although with regard to Lithuania, an examination of the definition of an employment contract in Article 32 of the Labour Code of the Republic of Lithuania is provided.

Summarizing the characteristics of these two parties from their definitions, the employment relationship appears to represent an exchange relationship of performance of a job function for remuneration, which takes place for the benefit and under subordination of one of the parties (the employer). The link between the two parties is the employment contract. Its current definition, introduced with the new Labour Code in 2017, largely codifies previous case law.

For this reason, it is necessary to first examine briefly the situation before its introduction.

1.1. The concept of the Lithuanian employment contract before 2017

Before 2017, the term 'employment contract' was defined in Article 93 of the old Labour Code which entered into force in 2003. It was an agreement between an employee and an employer, where the employee undertook to "perform work of a certain profession, speciality, qualification or to perform specific duties in accordance with the work regulations established at the workplace" (Labour Code …, 2002).

In return, the employer undertook to "provide the employee with the work specified in the contract, to pay him the agreed wage and to ensure working conditions as set in labour laws, other regulatory acts, the collective agreement and by agreement between the parties" (Labour Code …, 2002).

Despite being substantive and not merely descriptive, this definition was relatively vague and not exhaustive. Consequently, case law played a major role in clarifying it. It established the fundamental principle that, in order to identify an employment contract, all necessary indications of employment law relationships must first be established, and an overall consideration of circumstances is required (rulings of the Supreme Court of Lithuania of 31 January 2001 and 11 February 2002 in civil cases). This approach necessitates that this type of contract is not determined strictly by legal conditions, but rather by an overall assessment of indications typical in reality. Not all features characterizing the type of contract need to be present, but rather they can be present to varying degrees and intensity.

Case law further clarified that, under an employment contract, the performance of work is characterized by the execution of a specific job function, rather than the performance of specific tasks. The job function means that an employee is obliged to perform result-independent activities continuously, distinguishing it from civil law contracts (rulings of the Supreme Court of Lithuania of 31 January 2001 and 11 February 2002 in civil cases). Additionally, the court practice determined that performing the job function according to work regulations and following the employer's instructions constitutes subordination, which is also absent in civil law contracts (ruling of the Supreme Court of Lithuania of 11 February 2002 in a civil case). However, it is questionable whether subordination must only be understood as performing the job function under orders or supervision. A. Supiot formulated that "when workers are afforded a certain degree of autonomy in the performance of their duties, other indicators of their possible subordination must be sought to establish the legal status of their contracts" (Supiot, 2001, p. 12). Thus, a broader understanding of subordination can also encompass the integration of the worker into a collective organizational scheme, designed by and for others (Supiot, 2001, p. 12).

Additionally, rulings from the Supreme Administrative Court in tax law indicated that the bearing of risks could influence the assessment based on the definition of individual activity according to Article 5 para. 7 of the Law on Personal Income Tax (Law on Personal Income Tax, 2002). While debated whether the bearing of risks should be a decisive factor (Martišienė, 2011, p. 143–144), the Supreme Administrative Court primarily used it to indicate the presence of autonomy (ruling by the Supreme Administrative Court of Lithuania of 28 June 2012) which opposes subordination in this context. Following this approach, the risk-bearing could show if autonomous decision-making is possible, as only those individuals taking commercial and industrial risks can work autonomously in a profit-oriented

manner (Davulis, 2017, p. 13). Here, risk-bearing would serve more to indicate the degree of autonomy, and therefore would allow conclusions to be drawn about the existence of subordination.

1.2. The concept of the Lithuanian employment contract after 2017

Since 2017, according to Article 32 para. 1 of the Labour Code, the concept of the employment contract describes the above-mentioned exchange relationship of performing a job function by a natural person with its continuous and non-deliverable oriented nature for remuneration. In addition, it must serve the benefit of the employer, whereby this serves mainly to clarify who the actual employer would be in the case of a triangular employment relationship (Davulis, 2018, p. 86). The key characteristic is subordination which is comprehensively defined in Article 32 para. 2 of the Labour Code.

However, what might seem like a straightforward codification of case law into statutory law necessitates a different methodological approach, given that the term 'employment contract' in the new Labour Code includes elements of a legal definition. Legal definitions are open to legal interpretation, but this interpretability is restricted by the Labour Code itself. Article 5 para. 2 of the Labour Code stipulates that the words and word combinations used in labour law provisions are to be interpreted according to their general meaning, except when they have a specific legal, technical, or other defined meaning. In cases where the two terms do not correspond, the specific meaning prevails (Labour Code …, 2016). Based on the case law of the Supreme Court (cf. ruling of the Supreme Court of Lithuania of 11 February 2002 in a civil case), subordination according to Article 32 para. 2 of the Labour Code is defined as: "the performance of a job function when the employer has the right to control or manage either the entire work process or part thereof, and the employee obeys the instructions of the employer and the procedures in force at the workplace" (Labour Code …, 2016).

This subordination pertains to the obligations arising from the employment contract (Davulis, 2018, p. 132). It is evident that the job function performed by the working person is performed under heteronomy, indicating primarily organizational supervision or control rights (right to control or manage) for the work orderer and obeyance obligations for the working person (Bagdanskis *et al*., 2018, p. 53). This supervision or control can be exercised by issuing instructions or by the procedures in force at the workplace. The definition thus only contains an organizational subordination (Abrantes, *et al*., 2009, p. 16), which is just a partial aspect of a broader understanding of subordination, which, according to A. Supiot, may also involve the integration of the working person where there is hardly any supervision or control left (Supiot, 2001, p. 12). However, according to the rules of interpretation set forth in the Labour Code itself, the specific meaning defined in Article 32 para. 2 should prevail, so that the mere integration of the working person is not a factor for identifying an employment contract. Nonetheless, it may be relevant in other contexts, as discussed below.

