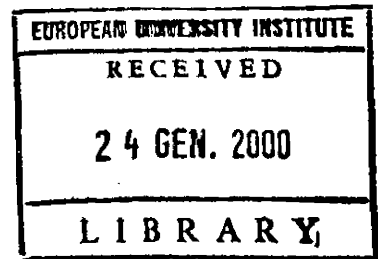


EUROPEAN UNIVERSITY INSTITUTE
Department of Law



**"A comparative analysis of the legal position of
professional sportsmen under Finnish, English and
European Community law. The borderlines of
employment"**

By Mikko Huttunen

Thesis submitted with a view to obtaining the title of PhD at the EUI

Jury Members: Prof. Brian Bercusson, Prof. Niklas Bruun, Prof. Juha
Pöyhönen, and Prof. Silvana Sciarra

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PART I: INTRODUCTION¹

1 The hypothesis

It is well established in advanced industrial economies that labour is not a commodity, which can be subject to the ordinary rules of the market.² Therefore, the law distinguishes between different categories of suppliers of work in order to protect those who are not able to ensure adequate protection simply by negotiations at arm's length with the employer. The most common distinction made is between the employees working under a contract of employment and the self-employed performing work under another type of contract. It is through this dual categorisation that legislation attempts to protect the party considered weaker in the market by restricting the limits on the freedom of contract.³ These categories are also used when there is a need to classify a new group or a new profession, which enters the field of commercial use of labour. To put it in more theoretical language, this classification defines the personal scope of the

¹ I would like to thank my supervisors Prof. Brian Bercusson and Prof. Silvana Sciarra for their invaluable help during the course of writing this dissertation. I would also like to thank Prof. Juha Pöyhönen from the University of Lapland for his support and guidance throughout my doctoral studies.

² See Annex "Declaration concerning the aims and purpose of the International Labour Organisation" to the Constitution of the International Labour Organisation according to which one of the fundamental principles on which the organisation is based is that labour is not a commodity.

³ The inequality of bargaining power between the employer and the worker is usually referred to as the main reason for the subordination of the employee and, consequently, the rules in force to protect him as the weaker party to the contract. However, also other views have been expressed. Collins distinguishes between the inequality of bargaining power and the exercise of bureaucratic power as the source of employee's subordination. See more in detail Collins 15 [1986] Industrial Law Journal p. 1 to 14.

'juridification' of the working life, i.e. the extent to which labour/employment legislation limits the freedom of contract and enters those spheres previously subject to the autonomy of groups and individuals.⁴ Although there are developments where a new category has been introduced,⁵ there is no doubt that distinguishing those workers in need of protection from those who are able to protect themselves continues to be in at very core of labour law.

The scope of labour law has been subject to extensive case law and numerous academic studies in most, if not all, legal systems which base the structure of their law on this fundamental distinction. However, it would also seem that most jurisdictions have faced considerable difficulties in their attempt to provide a proper tool for making that distinction. These difficulties have led some scholars to conclude that, in the words of *Collins*:

"The difficulty of distinguishing between employees and independent contractors has challenged legal minds for over a century. Clearly, this binary classification of contracts involving the performance of services is bound to run into difficulties in borderline cases. It is not the resulting

⁴ Clark and Wedderburn define juridification as "a process (or processes) by which the state intervenes in areas of social life in ways which limit the autonomy of the individuals or groups to determine their own affairs." See more in detail Clark and Wedderburn 1987 p. 165.

⁵ For instance, the new UK working time regulations use the notion of 'worker' to define the scope *rationae personae* of the regulations (Statutory Instruments 1998 No. 1833). In Italy, the notion of "parasubordinate" workers has been proposed (see Article 1 of Proposta di Legge approvata dal Senato della Repubblica il 4 febbraio 1999 "Norme di tutela dei lavori atipici"). One can also refer to the work on "contract labour" in the ILO context (ILO Report V(2b) "Contract labour", 86th session June 1998).

uncertainty and unpredictability of results in these borderline cases, however, which has provoked the claim that there is a crisis in legal concepts. Rather the problem resides in determining how to go about answering the question, that is in identifying the relevant criteria which would enable the courts to police the boundary between employment and independent contracting."⁶

This study attempts to look at this issue in the context of the Finnish legal system and Finnish labour law. Following a proposition put forward by a distinguished Finnish scholar *Kaarlo Sarkko*, it is claimed that academic doctrine on the scope of Finnish labour law has influenced legal decision-making in such a way that at present it may be an obstacle to the openly argued application of labour law.⁷ This deductive and conceptual tradition may lead, or even oblige, the courts to hide the real reasons of their decisions if political pressure is too high and the practical meaning of the decision too important.⁸ This hypothesis has not really been tested even though Prof. Sarkko put it forward some 25 years ago.⁹

⁶ Collins 1990 p. 369. See also e.g. Freedland 1995 p. 18 to 21 and "Transformation of Labour and Future of Labour Law in Europe" Final report of the expert group set up by DG V of the European Commission. General Rapporteur Prof. Alain Supiot. Other members of the group: Prof. Maria Emilia Casas, Prof. Jean De Munck, Prof. Peter Hanau, Prof. Anders Johansson, Prof. Pamela Meadows, Prof. Enzo Mingione, Prof. Robert Salais and Prof. Paul van der Heijden. 1999 p. 5 to 6.

⁷ See Sarkko 1980, p. 30 to 33. See also Kairinen LM 1998 p. 204 to 205 where he states that in respect of the scope of Finnish labour law, there is a certain kind of ballast which the basic relationship theory has brought in.

⁸ It is certainly admitted that the idea about policy considerations behind judgements is not a novelty. However, in the context of the scope of Finnish labour law policy factors have not been

It would seem that the difficulties associated with the established approach for defining the scope of Finnish labour law have become evident in the context of the controversial case law on the legal position of sportsmen under labour and occupational social security law. During the 1990s eight (8) cases were decided by the Finnish supreme courts around this issue. This study is an analysis of that case law. The essential question being: Is sport just an exceptional case or is this case law a symptom of a more general problem in the decision-making of the courts in the context of defining the scope of Finnish labour law. It is claimed here that the latter is the case. It would seem that the assumed consequences of applying labour law to professional sport played a vital role in the decision-making of the courts. However, this is not highlighted in their argumentation. Thus, it is asserted herein that the courts, and in particular the Insurance Court, were focused more on the consequences of the cases than making these deliberations available to the public.

The study will show that Finnish supreme courts have used either very limited or very formal and, as the case may be, even contradictory arguments in their attempt to distinguish between work performed under a contract of employment and other work in the context of professional sport. These

properly discussed. As an example of policy factors behind judgements see e.g. Markesinis "Policy factors and the Law of Tort" where he at p. 229 states "The various concepts [they encounter] in [their] books and in judgements are often little more than verbal devices, "means of formulating conclusions" but not the reasons that dictate them."

⁹ The textbook "Työoikeus. Yleinen osa" in which Sarkko put forward his hypothesis was first published in 1973.

inconsistencies necessarily raise the question whether the way in which the courts argue and, in particular, the criteria they use for identifying those in need of protection are up-to-date in the context of a modern welfare state. It is asserted here that the time has come to rethink the way in which the essential distinction between employees and self-employed is drawn under Finnish law.

In order to strengthen the analysis of this study, a comparative method is used although the main focus of the study stays remains the Finnish system. The same, or equivalent, question, i.e. the way in which courts have argued in making a distinction between employees/workers and self-employed in the context of professional sport, is analysed under English law and under European Community law.

2 A comparative method

2.1 Introduction

The hypothesis put forward by this study is that the Finnish legal system, in respect of the scope of labour law, has ceased to reflect the social and economic reality under which it is supposed to function. In other words, it is assumed that the openly argued criteria Finnish courts use when they hand out a judgement dealing with the scope of labour law are strongly influenced by old doctrinal considerations which, in turn, are not necessarily adequate in the context of a modern welfare state. Furthermore, it is likely that those openly expressed arguments based on the old established criteria do not reflect the true decision-

making process of the courts. There is a dual problem: On the one hand, the 'test' used for distinguishing between employees and self-employed under Finnish labour law does not seem adequate and, on the other hand, although the Finnish courts usually respect this 'test', purportedly laid down in Section 1 of the Contracts of Employment Act, the application of the test is only carried out after the essential decision has already been reached. Therefore, the criteria are rather more *justificatory* than genuinely the *ratio decidendi* in a given case. However, at this stage this assumption is based more on intuition than evidence.¹⁰

To test this assumption it is important, first of all, to describe in detail the scope of Finnish labour law, as established by the doctrine and generally confirmed by the Courts with a view to analysing Finnish case law on the position of sportsmen. In particular, a description of the theoretical roots of Finnish labour law and the result of that theoretical doctrine is fundamental together with its influence on the current legal thinking in the country. However, staying solely within the Finnish system is not sufficient for testing the hypothesis precisely for the reason for which this study has been undertaken namely, the argumentation of the courts would not seem to reflect the real decision-making process, being only the open justification of a final conclusion. Therefore, it is essential that the same or equivalent question be looked upon from a *comparative perspective*.¹¹ In other

¹⁰ According to Frankenberg, a comparative activity often begins with "a question or a feeling, such as a feeling of dissatisfaction". See more in detail Frankenberg 1985 p. 436.

¹¹ Comparative legal research is sometimes divided into "macro-comparison" and "micro-comparison" according to whether the subject matter is two or more legal systems or parts, branches or aspects of two or more legal systems. In other words, macro-comparison is concerned

words, in order to question the criteria used and the way in which the Finnish courts argue in this context, it is difficult to lay down anything more than further assumptions unless the question is looked at in the light of comparable case law under other legal systems. As Kamba puts it:

"Comparative law liberates one from the narrow confines of the individual systems. It is one of the most effective instruments for gaining a better knowledge and deeper understanding of one's own legal system."¹²

2.2 Methodological guidelines

What is the methodology for such a (partially) comparative study? In all essential aspects, the methodological guidelines of comparative law should be followed.

It is often emphasised in literature that it is impossible to provide a fixed methodological framework for comparative studies, which could be applied

with two or more entire legal systems while micro-comparison is limited to aspects or topics of two or more legal systems. This division has not been adopted here since it is considered that even micro-comparison must be conducted in the context of the whole legal system. For descriptive reasons this division could, however, be accepted. See more in detail W.J Kamba p. 505.

¹² Kamba p. 492. See also e.g. Frankenberg 1985 p. 412, Gordley 1995 p. 555, Markesinis 1997 ("Learning...") p. 177 to 181 and Markesinis 1997 ("Bridging") p. 203 to 205.

to all situations and in all areas of law. It is at the same time a burden and a relief that the basic methodological rule of comparative law is that it is for the comparative lawyer himself to decide how to go about the comparison.¹³ As possible topics may vary substantially, it would be too rigid to attempt to apply a fixed methodology. However, this does not mean that some benchmarks could not be laid down.

Markesinis puts forward an interesting point for the purposes of this study. In his view, relatively narrow topics, and in particular problems addressed through case law, are particularly good as starting points for comparative studies.¹⁴ *Legrand*, on the other hand, emphasises more general and, according to him, deeper aspects of legal systems, to which he refers to using the concept of "legal mentalité".¹⁵ For him, the norms, concepts and institutions are only the

¹³ Kamba p. 510-511; Kahn-Freund 1966 p. 40 to 42 and Zweigert-Kötz p. 29 to 30 where they state at 29:

"Even today the right method must largely be discovered by gradual trial and error. Experienced comparatists have learnt that a detailed method cannot be laid down in advance; all one can do is to take a method a hypothesis and test its usefulness and practicability against the results of actually working with it. Earlier theories committed the error of supposing that the basis, goals, and methods of comparative law could be determined a priori from a philosophy or scheme of law. Even today it is extremely doubtful whether one could draw up a logical and self-contained methodology of comparative law which had any claim to work perfectly. Most probably there will always remain in comparative law, as in legal science generally, let alone in the practical application of law, an area where only sound judgement, common sense, or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness." See also Frankenburg 1985 p. 416 to 418.

¹⁴ See e.g. *Markesinis* 1990 p. 1 to 2.

¹⁵ See e.g. *Legrand* 1995 p. 272 to 273 and 1996 p. 60 to 64 where he states: "The essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture. The aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and

surface of a legal system. The more important questions lie somewhere in the deeper structures of the legal thinking of a given legal system.

These two approaches, which are presented here as examples of different approaches to comparative law, highlight important methodological differences. According to the approach advocated by *Markesinis* it is essential that the systems to be compared solve the same factual problem. In other words, as *Zweigert and Kötz* put it:

"The institutions of different legal systems can be meaningfully compared only if they perform the same task, if they have the same function. Function is the starting point of all comparative law."¹⁶

This means that the institutions of the legal systems under comparison must perform the same task, that they have the same function.¹⁷ This functional approach, which will be the approach adopted in this study, presupposes that while there may be differences about how legal problems are conceptualised, the functional solutions are often similar across western legal

why it thinks about the law in the way it does. The comparatist must, therefore, focus on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure."

¹⁶ *Zweigert and Kötz*, p. 42. For a general presentation of "comparative functionalism" with critical remarks see *Frankenberg* 1985 p. 435 to 440.

¹⁷ *The Zweigert – Kötz "Introduction to Comparative law, Vol. I"* p. 42; *Kahn-Freund* 1966 p. 54.

systems.¹⁸ However, it should be underlined that this choice of methodology does not imply that one should disregard aspects to which Legrand refers as the "legal mentalité". It is an explicit choice in the context of this study to concentrate on the details of a particular problem with a view to revealing certain key aspects of the general legal thinking in Finland in the area of labour law.

Kamba presents three different phases of an (*intra-cultural*)¹⁹ functional comparative study: 1) the descriptive phase, 2) the identification phase and 3) the explanatory phase. The *descriptive phase* is essentially a thorough analysis in the context of the relevant legal system of the norms, concepts and legal institutions that are the subject of comparison. In other words, before the

¹⁸ See e.g. Frankenberg 1985 p. 436, Gordley 1995 p. 560. Legrand has criticised the functional approach for being superficial. In his view, a comparatist should look, instead of rules and institutions dealing with the same issue, at "the cognitive structure of a given legal culture". Without disregarding the importance of this "legal mentalité", it is not possible to share the view about superficiality. In dissociating the "legal mentalité" from the norms and institutions of a given legal culture, Legrand creates an image of static legal cultures not subject to pressures of change. It would seem that without understanding the functioning of the rules and institutions of a given legal culture it is difficult to draw conclusions about the "legal mentalité" of that culture. See more in detail e.g. Legrand 1996 p. 54 to 64.

¹⁹ *Kamba* differentiates between *intra-cultural comparison*, i.e. the comparison of legal systems rooted in similar cultural traditions and operating in similar socio-economic conditions and *cross-cultural comparison*, i.e. comparison of legal systems with totally different cultural and socio-economic backgrounds.