As part of the reform of the Labour Code, a supplementary Paragraph 3 was added to the definition of an employment contract in Article 32 of the Labour Code (Labour Code of Lithuania, 2016). Thus, it seems that the specific nature of an employment contract is that "in carrying out a job function, the commercial, financial or industrial threat that arises falls to the employer" (Labour Code of Lithuania, 2016, Art. 32 para. 3). This Paragraph serves first of all as a prohibition for the employer on passing on costs, liability, economic risks or losses to the employee as long as it is not explicitly allowed by the Labour Code (Bagdanskis *et al*., 2018, p. 54). T. Davulis argues that this Paragraph 3 can also be seen as a further feature to identify an employment contract and to distinguish it from self-employed contract relationships, primarily as an indicator for the presence of autonomy, and ultimately the presence of subordination (Davulis, 2017, p. 13). This would not alter the definition of an organizational subordination from Paragraph 2 and be indeed a strong indicator. Following this, there is growing evidence that

subordination is necessary for every employment contract (Davulis, 2018, p. 86). T. Davulis elaborates on how the presence of subordination can be assessed. In cases of labor disputes, courts or authorities are advised to evaluate its presence based on specific characteristics or indicators. He provides a total of 19 example indicators for this purpose, while emphasizing that this list is not exhaustive, and that the indicators are not ranked hierarchically (Davulis, 2018, p. 133–134).

Among these example indicators, several clearly indicate organizational subordination because they address aspects of control and obedience in the broadest sense. These indicators, numbered 1–4, 8, 12–13, and 16, include, e.g., extent and intensity of the employer's direction and the employee's compliance with this direction or whether the working person can decide when to take time off work or allocate time for other purposes (Davulis, 2018, p. 133–134). However, some other indicators raise questions. T. Davulis mentions in no. 5 as an indicator the integration of the working person into the organization or business scheme of the work orderer (Davulis, 2018, p. 133). Integration could also be seen as a sign of economic dependency (Bagdanskis *et al*., 2011, p. 1111), but it is not typically considered a component of organizational subordination. However, it can serve as an indicator suggesting that integration implies indirect control or supervision by the employer.

T. Davulis also mentions as further indicators the one-off or ongoing nature of the relationship (no. 7), the passing of the created product's ownership (no. 15), or the casual nature of the work performance (no. 18.) (Davulis, 2018, p. 133–134). In fact, these would likely be indicators of the existence of a job function, which, according to case law, is already inherently present, and which is of a continuous nature and is not deliverable-oriented.

Moving on to indicators such as payment by the work orderer for the working person's rest periods (no. 9), payment of additional allowances for work done on business trips (no. 10), and determining who provides materials and tools for work and covers their costs (no. 14), it becomes challenging to establish a direct link to an organizational subordination.

It is particularly challenging with questions such as "whether the remuneration for such work is the sole and main source of income for the person employed" (no. 11) or "whether the worker has and can have other customers" (no. 17) (Davulis, 2018, p. 134). While the aspect of whether the working person "can have" other customers can indeed indicate an organizational subordination, it is less clear with regards to whether the working person 'has' other customers. These latter indicators appear to focus more on economic dependence, a concept not explicitly covered in the Lithuanian definition. To fully understand these example indicators, the rationale behind them requires further consideration, but it is lacking in T. Davulis' statements.

In the following, it will therefore first be discussed how the criteria listed in Chapter II of the Recommendation, and in particular the example factors and indicators, are intended to function, in order to then analyze the extent to which a blanket context-free inclusion of the example indicators for discussing the Lithuanian understanding of subordination, as proposed by T. Davulis, is viable.

2. Chapter II of the Recommendation and its Significance for the National Concept of the Employment Contract

Firstly, it should be noted that the Recommendation as such is not legally binding, and that it cannot expand the national legal definition unless formally incorporated into law. It can only serve as an interpretive aid within the framework of the existing national concept without altering it. It is true that the Recommendation sets forth specific principles, such as the principle of the primacy of fact (Recommendation, 2006, Sec. 9), and encourages member states to "promote clear methods for guid-

ing workers and employers as to the determination of the existence of an employment relationship" (Recommendation, 2006, Sec. 10).

The Recommendation describes an exchange relationship performance of work for remuneration (Recommendation, 2006, Sec. 9). Unlike the concept of performance of a job function in Lithuanian law, the concept of performance of work does not inherently encompass a continuous and non-deliverable-oriented work performance.

When it comes to the form of the national definition, the Recommendation suggests its member states to proceed in a specific manner.

2.1. Recommended form of national policy

Considering that the employment relationship is an exchange relationship – performance of work for remuneration – which has distinct characteristics, member states may consider providing clear legal definitions outlining the conditions for determining an employment relationship based on specific qualitative criteria that demonstrate its existence (Recommendation, 2006, Sec. 12). These conditions are commonly, and sometimes interchangeably, described as factors, indicators or tests in different member states. The *International Labour Conference's Report V(1) The employment* relationship used the term factor for methodological purposes regarding such qualitative criteria (cf. Report V(1) The employment relationship, 2005, note 13). This is therefore also used in this article to describe these conditions. The specific characteristics of the employment relationship could be incorporated into the national definition by formulating such specific factors, whereby these factors could enable a wide range of means for determining the existence of an employment relationship (Recommendation, 2006, Sec. 11a). To determine the presence of these factors in each individual case, the actual circumstances of the case should be examined. These are the so-called indicators.

For this purpose of qualifying a contractual relationship as an employment relationship, the indicators are then clustered in an overall assessment, i.e., they are assigned to the factors to ultimately qualify the employment relationship (Report V(2A) The employment relationship, 2006, p. 149 Qu. 11(2); Report V(1) The employment relationship, 2005, note 13). A. Supiot calls this method "indication clustering" (Supiot, 2001, 12).

Therefore, the Recommendation offers member states a framework resembling an algorithm for defining an employment relationship in national law. Based on this framework, member states should consider a legal presumption that an employment relationship exists when one or more relevant indicators are present (Recommendation, 2006, Sec. 11 b) and determine whether a working person is classified as either employed or self-employed (Recommendation, 2006, Sec. 11 c).

However, since the Recommendation not only outlines this method but also lists factors (Recommendation, 2006, Sec. 12) and indicators (Recommendation, 2006, Sec. 13), it prompts the question of whether the Recommendation also offers specific suggestions for the content of national policies beyond their structure, as it seems to give the impression[12].

2.2. Recommended content of national policy?

To address this question, it is important to briefly review the history of the Recommendation.

Originally launched with the intention of protecting certain categories of vulnerable workers through the adoption of a convention and recommendation, these efforts faced setbacks in 1997 and 1998 (Report V(1) The employment relationship, 2005, p. 4; Report V The scope of …, p. 3).

[12] Davulis, 2018, p. 133–134; Povilaitienė, 2012, p. 40, 73, Granickas, 2012, p. 1595; Granickas, 2010, p. 321.

Subsequently, a series of national studies were conducted to evaluate the global *status quo* regarding the topic. These studies focused on four main areas: subordinate work, triangular relationships, self-employment, and self-employment under conditions of dependency (economic or otherwise) (Report (V) The scope of …, 2003, note 15).

The results of the continuous research showed how difficult it would be to define the nature of the employment relationship universally, as different member states approached the issue in very different ways (Report V(1) The employment relationship, 2005, p. 76). It turned out that the description of the factors mentioned varied from country to country in terms of wording and detail. Furthermore, some member states used substantive definitions, while others, especially common law member states, sometimes used more or less purely descriptive definitions, thus complicating universal approaches (Report V(1) The employment relationship, 2005, p. 20–22).

The results of the research were compiled in a report which provided a comparative analysis of key developments and emerging trends (Report V(1) The employment relationship, 2005). Building on this, member states were invited to provide detailed responses to a questionnaire attached to the report (cf. Report V(1) The employment relationship, 2005, p. 1, 59–70). From that point onward, the primary objective was limited to just providing methodological guidelines in the form of a recommendation without defining universally the substance of the employment relationship. Definitions were to be determined solely by the member states themselves (Report V(1) The employment relationship, 2005, p. 6, 55, 57).

However, the results of the questionnaire attached to *Report V(1) The employment relationship* from 2005, which were published in the *Report V(2A) The employment relationship* in 2006, revealed that the member states were far from unanimous regarding the structure and content of the targeted instrument – in particular on the question which example factors or indicators should be included in the Recommendation, if any at all.

2.2.1. Example factors from Section 12 of the Recommendation

While the final version of the Recommendation lists only subordination and dependence as example factors (Recommendation, 2006, Sec. 12), the initial draft of the Recommendation in Section 8 also contained the example factor "the fact that the work is done for the benefit of another person" (Report V(2B) The employment relationship, 2006, p. 7). The latter was intended to identify the actual employer in the case of a triangular employment relationship. However, it was later deleted because it was considered unhelpful in distinguishing an employment relationship from other types of relationships (Provisional Record 21, paras. 398, 423, 428)[13].

Both example factors included into the final version of the Recommendation, i.e., subordination and dependence, are the decisive factors used in all European countries (Risak *et al*., 2013, p. 36). However, both terms are very broad, in itself empty shells, and can have entirely different meanings within each national legal system. As already discussed, Lithuania focuses on a narrow organizational subordination.

On the other hand, e.g., Germany uses the concept of dependence to distinguish between an employment relationship and other legal relationships, but it differentiates between personal and

[13] It should be mentioned at this point that the questionnaire which the member states were asked to complete also still suggested "work under instruction" as an example factor (Report V(1) The employment relationship, 2005, p. 67 Qu. 11(1)). This makes it clear that the factors 'subordination' and 'dependence' in Section 12 of the Recommendation, as stated by Section 12 itself, are mere examples (cf. Recommendation, 2006, Sec. 12).

economic dependency. Personal dependency can result from the work being tied to instructions or the determination by the work orderer (German Civil Code, Sec. 611a para. 1 sentence 1). Being tied to instructions may concern "the substance, implementation, time and place at which the activities are pursued" (German Civil Code, Sec. 611a para. 1 sentence 2; rulings of the German Federal Labour Court of 17 May 1978 and 9 September 1981). Determination can result, among other things, from an integration into the employer's work organization (ruling of the German Federal Labour Court of 1 December 2020), or the dependence on the employer's organization (rulings of the German Federal Labour Court of 13 August 1980 and 9 September 1981). The German definition of the employment contract primarily hinges on the factor of personal dependency as a subtype of dependence. While the Recommendation lists indicators for personal and economic dependency, economic dependency is in Germany not a factor in this assessment.