See more in detail *Kamba* p. 511. In support of the claim for intra-cultural comparison one can perhaps refer to Article 6 of the Treaty establishing the European Union which states that "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles, which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Frankenberg, on the other hand, criticises different dichotomies of legal systems as over-simplifying and as putting the western legal culture at the top of some implicit normative scale. See more in detail Frankenberg 1985 p. 422.

actual comparison can begin, it is essential to describe the issues thoroughly in their own context. *Markesinis* puts it in another way:

"The methodological differences must first be explained... But once these differences are cleared out of the way, and the foreign system is made intelligible to the outside observer, you can start noticing the similarities and even questioning the rationale of the rules – yours and theirs."²⁰

The comparison begins with the next phase, the *identification phase*. The aim here is to identify the similarities and differences between the legal systems, which are chosen for the comparison.

Finally, the third phase, the *explanatory phase*, explains and analyses the similarities and differences established during the identification phase. However, it is important not try to distinguish too clearly between these three phases, as they obviously may overlap. It is clear that the hypothesis laid down and the explanations assumed may influence the way in which the descriptive phase and the identification phase will be carried out. However, all these three phases, whether they are clearly distinguished formally or not, are important benchmarks for a comparative study.

²⁰ *Markesinis* 1997 ("The Destructive...") p. 42.

2.3 What should be compared?

The topic of this study stems from the case law of Finnish supreme courts on professional sportsmen in the context of the scope of Finnish labour and occupational social security law. The main aim of the comparative method in this context is therefore to provide some benchmarks against which the argumentation of the Finnish courts can be measured.²¹ Therefore, the aim of the study is not to analyse the same legal solution in all possible details in each of the systems to be compared, but to provide "evidence" to test a hypothesis regarding the controversial case law in Finland. In other words, the essence of the comparison is not a detailed analysis of a functionally equivalent concept in different legal systems but an analysis of the argumentation of the courts in equivalent situations.

The two²² legal systems chosen for comparison with the Finnish system in this study are the English common law system and the system of the law of the European Community.

²¹ To use Frankenberg's words, the study attempts to take "distance" from the traditional Finnish way of looking at the question. See more in detail Frankenberg 1985 p. 414.

²² The number of legal systems to be compared is always a difficult question for a comparative study. The choices naturally depend on the aim of the study so fixed answers are impossible to give. According to Zweigert and Kötz, "sober self-restraint is in order, not so much because it is hard to take account of everything as because experience shows that as soon as one tries to cover a wide range of legal systems the law of diminishing returns operates" Zweigert – Kötz "Introduction to Comparative law, Vol. I" p. 38 to 39. See also Kahn-Freund 1966 p. 42 where he states: "A comparative lawyer may, and probably should, limit his field of research and teaching, both in the geographical sense and as regards subject-matter."

The English system has been chosen for two equally important reasons.²³ First, the English system represents the common law tradition with its distinctive way of argumentation.²⁴ The openness of argumentation, its emphasis on substance in relation to form, and its discursive character provides an excellent mirror to the distinctively formal deductive argumentation of the Finnish courts. Furthermore, judicial attitudes towards academic works are, perhaps, less enthusiastic in England than in many civil law countries.²⁵ As regards the English system, it is the common law concept of *contract of service/contract of employment*, which would seem functionally equivalent to that of employment relationship/contract of employment under Finnish law.

Second, the professionalism in sport has its origins in the British Isles where the beginning of the process of professionalisation and commercialisation of sport goes back to last years of the nineteenth century, to the dawn of modern labour law and industrial relations.²⁶ Consequently, questions about the legal status of professional sportsmen in team sports in the context of labour law had to be answered at a relatively early stage. What is interesting about this fact is that,

²³ It must also be admitted that when this study was initiated and the legal systems chosen, the possibility to use the English language had an important role to play in the choice of the legal systems to compare.

²⁴ See more in detail Bankowski – MacCormick – Marshall 1997 p. 318 to 320 and Aarnio 1997 p. 71 to 73 where he states: "Traditionally, the Finnish courts have been very terse in their style of formulating the opinions. The reasoning has often been abstract and the information included in it quite insignificant. Over the past 15 years, a clear development in the style of reasoning can be identified. However, the internal structure of reasoning is still more deductive than discursive as to its nature." See also Legrand 1996 p. 74 to 76.

²⁵ See e.g. Markesinis 1997 ("A matter of Style") p. 139 to 141.

although the way in which the scope of labour law is defined has not changed radically, the context in which these decisions were made was very different from the context of equivalent case law in Finland. This fact makes the comparison particularly interesting.

The legal system of the European Community, on the other hand, has been chosen for somewhat different reasons. The issue about the legal position of professional sportsmen has been controversial precisely at the same time at Community level as under the Finnish system. This factor relating to the equal timing of the controversy led to an attempt to analyse whether the case law from the ECJ could be used for the comparison. In this respect the main difficulty was that at Community level the question was raised in the context of free movement of workers and not in a "traditional labour law" context.²⁷ Obviously, the Community legal order is a supranational legal system to which both the Finnish system and the English common law system are directly connected. Community law forms an important part of the national systems and vice versa.²⁸ This

²⁶ See Vamplew 1988 p. 21 to 74.

²⁷ In this context "traditional labour law" refers to the rights and obligations which are applied to a given employment relationship in a national context once the employment relationship has been established. In other words, provisions dealing with access to work or general macroeconomic labour market regulations are not considered as "traditional labour law" for the purposes of this study.

²⁸ In the context of this study it is not intended to enter the discussion on whether the national legal systems belonging to the European Union are converging or not. Markesinis points out the notion of 'worker' as an example of Community law, which has had harmonising effects on national legal systems. He is of the view that a convergence is inevitable due, in particular, of the similarity of problems in the Member States. Legrand, on the other hand, is firmly of the opinion that European legal systems are not converging and, in respect of the difference between common law and civil law systems, will never converge. Without going more into details, the arguments put forward by Legrand, despite of their theoretical merits, would not seem convincing. His view of the legal

difference of level, on the one hand, and the interconnection on the other hand, naturally raises the question on whether it is possible to compare case law arising in national contexts with case law of the European Court of Justice.

Community law Directives normally refer all the notions relating to the scope *rationae personae* to national law.²⁹ Concepts such as 'worker', 'employee', 'employment contract' and 'employment relationship' are used. Only the working time directive 93/104/EEC³⁰ indirectly, through Article 3 of the framework health and safety directive 89/391/EEC³¹, lays down a Community concept of a 'worker' for the purposes of the directive. However, in the absence of case law from the European Court of Justice this concept which defines 'worker' as "any person employed by an employer, including trainees and apprentices but excluding domestic servants" is not helpful in this context. It should be emphasised, however, that the Treaty itself makes, in the context of the free movement of

systems seems overly static. To put it simply, if the common law and civil law systems have once developed to what they are now, why could they not develop further making a convergence possible? See more in detail e.g. Markesinis 1997 ("Learning from Europe..") p. 189 to 193 and Legrand 1996 p. 74 to 78.

²⁹ See e.g. Article 2(2) of Council Directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer OJ L 283 28.10.1980 p. 23; Article 1(1) of Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship OJ L 288 18.10.1991 p. 32; Article 2(1)(d) of Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. OJ L 201 17.7.1998 p. 201.

³⁰ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time OJ L 30, 13.12.1993 p. 18.

³¹ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L 183 , 29/06/1989 p. 1.

persons, a distinction between 'workers' under Article 39 and 'the right of establishment of self-employed' under Article 43/49 of the Treaty.³² Article 39 has been the subject of extensive case law from the ECJ.

The right to free movement of workers for EU citizens concerns access to the labour market while the various directives in the area of employment deal with the rights and obligations of a worker once the employment relationship has been established. In other words, the right to free movement is a right which enables workers to seek work while the Community secondary legislation deals with the rights and obligations of the parties irrespective of whether an individual has used his right to seek work on the basis of the free movement of persons. Articles 7 to 9 of Council Regulation No 1612/68³³ links these two layers of employment rights in the EU context. What is fundamental for the purposes of this study is that the scope *rationae personae* of the provisions regulating the free movement of workers is a matter that cannot be defined by national legislation while the equivalent distinction in respect of "traditional labour law" is made, at present, solely at national level.³⁴ The Court has clearly separated the notion of a 'worker' in the meaning of the provisions on free movement from an equivalent notion in a Directive which leaves its scope to be defined at national level.