However, it is a factor in another context of German law: The concept of the employee-like person is recognized in certain areas of employment law, taking different forms depending on the specific context. It is designed to close gaps in protection and prevent circumvention, i.e., a law applies if at least the qualification as an employee-like person is established (Schulze-Doll, 2023, § 2 para. 19). Employee-like persons are self-employed individuals. However, they are assumed to have a similar need for social protection comparable to an employee in certain aspects of employment law (rulings of the German Federal Labour Court of 8 June 1967 and 15 November 2005). In many cases, this need arises from economic dependency instead of personal dependency (rulings of the German Federal Labour Court of 21 February 2007, 17 January 2006, 15 November 2005, and 26 September 2002). Economic dependency is typically assessed based on whether the individual performs their work exclusively or predominantly for the benefit of only one other party (ruling of the German Federal Labour Court of 17 January 2006), or whether the remuneration received from the work constitutes their sole or primary source of income (rulings of the German Federal Labour Court of 28 June 1973 and 8 June 1967). The fact that this catch-all provision only exists in some areas of employment law means that only core employment rights are applicable to these working persons, but not the entire employment law in principle, as it is the case for employees (Hohmeister, 2013, § 2 recital 14). Employee-like persons are not personally dependent, as otherwise they would be employees. The type of dependence is therefore decisive in determining whether an employment contract exists. Indicators for these factors must be clustered accordingly. For instance, strong indicators for personal dependency and therefore for the existence of an employment contract would be "that the work is carried out according to the instructions and under the control of another party" (tied to instructions) or the "integration of the worker in the organization of the enterprise" (determined work). Indicators showing economic dependency, on the other hand, are not suitable, and they only play a role for the determination of an employee-like status.

Such a third intermediary category of a working person exists, e.g., also in UK law – but it follows a different systematic. Alongside employees, there are also certain self-employed individuals who benefit from a core set of labour rights, known as limb (b) workers (Freedland, 2017, p. 27). The rationale behind extending some employment law protections to limb (b) workers was to provide essential protections to individuals who require similar safeguards as employees 'stricto sensu'. They are deemed to be at least substantively and economically in the same subordinate and dependent position as employees vis-à-vis their employer (ruling of the Employment Appeal Tribunal in the case Byrne Bros (Formwork) Ltd v Baird, 2002, para. 17 (4)). Limb (b) worker is a broader term than 'employee', because an organizational subordination might be present but not as pronounced, so that the distinction between the two worker statuses, unlike the distinction between an employee and an employee-like person in German law, is not necessarily characterized by a different type of dependency, but rather

by a different degree of subordination (ruling of the Employment Appeal Tribunal in the case Byrne Brothers (Formwork) Ltd v Baird, 2002, para. 17 (5); Freedland, Prassl, 2017, 24). However, to date, qualifying for the employee status requires the presence of mutual obligations between the contracting parties of the contract. This means that the work orderer is committed to providing work in the future, while the working person must be contractually bound to accept and perform the assigned tasks (cf. ruling of UK's Supreme Court in the case Pimlico Plumbers Ltd v Smith, 2018). This requirement does not seem to be a prerequisite for obtaining limb (b) status. In the sense of the Recommendation, a crucial sub-factor in UK law for obtaining limb (b) status is control and its degree, which is seen as a typical feature of (an organizational) subordination (ruling of UK's Supreme Court in the case Uber BV v Aslam, 2021, para. 97; The Employment Relationship: An annotated …, 2007, p. 35) or personal dependency. Therefore, compared to employees and employee-like persons under German law, control is important for both limb (a) and limb (b) status. When determining indicators for the existence of an employment contract or a limb (b) status, special emphasis must therefore be placed to how well this indicator reflects the degree of control.

Therefore, while Lithuania, Germany, and the UK all rely on some form of subordination or dependence as crucial factors in their legal frameworks, the precise interpretation and application of these terms vary significantly among these countries. The general terms, as used in the Recommendation, therefore have completely different characteristics in all three countries, which also makes the Recommendation's indicators differently suitable for indicating an employment relationship in the different countries. Application of the indicators that would be appropriate in Germany or the UK for assessing dependence or subordination directly to the Lithuanian concept of an organizational subordination would yield a different outcome. This is because Lithuanian employment law operates on a binary system, by distinguishing strictly between employees and self-employed persons without recognizing any intermediary statuses where only a core set of employment rights applies.

Therefore, when clustering indicators during the process of determining subordination in Lithuanian law, it is crucial that these indicators align with and accurately describe the specific factor as defined within national legislation. This ensures that the assessment remains consistent with the legal framework and accurately identifies either direct or indirect signs of organizational subordination.

The extent to which the example indicators from Section 13 of the Recommendation are suitable for this and their significance will be considered below.

2.2.2. Example indicators from Section 13 of the Recommendation

Some indicators in Section 13 of the Recommendation clearly depict an organizational subordination, where control is pivotal (The Employment Relationship: An annotated …, 2007, p. 35) – in particular, the control over the direction of the work. This includes the control of either the process of performing the work or the result of the work as well as the right to determine the time and place of the work (Risak *et al*., 2013, p. 38). However, the subordination factor had proven "to be insufficient as a principal benchmark to determine a genuine employment relationship as distinct from commercial relationships" (The Employment Relationship: An annotated …, 2007, p. 33). Therefore, also indicators indicating possible other factors were included.