³² Article 49 deals with the provision of services. In the context of this study there is no need to distinguish between the right of establishment of self-employed and the provision of services by self-employed.

³³ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. OJ L 257 19 October 1968 p. 2.

³⁴ See also e.g. Deakin – Morris 1998 p. 151 to 152.

However, at the same time it should be noted that the ECJ has used the notion of 'worker' under Article 39 as an interpretative benchmark in the context of a Council Directive.³⁵ However, it is clear that the context of the free movement of workers is an area of Community law where the division between employees/workers and self-employed is made, *de jure*, exclusively at Community level. Thus, for the purposes of this study, the distinction made between Article 39 and 43 / 49 of the Treaty is functionally equivalent to the distinction made under

³⁵ Case 105/84 A/S Danmols Inventar, ECR 1985, p. 2639 where the Court argued:

"It is common ground that directive no 77/187 does not contain an express definition of the term 'employee'. In order to establish its meaning it is necessary to apply generally recognised principles of interpretation by referring in the first place to the ordinary meaning to be attributed to that term in its context and by obtaining such guidance as may be derived from Community texts and from concepts common to the legal system of the Member States. It may be recalled that the Court, *inter alia* in its judgement of 23 March 1982 (Case 53/81, Levin [1982] ECR 1035), held that the term 'worker' as used in the Treaty, may not be defined by reference to the national laws of the Member States but has a Community meaning. If that were not the case, the Community rules on freedom of movement of workers would be frustrated, since the meaning of the term could be decided upon and modified unilaterally, without any control by the Community Institutions, by the Member States, which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty. It is necessary to consider whether similar considerations apply to the definition of the term 'employee' in the context of Directive No 77/187. According to its Preamble, the Directive is intended to ensure that employees' rights are safeguarded in the event of a change of employer by providing for, *inter alia*, the transfer from the transferor to the transferee of the employees' rights arising from a contract of employment or from an employment relationship (Article 3) and by protecting employees against dismissals motivated solely by the fact of the transfer of the undertaking (Article 4). It is clear from those provisions that directive No 77/187 is intended to achieve only partial harmonisation essentially by extending the protection guaranteed to workers by the laws of the individual Member States to cover the case where an undertaking is transferred. Its aim is therefore to ensure, as far as possible, that the contract of employment or the employment relationship continues unchanged with the transferee so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria. It follows that Directive No 77/187 may be relied upon by persons who are, in one way or another, protected as employees under the law of the Member State concerned. If they are so protected, the directive ensures that their rights arising from a contract of employment or an employment relationship are not diminished as a result of the transfer. In reply to the second question it must therefore be held that the term 'employee' within the meaning of directive No 77/187 must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law. It is therefore for the national courts to establish whether that is the case in this instance."

Finnish labour and occupational social security law between employees and self-employed. However, it goes without saying that the legal consequences of being a 'worker' under Article 39 of the Treaty and an 'employee' in a national labour law context are different. This fact must be carefully taken into account in the comparison.³⁶

Thus, the comparison on the one hand with case law from a common law country with a distinctively different culture of argumentation, and the comparison, on the other hand, with a supranational system to which both national systems belong, highlight interesting, and above all, revealing features of the fashion of argumentation of the Finnish courts in the context of the scope of labour and occupational social security law. The aim of the comparison is strictly to present a similar factual decision-making situation in three separate but intertwined systems with a view to analysing the situation in Finland. However, in order to compare the argumentation it is vital to compare the context of the relevant concepts and notions, which define the scope of the functionally equivalent decision-making situations in these legal systems.

3. The structure of the study

The study is in four parts. In addition to the introductory part, there are two parts followed by a conclusion. The first part contains a detailed analysis of the relevant concepts under the three systems. Due to the topic of the study, the

³⁶ Of the importance of the contextual background of comparative studies see e.g. Markesinis

relevant concepts in the Finnish system are described in greater depth than in the English and the Community systems. After the description of the three essential concepts in their historical context, Part II ends with a comparison of the concepts. Using the benchmarks of *Kamba* presented above, Part II contains the initial descriptive and identification phases of the study.

The second part then goes on to describing how the three concepts have been applied in a functionally similar decision-making situation. In other words, Part III analyses the case law in respect of applying the concepts to professional (team) sports. Moreover, employing the benchmarks presented above, Part III combines the descriptive and identification phases in a particular decision-making situation. Some preliminary observations as to the explanation for the differing applications and argumentations are also made with a view to building a bridge to the conclusion which, using the vocabulary of *Kamba*, is the explanatory phase of the study.

The concluding chapter puts the results of the study into context with a view to explaining controversial case law in Finland. Finally, the concluding chapter ends with some reflections on what the results mean in the context of the contemporary discussions on the state and future of labour law in Finland.

**PART II: DESCRIBING AND COMPARING CONCEPTS. THE
EMPLOYMENT RELATIONSHIP UNDER FINNISH LAW, THE
CONTRACT OF SERVICE UNDER (ENGLISH) LAW AND 'WORKER'
UNDER ARTICLE 39³⁷ OF THE EC TREATY**

"At the end of the day concepts are not necessarily precise and everything turns on the circumstances of each case"³⁸

1 The employment relationship under Finnish law

1.1 Introduction

The employment relationship is the key concept under Finnish labour law. According to the established view, the concept of employment relationship not only distinguishes labour law from other branches of law but also defines the scope of application of the relevant statutory legislation. Following the prevailing doctrinal position, the definition and criteria of an employment relationship are laid down in Section 1 of the Contracts of Employment Act, which contains the definition of the contract of employment.

The following chapters will first provide an analysis of the origins of the contractual model of employment in Finland followed by a description of the

³⁷ Following the entry into force of the Treaty of Amsterdam, Article 48 of the Treaty establishing the European Community is now Article 39.

³⁸ Markesinis 1997 ("A matter of style") p. 130.

development of the so called "basic relationship theory" ("perussuhdeteoria") which is also behind the contemporary thinking of the legal profession in the country. After the description of the development of the theory, a legal analysis de lege lata of the scope of labour law will be presented.

1.2 The origins of the contract of employment in Finland

The period of the "estate society"³⁹ ended in Finland during the latter part of the 19th century. The industrial revolution and the market mechanism replaced the old highly regulated mercantile economy.⁴⁰

The industrial revolution changed radically the use of labour. New forms of work emerged. The old normative structure designed for a static agrarian society did not resolve the new problems of industrial workers, on the one hand, and those of the so called white collar workers, on the other hand. Although the old provisions regulating the relationship between masters and servants and sailors had been amended, they did not reflect the problems brought about by the then new forms of work. Increasingly the use of labour was left uncovered by legislation. Gradually, *contract* became the source of norms for these new forms of work.⁴¹

³⁹ In Finnish: sääty-yhteiskunta.

⁴⁰ See e.g. Kekkonen 1987 p. 38 to 154; Kairinen 1979 p. 111 to 112.

⁴¹ Kairinen 1979 p. 112 to 113. See also Kekkonen 1987 p. 152 to 154.

As a consequence of the industrialisation, the division of labour became wider. New sectors of the economy emerged which demanded labour in varying forms. Gradually it became clear that general legislation was needed⁴², on the one hand, in order to avoid the legislation becoming piecemeal and, on the other hand, in order to guarantee that workers in different sectors of the economy were treated equally.