An employment relationship may also feature a permanent organizational relationship, implying the worker's continual availability (The Employment Relationship: An annotated …, 2007, p. 40–41). In addition, there are indicators that describe a lack of independence, such as the integration of the worker into the organization of the work orderer, where the worker orderer has minimal control over

the work process (Risak *et al*., 2013, p. 41). Such an indicator could serve to assess the existence of personal dependency, as it is a factor in Germany. In Lithuania, however, it is crucial that the integration of the working person into the organization of the work orderer results at least indirectly in some residual control or supervision.

Furthermore, a type of economic dependency is also mentioned in the Recommendation, e.g., the extent to which the work is performed solely or mainly for the benefit of another person (Recommendation, 2006, Sec. 13 a), i.e., whether or not the working person is limited to exclusively or personally (cf. The Employment Relationship: An annotated …, 2007, p. 38, 39) performing work to the work orderer or whether the remuneration constitutes the working person's sole source of income (Recommendation, 2006, Sec. 13 b). If understood as an economic dependency, the latter would not be an appropriate indicator for the existence of the Lithuanian concept of subordination. However, the fact that the work must be performed personally is a typical feature of the Lithuanian employment relationship in general, and it may also indicate an organizational subordination, but only when the working person is prohibited by the work orderer from using their own assistants to perform the work.

The Recommendation also contains an accumulation of rather descriptive indicators, such as the payment of travel expenses, provision of payment in kind, bearing of the financial risk, or granting of leave entitlements (Recommendation, 2006, Sec. 13 b; cf. The Employment Relationship: An annotated …, 2007, p. 44). This issue also arises in the case of periodic remuneration payments instead of payment on the basis of invoices (Recommendation, 2006, Sec. 13 b; The Employment Relationship: An annotated …, 2007, p. 42). Although these indicators may, from the outside, show a difference compared to the commercial relationship, they are often more likely symptoms of the employment relationship, because these requirements typically apply under employment law once an employment relationship has already indisputably existed – it is the causality that is crucial in this case (Martišienė, 2011, p. 142). However, if, for instance, the lack to invoicing or the bearing of the financial risk serve to indicate whether the working person is permitted or able to work autonomously on their own account, this indicator could indeed be used for the Lithuanian concept of subordination. In addition, continuous remuneration can also be a strong indicator of the existence of a job function which has a continuous nature.

It becomes evident that there is no universal correlation between the example factors listed in Section 12 and the example indicators detailed in Section 13 of the Recommendation. These indicators can have varying and sometimes multiple interpretations always depending on the respective national context.

This is confirmed when examining the development process of the indicators. There was already disagreement on the question of whether sample indicators should be included in the Recommendation at all. While the Lithuanian workers' organization *Lietuvos profesinių sąjungų konfederacija* (LPSK) advocated for a full, compulsory and clear list where all indicators must be met to establish an employment relationship, many member states opposed the inclusion of example indicators accompanied with sometimes drastic warnings against creating definitions through the back door and expressing concerns about potential legal uncertainties and conflicts with national definitions (Report V(2A) The employment relationship, 2006, p. 152–154). Germany, for instance, issued a particularly strong warning that it "is virtually impossible to devise indicators applicable to all cases which are anything more than broad definitions and are to some extent binding" (Report V(2A) The employment relationship, 2006, p. 153). As a result, almost all member states that rejected the idea of example indicators did not directly participate in drafting them (Report V(2A) The employment relationship, 2006, p. 155–160).

The previously conducted research offered a detailed view of the situation across member states – in particular, the national studies. The authors were expressly instructed to accurately describe their country's circumstances and avoid specific terminology so that to prevent misinterpretations (Report (V)

The scope of …, 2003, p. 9). In contrast, the questionnaire approach just provided a sum of options and, in some instances, a collection of vague terms without any underlying considerations. Member states often listed indicators in brief responses without explaining the rationale and meaning behind their inclusion, particularly which factor the suggested indicator was meant to signify. This underscores once more that there is no inherent universal link between the example factors and the example indicators, as they were essentially developed independently of each other[14].

Where some member states indicated links between certain indicators and factors in their responses, the understanding of some terms diverged. For Lithuania, the LPSK proposed, among other things, "the extent of the commercial risk to the worker" (Report V(2A) The employment relationship, 2006, p. 157), which can, as described, indirectly serve as an aid to get an understanding of organizational subordination. On the other hand, the contribution of Peru stands out, because it proposed basically the same indicator "absence of commercial risk" as an indicator of economic dependency[15], but did not explain how this indicator can serve this factor (Report V(2A) The employment relationship, 2006, p. 158).

There also appears to have been some confusion about terminology in the process. Question 10 of the questionnaire contained the wording "the person for whose benefit the work is performed", which, in this context, was intended to identify the employer in a triangular employment relationship. In this context, the Belgium contribution stands out, because Belgium apparently understood it as working (solely) for the benefit of another party, i.e., an indicator for economic dependence (Report V(2A) The employment relationship, 2006, p. 142). The impression persists that not all member states were fully aware of the intended interplay between the factors and indicators during the process.

Furthermore, there are also contradictions in the responses of individual member states. The Netherlands responded to the questionnaire by listing three indicators it supposedly uses in its national law: subordination, remuneration, and the obligation to perform the work personally (Report V(2A) The employment relationship, 2006, p. 157). However, this statement appears to refer to factors, rather than indicators, as elsewhere there are significantly more and different indicators listed by and for the Netherlands (Report V(1) The employment relationship, 2005, p. 25 note 34). There seemed to be misunderstandings regarding the determination of indicators and what this term meant in the context of the planned Recommendation. Also related to the Netherlands, *Report V(1) The employment relationship* cites an example where the Middelburg Court of Appeal ruled that an employment contract existed because, among other things, the worker could not take leave without the consent of the employer (Report V(1) The employment relationship, 2005, p. 40). Understood in this way, the example indicator "recognition of entitlements such as weekly rest and annual holidays" would have a completely different meaning than the wording suggests – namely, as an indicator of an organizational subordination.