In 1908 the law drafting committee ("lainvalmistelukunta", hereinafter "LVK") produced a thorough report which formed the basis for a proposal for a new Act on Contracts of Employment. In this context it is necessary to look more closely at this proposal and the several amended proposals based on the report since it indirectly forms the basis also for the Contracts of Employment Act of 1970 which is still the framework for the regulation of the employment relationship in Finland.

According to section 1 of the proposal the Act was intended to regulate employment contracts. The proposal stated that

"Under a contract of employment the employee undertakes to perform work to the employer under his supervision and direction in exchange for compensation"

⁴² Kairinen 1979 p. 141 to 142.

At that time such a definition was not particularly widespread in other European countries. The emphasis on the criterion "direction and supervision" was new since only Belgian and Dutch legislation during the time of the work of the law drafting committee used this feature in defining a contract of employment.⁴³

The starting point for the "LVK" in forming the definition of a contract of employment was a "works contract" in the widest sense. Such a "works contract" was understood to encompass all promises where the other party undertakes to perform work for the other. This wide concept was then narrowed by using several criteria, which were understood to be in a logical and hierarchical relationship to one another. The "LVK" used a deductive method, i.e. it "carved" the definition of a contract of employment by proceeding from general towards specific one criterion after the other.⁴⁴

First, the law drafting committee used the general systematic dichotomy between private law - public law in order to exclude all works contracts with a public law nature from the definition of a contract of employment.⁴⁵

The next criterion used was formulated by asking whether the obligation to perform work was the principal or only a secondary obligation. According to the "LVK", only contracts where the performance of work was the principal obligation

⁴³ Kairinen 1979 p. 143.

⁴⁴ LVK 1908, p. 56 to 62, Kairinen 1979, p. 143 to 144.

⁴⁵ LVK 1908, p. 56 to 62, Kairinen 1979 p. 144.

could be defined as contracts of employment. Furthermore, the law drafting committee underlined that as a performance of work in this context can only qualify activities, which can be performed personally by the worker.⁴⁶

Additional criteria were added. According to the "LVK" work performed on the basis of a contract of employment was to be performed in exchange for compensation ("consideration"). Last but not least, work performed under a contract of employment had to be performed under the direction and supervision of the other party. The law drafting committee considered that without this feature there would be no need to protect the weaker party of the contractual relationship.⁴⁷

Looking back in retrospect the definition reached by the law drafting committee was indeed "modern". In establishing the concept of a contract of employment it did not proceed from contemporary contractual constructions as was the case in many continental European countries although recent Belgian and Dutch examples were carefully taken into account. The definition formulated managed to create a bridge between contract law and the emerging socially-orientated protective legislation. At the time such an approach was ahead of its time.

However, what is more important in this context is the *method* used to reach the definition of a contract of employment. Paying tribute to the

⁴⁶ LVK 1908, p. 56 to 62, Kairinen 1979 p. 144.

⁴⁷ LVK 1908, p. 56 to 62, Kairinen 1979 p. 144.

contemporary 'scientific' model, i.e. deduction and, more specifically, conceptual jurisprudence⁴⁸, a new type of a contract was created. What is essential to note for the purposes of this study is that the same approach was subsequently adopted and "canonised" by jurisprudence and would also serve as the model for courts when considering the employment relationship.

Because of the generally difficult situation in Finland during the 1910s the proposal made by the law drafting committee was not immediately transformed into legislation.⁴⁹ However, after the civil war the parliament continued to discuss the issue and in 1921 a new proposal based on the previous proposal for general legislation on contracts of employment was made. This proposal was subsequently adopted by the parliament in 1922. Section 1 of the new Act read:

"The provisions of this Act apply to contracts whereby the other contractual party, the employee, undertakes to perform work to the other party, the employer, under his direction and supervision in exchange for compensation. Even if the parties have not explicitly agreed upon a compensation but the facts do not imply that the work was to be

⁴⁸ In the beginning of the century Finnish doctrine was strongly influenced by German jurisprudence. See more in detail Aamio 1989 p. 118 to 124; Kairinen 1979 p. 29 to 32; Sipilä 1938 p. 87 to 132.

⁴⁹ Of the Finnish situation prior to the civil war and the independent Republic of Finland see more in detail e.g. Ketonen 1983 p. 151 to 171.

performed without compensation, the work shall be compensated and this Act shall be applicable.

A contract of employment may be concluded regarding any kind of work, and this Act shall be applicable without prejudice to more specific legislation and work performed in public service."⁵⁰

As will be seen, this definition was in all substantial aspects adopted when the legislation on contracts of employment was amended in 1970. Thus, the general statutory definition of a contract of employment has been in all essential aspects identical under Finnish legislation throughout the century. The definition adopted also served as a model for other statutory labour and social legislation during the forthcoming decades.

1.3 The establishment of the "basic relationship theory" in Finnish labour law

An increasing amount of statutory legislation designed to regulate industrial relations in general and the employment relationship in particular was adopted during the first two decades of the independent Republic of Finland. This

⁵⁰ In Finnish: "Tämän lain säännökset koskevat sopimuksia, joissa toinen sopimuskumppani, työntekijä, sitoutuu tekemään toiselle, työnantajalle, työtä tämän johdon ja valvonnan alla korvausta vastaan. Vaikkakaan korvausta ei ole nimenomaan määrätty, mutta asianhaaroista ei käy selville, että työ olisi korvauksetta tehtävä, on työ hyvitetty ja tämä laki sovellettava.

Työsopimus voidaan tehdä kaikenlaisesta työstä, ja on tämä laki sovellettava, mikäli erityinen laki ei siitä sisällä tästä poikkeavia säännöksiä tai työ tarkoita julkista virkatointa."

new area of legislation created difficulties of interpretation for courts and, in particular, difficulties for contemporary academic scholars. Several studies relating to the new set of norms were published during this period but none of them managed to create a systematic harmony between different parts of the emerging new area of law.⁵¹

It was not before the extensive work done by *Arvo Sipilä* that one could begin to use the concept of labour law in Finland. His ambitious monograph on "The concept and system of labour law in Finland and its relationship with social legislation"⁵² published in 1938 laid down the foundation for an independent discipline of labour law.

The main aim of Sipilä was to define the concept of labour law and to create a system. In the light of the contemporary discussions in Europe, his approach was original. He contested the continental view of labour law as being a special branch of law to protect workers who are in a dependent position vis-à-vis their employer. Instead, he underlined that labour law should be regarded as encompassing all provisions which aim at *regulating the relationship between an employer and an employee* irrespective of whether the aim of given provisions was to protect the employee or not. Although he admitted that such a position was first and foremost a matter of principle, he claimed that this view had also practical

⁵¹ Kairinen provides a brief analysis on the early attempts to systematise the new pieces of labour legislation. See Kairinen 1979 p. 152 to 156.

⁵² "Suomen työoikeuden käsite ja järjestelmä sekä suhde sosiaaliseen lainsäädäntöön"

implications. In his view, reducing the concept of labour law to those provisions directly aiming at protecting the employee would result in certain important parts of new statutory legislation relevant to the employment relationship being excluded from the scope of labour law. Thus, the concept of labour law for Sipilä was wider than for contemporary continental doctrine.

However, for the purposes of this study it is vital to look at the *method* Sipilä used to define labour law. As described above, the central concept for him was the 'employment relationship', which he derived from the concept of a contract of employment. This approach was to dominate the Finnish doctrine for decades to come and its influence in the decision-making of the courts is still beyond doubt although it seems that Sipilä's intention was not to give guidance to the courts in cases relating to the applicability of labour law. His original intentions were predominantly systematic and doctrinal.⁵³

The way in which Sipilä gave an identity to labour law in Finland was to claim that certain pieces of legislation have the *same scope*. This was carried out by respecting the contemporary 'scientific' model, which in the field of jurisprudence was dominated by conceptual jurisprudence. The line between labour law and other fields of law was drawn by using the concept of *the employment relationship*.