However, the latter example also illustrates that almost any of the example indicators could also be an indicator of subordination, and, possibly, also of organizational subordination, if modified accordingly. For example, could the "provision of tools, materials and machinery by the party requesting the work" be such an indicator for the Lithuanian concept of an organizational subordination if the working person was directly or indirectly forced to use the items provided and lacked the option to use their own. This also shows once more that the example indicators in the Recommendation are just vague terms which have no inherent meaning, and that indicators are only appropriately usable depending on the national factors of the national definition – which was also their purpose.

[14] It challenges the prevailing notion in the literature that the final text of the Recommendation was truly "created on a comparative basis" (Kocher, 2022, p. 37).

[15] This is a factor which does not exist in the Lithuanian definition.

2.3. No recommended content of the national policy

Based on the above, it can be summarized that Chapter II of Recommendation 198 provides merely technical methods for member states to define the employment relationship, without offering a definition itself.

The list of indicators is not only not exhaustive, but the choice of words "might include" in Section 13 implies that one, more or none of the examples could be used. They are merely intended to provide member states with guidance and inspiration for the adoption of a national policy (Provisional Record 21, para. 409).

In terms of the content, the employment relationship should be defined solely in the context of national law and practice (Green Paper: Modernising labour law …, 2006, note 32). This is also illustrated by the fact that some member states insisted until the last moment that the text should be significantly weakened by waiving the example factors and indicators at all (Provisional Record 21, paras. 399–403).

National law could include a definition based on certain factors. Indicators could then be collected on the basis of an overall assessment of the individual case. However, these indicators must not be understood as a kind of checklist; instead, the overall circumstances must be considered. Decisiveness is attributed to their connection, intensity and frequency of occurrence in the specific individual case. The indicators are clustered based on the possible factors covered by the national definition. Therefore, the indicators to be used must also be suitable for actually indicating the existence of these factors. A court or authority dealing with a labor dispute must therefore disclose the considerations behind the inclusion of a particular indicator in its assessment.

The Lithuanian employment contract definition of Article 32 of the Lithuanian Labour Code essentially follows this method (Davulis, 2017, p. 13). Like the Recommendation suggests, it is an exchange relationship performance of work for remuneration. However, Lithuanian law stipulates as an important factor that this work is performed as a job function, i.e., that it has a continuous nature and is not deliverable-oriented. Another important factor is that the work is performed personally. The most important factor for the distinction from self-employment, however, is subordination, whereby according to Article 32 Para. 2 of the Labour Code this is only to be understood as an organizational subordination based on supervision and control by the work orderer. In this respect, the example indicators proposed by T. Davulis and the Recommendation are not all sufficient to indicate this organizational subordination, but merely one of the various factors in the Lithuanian definition, if reformulated accordingly. In this sense, as the example indicators in the Recommendation, they must be seen more as general headlines or keywords. Any indicator must always follow one or more factors used in the national definition, i.e., if it is not sufficient to indicate one of these factors, it is not sufficient to indicate the existence of the employment relationship.

Therefore, when applied, clear justification for using an indicator in each case is crucial to avoid broadening the national concept of subordination and ultimately of the employment contract beyond legal intent.

Conclusion

1. Unlike possibly the principle of 'primacy of facts' outlined in the Recommendation, the example factors and indicators within the Recommendation do not have an inherent universal meaning. They are interchangeable and can only be interpreted contextually in relation to one or more existing (national) definitions. The intention behind their inclusion was purely technical. They are meant

to explain to national policymakers how the relationship between factors and indicators could operate in national definitions and to serve as mere keywords to inspire the creation of new national definitions. The latter can be achieved either by applying best practices through legal comparisons with other member states, or by developing entirely new national definitions using new factors. Consequently, referencing the example factors or indicators in the development of autonomous international employment relationship definitions is methodologically problematic. The example indicators listed in the Recommendation are not causally linked to the example factors. They were essentially determined independently of each other, are exchangeable, and member states are explicitly free to use all, some, or none of these factors and indicators in their national policies. Contrary to claims in parts of the Lithuanian and international literature, the indicators do not merely describe some form of subordination. They also describe other factors – even such that may not be part of the national definition and therefore may not be applied depending on the national context. While many member states show overlap with the common denominator of 'subordination' or 'dependence', these terms have distinct variations in different member states, each with its own set of indicators that would be appropriate for indicating them. The suitability of an indicator depends on the existing national factors.

2. The example indicators can only be used in relation to national law to the extent that they serve as keywords, in line with the existing factors of the national (Lithuanian) definition, to generate guidance for case-by-case analysis. Following the methodology of the Recommendation, the specific case determines the relevant indicators, which must be clustered, and, in the case of a comprehensive and narrow definition like the Lithuanian employment contract under Article 32 of the Lithuanian Labour Code, they are only appropriate if they can be subsumed under one of its existing factors.
3. Consequently, the Recommendation can also not by itself be used to develop a new understanding of the characteristics of new flexible and atypical forms of work, such as platform work. However, in line with the intention of the Recommendation, a legislator like the Lithuanian one could be inspired by the Recommendation to explore other legal systems where, e.g., indicators of economic dependence are in use. This could lead to the adaptation of best-practice approaches from other member states.