⁵³ In this context it should not be underestimated that in 1952 Sipilä became the first professor of Labour law in Finland when the second professorship on "Economic law" at the University of Helsinki was transformed into a professorship in Labour Law. In many ways Sipilä possessed a "monopoly power" in Finnish labour law during 2-3 decades.

According to Sipilä, defining labour law was to be carried out by clarifying conceptually the employment relationship, which was the subject of the relevant legislation. In order to carry out this task, Sipilä looked for the essential criteria, which could distinguish the kind of work, which was relevant for labour law. This was done by using a deductive method.⁵⁴

The starting point for Sipilä was the concept of "work" which he considered given by "life" and not by laws. After the concept of work Sipilä distinguished the concept "working to the other party". The third criterion for defining the employment relationship was to ask whether the performance of work for the other party was of private or public law nature. According to Sipilä, relevant work for the employment relationship could only be governed by "private law". He specified this further by giving relevance only to those relationships governed by private law, which were based on the law of obligations. Furthermore, the performance of work had to be the principal obligation of the worker. Moreover, the performance of work relevant for an employment relationship had to be performed under the direction and supervision of the person providing the work. Finally, in order to be relevant for labour law, the work had to be remunerated. According to Sipilä, work performed without remuneration could never be subject to the provisions of labour law.⁵⁵

⁵⁴ Sipilä 1938 p.74 to 98, Kairinen 1979 p. 160 to 161.

⁵⁵ Sipilä 1938 p. 98 to 208, Kairinen 1979 p. 161 to 162.

The method used by Sipilä in order to define an employment relationship and thus, the scope of "labour law" was identical to the one used by the law drafting committee in its original proposal for the Contracts of Employment Act although the committee attempted to define the concept of a "contract of employment" while Sipilä aimed at defining the "employment relationship". The deduction as such was not identical but the essential outcome did not result in any substantial differences. Thus, it is not surprising that Sipilä was able to find normative backing from the Contract of Employment Act of 1922 for his definition. This fact was crucial for accepting the theory as the "basic relationship theory"⁵⁶ of Finnish labour law.

The main interpretative proposition of the basic relationship theory relates to the scope of labour law. According to the theory, *the scope of Finnish labour law is in principle identical and is defined through the concept of an employment relationship*. In other words, the concept of an employment relationship, which appears in the different pieces of Finnish labour legislation, is identical. Thus, labour law was to be applied in its entirety to all legal relationships fulfilling the criteria of an employment relationship unless explicitly certain relationships are excluded from the scope of a given Act.⁵⁷

⁵⁶ This name ("perussuhdeteoria") was subsequently given by one of Sipilä's most prominent students Jorma Vuorio.

⁵⁷ Kairinen 1979, p. 3.

In his later works Sipilä developed the theory further.⁵⁸ The criteria of an employment relationship, which originally served for distinguishing labour law for systematic aims, started to gain interpretative weight. This development was strongly supported by *Jorma Vuorio* who, although a student of Sipilä, applied an analytical method and took into account the development of case law. Through his writings, the basic relationship theory was given a "modern analytical basis" which strengthened the theory even further. As regards the central question of the theory, the identical scope of labour law, he managed to conceptualise certain interpretative difficulties which the courts had faced in applying the "legal criteria" of an employment relationship in situations where certain "social criteria", which did not seem to fit into the original definition, seemed to emerge.⁵⁹ In a sense, the circle was closed, Sipilä had aligned the doctrine with the statutory definition in the (old) Contracts of Employment Act. The doctrine, in turn, influenced the decision making of the courts. Finally, *Vuorio*, by using an "analytical method" managed to bridge the emerging gap between the new case law and the doctrine. It is claimed here that this continuous "alignment" of the theory and practice are behind the particularly strong influence of the basic relationship theory in Finnish labour law.

In the 1960s particularly *Antti Suviranta* and *Raimo Pekkanen* brought new ideas to the basic relationship theory which at that time had already become

⁵⁸ Sipilä 1947, Sipilä 1960, Sipilä 1968, Kairinen 1979 p. 168 to 172

⁵⁹ Vuorio 1955 p. 170 to 179; Kairinen 1979, p. 172 to 186.

a firm basis and starting point for Finnish labour law. Suviranta and Pekkanen paid particular attention to the increasing case law, which had emerged around the concept of the employment relationship and the scope of labour law. Suviranta's main piece of work concerned the concept of an employment relationship under income tax legislation while Pekkanen published two monographs, one on "Mixed contract of employment" and another on the "Beginning and end of an employment relationship". Pekkanen's main interest was on issues related to the Employment Insurance Act.

The starting point for both of these scholars was clearly based on the basic relationship theory. They analysed the different components of the employment relationship in detail in the context of the scope of labour law taking particular account of case law. In addition to distinguishing the scope of income tax law from the scope of labour law, one of the main results of Suviranta was to put emphasis on a certain kind of "overall evaluation" particularly with respect to the "direction and supervision" component of the employment relationship. He claimed that in difficult borderline cases, the courts, instead of using clear legal concepts, seemed to make an overall evaluation as to whether the worker in question had performed his duties under the direction and supervision of the alleged employer.⁶⁰ The approach of Pekkanen was perhaps more loyal to the basic relationship theory in its original form. However, he agreed with Suviranta

⁶⁰ Suviranta p. 290. For a more thorough analysis of the work of Suviranta see Kairinen 1979, p. 196 to 199.

on the need to make an overall evaluation on the component "direction and supervision" of the concept of an employment relationship.⁶¹ Although adding some new ideas around the theory, the works of Suviranta and Pekkanen have strengthened the theory rather than criticized it.

The central proposition of the basic relationship theory has, however, been put into question. In his work concerning the Accident Insurance Act, *Routamo* has questioned the proposition of the general scope of labour law by referring particularly to the differing aims of different pieces of labour legislation. According to *Routamo*, as a consequence of the particular aim of the Accident Insurance Act the case law concerning its scope can not be used as a source of law when the scope of other pieces of labour law are considered, and vice versa.⁶²

⁶¹ See Pekkanen 1966 p. 10 to 27 and 36 to 40 and Pekkanen 1968 p. 81 to 82. For a more thorough analysis see Kairinen 1979, p. 199 to 202.

⁶² *Routamo* 1972 p. 168. From the point of view of the basic relationship theory, this critique seems to have only partial merits. It seems to be clear that the aim of the legislator has been to consider the scope of labour law as, at least, *qualitatively* identical. In other words: regardless of which piece of statutory labour and social legislation is in question, the same facts are qualified as relevant legal facts and the influence of them is the same (either an indication in favour or against an employment relationship). It is another question that the particular aim of a specific piece of legislation may in a given situation mean that *quantitatively* the scope of labour law is not necessarily identical, i.e. in order to be applied, courts may require under different statutes more favourable indications in favour of an employment relationship. However, it may also be argued that a more limited combination of relevant indicia means at the same time that the difference is also qualitative.

A recent study concerning the above mentioned criterion 'direction supervision' clearly shows how all the relevant courts, the Supreme Court, the Insurance Court and the Labour Council have evaluated the appropriate facts in a qualitatively similar way. See *Paanetoja* 1993 p. 145 to 147.

As was mentioned in the introductory chapter, this study is based on the assumption put forward by *Kaarlo Sarkko* who, although in principle accepting the main proposition of the basic relationship theory, has claimed that the concept may sometimes be an obstacle for a teleological application of labour law. He has also laid down an assumption that in difficult cases the courts, instead of proceeding logically from the norm to the conclusion, may proceed by making first an overall evaluation as to whether to apply labour law or not and only afterwards "transform" the decision to look like an application of the concept of the employment relationship and its components. He has also used the concept of "employee-position"⁶³ instead of the concept of the employment relationship.

The proposition of Sarkko regarding the hypothesis of an overall evaluation in difficult cases has subsequently been adopted, at least in principle, by Martti Kairinen⁶⁴, Kari-Pekka Tiitinen⁶⁵, Niklas Bruun⁶⁶ and Jorma Saloheimo⁶⁷. Kairinen has attempted to develop the idea of "employee-position" put forward by Sarkko. However, this has not led to any real criticism of the theory. It must, however, be stated that, with the exception of Kairinen, contemporary scholars have not been particularly interested in the issue. Kairinen's doctoral thesis on the basic relationship theory attempted to "understand" the development of the theory

⁶³ "Työntekijäasema", see Sarkko 1980 p. 33.

⁶⁴ Kairinen 1998 p. 10 to 11.

⁶⁵ See e.g. Tiitinen LM 1998 p. 211 to 214

⁶⁶ See e.g. Bruun - Remes, *Defensor Legis* 1983 p. 211 to 247, Bruun 1993 p. 129 to 130.

by using a hermeneutic approach rather than criticising the theory. However, in a recent article he also expresses some critical remarks about the doctrinal nature of the theory in respect of the scope of labour law.⁶⁸

However, *Jaana Paanetoja's* recent monograph on the scope of labour law seems to re-state the dominance of the original approach of the basic relationship theory. Her analysis of the 'direction and supervision' criterion of the employment relationship is clearly based on the main proposition of the basic relationship theory of an identical scope of labour law. As she states:

"All the criteria described in the Contracts of Employment Act must be present in each individual employment relationship."⁶⁹

It is clear for the purpose of this study that more than half a century after its formulation, the basic relationship theory still is the starting point of doctrine relating to the scope of labour law. In a sense, the need for an extensive chapter on the subject in this study confirms the rule. The following chapter, therefore, attempts to analyse this scope in detail taking into account the case law on the subject.

⁶⁷ See e.g. Saloheimo LM 1981 p. 780 to 810. Saloheimo TYV 1984 p. 157 to 166.

⁶⁸ Kairinen LM 1998 p. 204 to 209.

⁶⁹ Paanetoja 1993 p. 2. In Finnish: "Jokaisessa yksittäisessä työsuhteessa on oltava työsopimuslaissa mainitut työsuhteen tunnusmerkit".

1.4 An analysis of the scope of Finnish labour law *de lege lata*

1.4.1 Introduction: The "legal" criteria of an employment relationship

The scope of Finnish labour law is defined by using the concept of an employment relationship (contract of employment). According to Article 1(1) of the Contracts of Employment Act

"A contract of employment is an agreement in which one party, the employee, agrees to perform work for the other party, the employer, under the direction and supervision of the latter in return for wages or other remuneration."

In addition to this definition in the Contracts of Employment Act, the same definition is laid down in many other pieces of Finnish labour law. Sometimes, the scope of a given statute is defined by referring to the definition in the Contracts Employment Act or by simply using the word employment relationship.⁷⁰ As described above, the criteria of the employment relationship

⁷⁰See Art. 1 of the Act of Working Time Regulation, Art. 1 of the Accident Insurance Act, Art. 1 of the Industrial Safety Act, Art. 1 of the Employment Pension Act, Art. 1 of the Vocational Training Act, Art. 1 of the Protection of Young Workers Act, Art. 1 of the Act of Working Time Regulation for Caretakers, Art. 1 of the Annual Leave Act, Art. 1 of the Wage Guarantee Act, Art. 1 of the Act Regulating the Employment Relationship of Domestic Servants, Art. 1 of the Act of Working Time Regulation for Shops and Offices, Art. 1 of the Seamen Act, Art. 1 of the Wage guarantee Act for seamen, Art. 1 of the Act of Working Time Regulation for Vessels in Domestic Traffic, Art. 1 of the Employment Pension Act for

have been derived by doctrine from the definition of the contract of employment. These criteria are 1) the performance of work; 2) contract; 3) the work is performed for the other party; 4) remuneration; 5) direction and supervision.⁷¹

However, as mentioned above, during the last couple of decades, the idea of an overall evaluation has been emphasised in the doctrine. Sarkko, in particular, has strongly pointed out that the legal definition of the employment relationship has a rather limited practical value in difficult cases.⁷² According to Sarkko, the legal definition is a fairly good *description* in situations where it is clear that the relationship in question is an employment relationship. However, in more difficult cases the value of the definition essentially decreases. According to Sarkko, the reason for this is rather natural, since the main principle behind labour law, the safeguarding of the position of the employee, cannot be expressed by exact legal language.⁷³ As mentioned in the introduction, Sarkko has further claimed that the decisions in hard cases are presumably not made by applying the norm logically to the facts of the case. Instead, the argumentation is fitted to the conclusion, which in reality is made according to a wider overall evaluation of the situation. Therefore, at the level of the written argumentation of the courts, it looks

Performing Artists and Journalists, Art. 1 of the Act of Working Time Regulation for Agricultural Work. See also Sarkko 1980 p. 18 to 28.

⁷¹The first, and by far the most influential, piece of work is done by Arvo Sipilä whose position as the "father" of Finnish labour law is undisputed. See Sipilä 1938.

⁷²See Suviranta p. 290, Pekkanen 1968b p. 81 to 82, Sarkko 1980 p. 28 to 35.

⁷³Sarkko 1980 p. 28-30. This approach is a clear departure from the approach presented by Sipilä who emphasised, as mentioned above, that the scope of labour law should not be restricted to provisions relating to the protection of the employee as the weaker party to the contract.

as though the essential problem of a given case has always been the fulfilment of clear legal criteria.⁷⁴ However, while analysing in more detail the argumentation of the courts in cases where the problem has been, at the level of written arguments, the fulfilment of the criterion "direction and supervision", the hypothesis of an overall evaluation is strengthened by some empirical evidence.

The idea of an overall evaluation cannot, however, be directly confirmed by analysing the argumentation of the courts, since they have traditionally written their decisions by referring to the criteria of the employment relationship. The Labour Council has, however, at least on some occasions, referred to an "overall evaluation" in its decision-making. Also the Supreme Court has shown some signs of a more open argumentation although there are also examples that contradict this. However, if the courts simply refer to an "overall evaluation" without giving substantial reasons for that evaluation, the result is, in fact, an additional formal criterion. In other words, such an approach does not essentially change the structure of argumentation; it just adds a sixth criterion.

However, it must be again emphasised that the criteria of the employment relationship have been extracted from the definition of the contract of employment by the doctrine. In the different provisions defining the scope of the given piece of labour legislation there is no exact list of relevant criteria. This observation is very important in this context, as it is precisely *this acceptance of the doctrine by the courts*, which is behind the hypothesis of this study. This has

⁷⁴Sarkko 1980 p. 30 to 31.

not been referred to in the contemporary discussions. The formulation of Section 1 of the Contracts of Employment Act would certainly allow a different approach. However, it is, as will be seen, this splitting up of the definition into five different criteria which represents the current judicial thinking in Finland. The different criteria of the employment relationship, as defined by the doctrine and used by the courts, are presented in the following.