Bibliography

Legal acts

Lithuanian legal acts

Law on Approval, Entry into Force and Implementation of the Civil Code of the Republic of Lithuania. Civil Code (2000). *Valstybės žinios*, 74-2262.

Law on Personal Income Tax of the Republic of Lithuania (2002). *Valstybės žinios*, 73-3085.

Republic of Lithuania Law on the Approval, Entry into Force and Implementation of the Labour Code. Labour Code of the Republic of Lithuania (2002). *Valstybės žinios*, 64-2569.

Republic of Lithuania Law on the Approval, Entry into Force and Implementation of the Labour Code. Labour Code of the Republic of Lithuania (2016). *The Register of Legal Acts*, 23709.

German legal acts

German Civil Code ("Bürgerliches Gesetzbuch") in the version published on 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), last amended by Article 17 of the Act of 5 May 6 2024 (BGBl. 2024 I No. 149).

South African legal acts

Staatskoerant, Code of Good Practice: Who is an Employee. *Government Gazette*, No 29445, 1 December 2006, 3-53.

EU legal acts

Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (2021). COM/2021/762 final [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0762

Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work [online]. Available at: https://eur-lex.europa.eu/eli/dir/2024/2831/oj/eng

International legal acts

International Labour Organization (2006). Recommendation R198: Employment Relationship Recommendation [online]. Available at: https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535

Special literature

Abrantes, J. J. *et al*. (2010). Thematic Report 2009: Characteristics of the Employment Relationship. Brussels: ELLN [online]. Available at: http://www.labourlawnetwork.eu/frontend/file.php?id=165&dl=1

Bagdanskis, T., Usonis, J. (2011), Problems of qualifying an employment relationship and undeclared work in Lithuania. *Jurisprudencija*, 18(3), 1101–1122. [online]. Available at: https://repository.mruni.eu/handle/007/11373.

Bagdanskis, T., Mačiulaitis, V., Mikalopas, M. (2018). *Lietuvos Respublikos darbo kodekso komentaras: individualieji darbo santykiai*. Vilnius: UAB „Rito projects".

Bogg, A. (2019). Taken for a Ride: Workers in the Gig Economy. *Law Quarterly Review*, 135, 219–226 [online]. Available at: https://research-information.bris.ac.uk/ws/portalfiles/portal/213088337/Bogg_Deliveroo_case_accepted_edit_1_2.pdf

Coleman, T. E., Mpedi, L. G. (2023). Collective bargaining and the representation in the gig economy in South Africa. *Journal for Juridical Science*, 48(2), 54–88.

Countouris, N. (2019). Defining and regulating work relations for the future of work. International Labour Office [online]. Available at: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_dialogue/documents/publication/wcms_677999.pdf

De Stefano, V. (2021). Not as Simple as it Seems: The Ilo and the Personal Scope of International Labour Standards. *International Labour Review*, forthcoming [online]. Available at SSRN: https://ssrn.com/abstract=3790766

Davulis, T. (2017). Darbo teisės rekodifikavimas lietuvoje. *Teisė*, 104, 7–27, https://doi.org/10.15388/Teise.2017.104.10842

Davulis, T. (2018). *Lietuvos Respublikos darbo kodekso komentaras*. Vilnius: VĮ Registrų centras.

Freedland, M., Prassl, J. (2017). Employees, workers and the 'sharing economy' Changing practices and changing concepts in The United Kingdom. *Spanish Labour Law and Employment Relations Journal*, Vol. 6(1–2), 16–29, https://doi.org/10.20318/sllerj.2017.3922

Granickas, V. (2010). Teisingo apmokėjimo už darbą principo įgyvendinimo bruožai. *Socialinių mokslų studijos*, 3(7), 311–328.

Granickas, V. (2012). Kintamosios darbo užmokesčio dalies nustatymo ir keitimo problemos siekiant įgyvendinti teisingo darbo apmokėjimo principą. *Socialinių mokslų studijos*, 4(4), 1585–1603.

Hajn, Z. (2024). The International Labour Organisation's Recommendation No. 198 and Self-Employed Workers. *Acta Universitatis Lodziensis, Folia Iuridica*, 107, 41–53. https://doi.org/10.18778/0208-6069.107.03

Hohmeister, F. (2013). BUrlG § 2 Geltungsbereich. In: Hohmeister, F., Oppermann, A. (eds.) (2013). *Bundesurlaubsgesetz*. Baden-Baden: Nomos.

Kocher, E. (2021). Digitale Plattformarbeit – die Verantwortung von Marktorganisatoren. *Zeitschrift für Europäisches Privatrecht*, 3, 606–633.

Kocher, E. (2022). *Digital Work Platforms at the Interface of Labour Law – Regulating Market Organisers*. Oxford: Hart Publishing.

Martišienė, B. (2011). Priklausomą ir savarankišką darbą atskiriančių požymių pokyčiai. *Teisė*, 80, 138–145. https://doi.org/10.15388/Teise.2011.0.156

O'Connor, N. (2024). Two Steps Forward, One Step App? Worker Status and Access to Fundamental Trade Union Rights in the United Kingdom. *Journal of International and Comparative Law*, 11 (1). 55–78.

Povilaitienė, L. (2012). *Darbo sutartis ir kitos teisinės darbo panaudojimo formos*. Daktaro disertacija, socialiniai mokslai, teisė (01 S), Vilniaus universitetas. Vilnius: Vilniaus universiteto leidykla.

Risak, M. *et al*. (2013). *Regulating the employment relationship in Europe: a guide to Recommendation No. 198*. Geneva: ILO/ELLN [online]. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_209280.pdf

Schoukens, P., Barrio, A. (2017). The changing concept of work: When does typical work become atypical? *European Labour Law Journal*, 8(4), 306–332. https://doi.org/10.1177/20319525177438

Schoukens, P., De Becker, E., Bruynseraede, C. (2024). The Evolution of Standard Work. In: *The Elgar Companion to Decent Work and the Sustainable Development Goals*, edited by Madelaine Moore, Christoph Scherrer, Marcel van der Linden, Forthcoming [online]. Available at http://dx.doi.org/10.2139/ssrn.4682600

Schulze-Doll, C. (2023). ArbSchG § 2 Begriffsbestimmungen. In: Kohte, W.; Faber, U.; Busch, D. (eds.) (2023). *Gesamtes Arbeitsschutzrecht*. Baden-Baden: Nomos.

Supiot, A., Medows, P. (2001). *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*. Oxford: Oxford University Press.

Case law

Lithuanian case law

The Ruling of the Supreme Court of Lithuania of 31 January 2001, Civil case No. 3K-3-123.

The Ruling of the Supreme Court of Lithuania of 11 February 2002, Civil case No. 3K-3-264.

The Ruling of the Supreme Administrative Court of Lithuania of 28 June 2012, Administrative case No. A-602-164-12.

German case law

The Ruling of the Federal Labour Court (BAG) of 8 June 1967, 5 AZR 461/66.

The Ruling of the Federal Labour Court (BAG) of 28 June 1973, 5 AZR 568/72.

The Ruling of the Federal Labour Court (BAG) of 17 May 1978, 5 AZR 580/77.

The Ruling of the Federal Labour Court (BAG) of 13 August 1980, 4 AZR 592/78.

The Ruling of the Federal Labour Court (BAG) of 9 September 1981, 5 AZR 477/79.

The Ruling of the Federal Labour Court (BAG) of 26 September 2002, 5 AZB 19/01.

The Ruling of the Federal Labour Court (BAG) of 15 November 2005, 9 AZR 626/04.

The Ruling of the Federal Labour Court (BAG) of 17 January 2006, 9 AZR 61/05.

The Ruling of the Federal Labour Court (BAG) of 21 February 2007, 5 AZB 52/06.

The Ruling of the Federal Labour Court (BAG) of 1 December 2020, 9 AZR 102/20.

UK case law

The Ruling of the UK's Supreme Court in the case Uber BV v Aslam [2021] UKSC 5.

The Ruling of the Employment Appeal Tribunal in the case Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667.

The Ruling of the UK's Supreme Court in the case Pimlico Plumbers Ltd v Smith [2018] UKSC 29.

The Ruling of the England and Wales Court of Appeal (Civil Division) in the case The Independent Workers Union of Great Britain v The Central Arbitration Committee [2021] EWCA Civ 952.

The ruling of the UK's Supreme Court in the case The Independent Workers Union of Great Britain v The Central Arbitration Committee [2023] UKSC 43.

European case law

The Judgment of the Court of Justice of the European Union of 14 October 2010, Union Syndicale Solidaires Isère, C-428/09.

The Judgement of the Court of Justice of the European Union of 11 November 2010, Danosa, C-232/09.

The Judgement of the Court of Justice of the European Union of 9 July 2015, Balkaya, C-229/14.

The judgment of the Grand Chamber of the European Court of Human Rights of 9 July 2013, Application no. 2330/09 (Sindicatul "Păstorul cel Bun" v. Romania).

Other sources

Commission of the European Communities (2006). Green Paper: Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final [online]. Available at: https://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0708_/com_com(2006)0708_en.pdf

European Commission (1999). Transformation of labour and future of labour law in Europe [online]. Available https://op.europa.eu/en/publication-detail/-/publication/b4ce8f90-2b1b-43ec-a1ac-f857b393906e

International Labour Conference (2003). Report (V): The scope of the employment relationship, 91st Session [online]. Available at: https://webapps.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf

International Labour Conference (2005), Report V (1): The employment relationship, 95th Session [online]. Available at: https://www.ilo.org/public/libdoc/ilo/2005/105B09_8_engl.pdf

International Labour Conference (2006). Report V (2A): The employment relationship, 95th Session [online]. Available at: https://www.ilo.org/public/libdoc/ilo/2006/106B09_29_engl.pdf

International Labour Conference (2006). Report V (2B): The employment relationship, 95th Session [online]. Available at: https://webapps.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-2b.pdf

International Labour Conference (2020). Promoting employment and decent work in a changing landscape, 109th Session [online]. Available at: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_736873.pdf

International Labour Conference (2006). Provisional Record 21, 95th Session [online]. Available at: https://webapps.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/pr-21.pdf

International Labour Organization (2007). The Employment Relationship: An annotated guide to ILO Recommendation 198 [online]. Available at: https://www.ilo.org/media/323921/download

Hans Lauschke is a PhD student at the Institute of Private Law of Mykolas Romeris University. His primary scientific interests and research areas include employment and comparative law. The title of his dissertation is "Rights and Social Guarantees for Freelance Workers – *Status Quo* and Developments of Legal Instruments in Lithuania in Comparison with Other European Countries".

Hans Lauschke yra Mykolo Romerio universiteto Privatinės teisės instituto doktorantas. Pagrindinės mokslinių interesų ir tyrimų sritys – darbo ir lyginamoji teisė. Jo disertacijos pavadinimas – „Laisvai samdomų darbuotojų teisės ir socialinės garantijos – *status quo* ir teisinių instrumentų raida Lietuvoje, lyginant su kitomis Europos šalimis".