The judicial structure in respect of the competence to decide on the scope of labour and social security law is rather complex. A thorough presentation in this context is not possible. However, in general terms it can be said that, as regards the statutory law on the individual contract of employment, it is the structure of the general civil courts, i.e. district courts - Courts of Appeal - The Supreme Court ('Käräjäoikeudet' - 'Hovioikeudet' - 'Korkein Oikeus' 'KKO'), which is competent to rule on whether a given relationship is an employment relationship or not. In respect of health and safety legislation (including working time and holiday legislation) it is the Labour Council ('Työneuvosto' 'TN') which is competent to interpret the scope of the relevant legislation. As regards occupational social security legislation there is also a special court structure. An individual may appeal against the decision of a social security institution to the relevant Appellate Board i.e. Accident Insurance Appeal Board or Pension Appeal Boards ('Tapaturvavakuutuslautakunta', 'Eläkelautakunnat'). In respect of social security law the highest instance is the Insurance Court. Furthermore, the Labour Court ('Työtuomioistuin') is the sole instance in all issues relating to the

interpretation of collective agreements. Finally, in respect of taxation and law on the civil service, it is the administrative court structure, with the Supreme Administrative Court as the highest instance ('Korkein Hallinto Oikeus' 'KHO'), which must be followed.⁷⁵

As regards the composition of the different courts and tribunals, it must be emphasised that the general civil courts and the administrative courts consist of professional (and lay) judges while the Labour Court, the Labour Council and the court structure in respect of occupational social security legislation is formed on a tripartite basis with equal representation from the trade union and employer organisations together with an impartial chairman.

This relatively complex court structure certainly makes it difficult to guarantee that the central proposition of the basic relationship theory on the identical scope of labour law can be maintained. The risk for non-uniform decisions is evident.

1.4.2 The concept of "work"

The concept of "work" has been distinguished from the definition of the employment contract as a separate legal criterion by the doctrine. The meaning given to this concept shall be pictured in the following.

⁷⁵ See e.g. Kairinen 1998 p. 60 to 61.

The definition of the employment contract in Section 1 of the Contracts of Employment Act gives no further advice as to what is to be considered as work in this context. However, in Section 1(2) it is stated that

"All kind of work may be the subject of a contract of employment".⁷⁶

Therefore, any classification of work into e.g. blue and white-collar work is irrelevant for the application of Finnish labour law.⁷⁷

By definition, the aim of labour law is to regulate work i.e. human labour. Therefore, as the doctrine states, it is self-evident that the activities of animals and nature in general cannot be regarded as work in the meaning of labour law, even though in colloquial language the word work may be used in these contexts. Thus, the performance of "work" means essentially human behaviour/activity. The word behaviour has to be regarded as more accurate, since the word activity refers to active behaviour. Also behaviour which seems passive may be "work" in a legal context.⁷⁸ Since the meaning of the concept of "work" in the definition of an

⁷⁶In Finnish: "(Työ)sopimus voidaan tehdä kaikenlaisesta työstä", TSL 1 §:n 2 momentti.

⁷⁷In the preparatory works for the old Contracts of Employment Act it is underlined that distinguishing manual labour from intellectual work is practically impossible. See LVK 1908 p. 64 to 65. In the preparatory works for the new Contracts of Employment Act only the problems which had occurred in the case law of the courts were given attention. Among the conclusions of the preparatory committee it was stated that "there seems to be no reason to adopt any changes into the definition of an employment contract included in the present legislation". Therefore the preparatory works of the old Contracts of Employment Act may be used as a guideline in defining the meaning of the concepts in question. See KM 1969 A:25 p. 19.

⁷⁸Immobility may in some occasions require considerable efforts. Being a model of a painter can be mentioned as an example. Whether a given behaviour may be classified as active or passive is

employment relationship is restricted to human behaviour, also the behaviour of legal persons, i.e. companies, associations etc., falls outside of the concept.

Most scholars have tried to describe "work" in a legal context with some additional criteria. In more recent works it is required that, in order to be regarded as work the behaviour has to contain financial value.⁷⁹ According to *Pekkanen*, the financial value of human behaviour is obvious when it is remunerated by another person. In his opinion, remuneration can not, however, be considered as a necessary criterion of "work" in a legal meaning since in some occasions human behaviour may clearly be regarded as containing financial value even though it is performed without remuneration.⁸⁰

Whether the motives behind the behaviour can be taken into account in analysing the concept of "work" in a legal context has also been discussed both in the preparatory works of statutory labour law and in the literature. The arguments have varied considerably.⁸¹ From a practical point of view the motives of

essentially a semantic problem, which has to be left outside in this context. See e.g. Kivimäki DL 1930 p. 296, Erma 1955 p. 99, Pekkanen 1966 p. 34, Sarkko 1980 p. 23, Kahri-Hietala p. 18.

⁷⁹Pekkanen 1966 p. 34, Aurejärvi 1976 p. 102, Sarkko 1980 p. 23, Kairinen 1979 p. 87 and 1991a p. 48, Kahri-Hietala p. 25. However, Sipilä is of the opinion that "work" does not have to be regarded containing financial value. See Sipilä 1968 p. 4 and 20.

⁸⁰Pekkanen 1968a p. 52. The arguments Pekkanen lays down are, at least in theory, convincing. The performance of "work" in a legal context is so closely connected to economic activity in general that the requirement of financial value can theoretically be sustained. It is, however, another question how the requirement of financial value can be used in difficult cases.

⁸¹The role of motives in assessing the concept of work has been discussed mainly in older literature. According to Kivimäki the motives of the behaviour can not have any role in deciding whether a given behaviour can be classified as "work". Therefore, activity for which the sole motive is fun or recreation may legally be "work". Sipilä, on the other hand, is of the opinion that if the motive of the behaviour is fun, recreation or health it can not be regarded as "work" in a legal context. The committee of working time pays some attention to the difficulties of proving the motives of a given behaviour. Depending on

behaviour can not have much value in defining the concept of "work" in this context since an objective evaluation of subjective motives is not possible. Drawing a line between enjoying one's work and doing something as a hobby is practically impossible since even the person himself may not be able to picture his motives perfectly. Therefore, the presumed motives should have, at the most, a very limited role in practical decision-making. For instance, the presumption of financial gain is practically the rule when a certain behaviour/activity is remunerated.⁸²

Also other criteria have been proposed. *Erma* and *Routamo* have underlined that the behaviour in question should be goal-orientated in order to qualify as "work" in a labour law context.⁸³ Goal-orientation is, however, a motive of behaviour. Therefore, what has been said about motives in general, seem to apply also to the requirement of goal orientation: in practical decision-making it can not have a role of its own. In addition, it has been suggested that the behaviour should be useful for society in order to qualify as "work".⁸⁴ This criterion

the actor, the same behaviour may be regarded as work or leisure time activity even though the motive of remuneration is usually presumed behind financially gainful behaviour. According to the report of the committee, the word "work" may, depending on the point of view, mean work as financially gainful behaviour on the one hand or any goal orientated behaviour which is valuable to the particular individual or the society as a whole on the other hand. See in more detail KM 1983:69 annex 3 p. 16, Kivimäki DL 1930 p. 296-297, Sipilä 1938 p. 88.

⁸²Of the role of motives in practice see Tapio, Työeläke 1990:1 p. 26 to 27. "The motive of financial gain is rarely doubted since the modern cynical administrator of law does not believe in charity. If an activity is remunerated, financial gain is the motive behind it." Such a practical approach sounds very refreshing in the midst of semantic and over-theorising considerations about the 'nature' of work.

⁸³See especially *Erma* 1955 p. 102 and *Routamo* 1972 p. 92 to 94.

⁸⁴*Erma* 1955 p. 102.

is, however, so vague and subjective that it has to be set aside in this context. Furthermore, it has been proposed that behaviour should require time and effort from the person in question to qualify as "work". Time is principally an easily measurable variable but it raises the problem of a required minimum duration of behaviour, which can in different situations be very different. In practice, it seems impossible to establish any kind of absolute border-line. Therefore, it may not serve as a sustainable criterion even in a theoretical evaluation of "work" in this context. Effort as physical and psychological exertion, on the other hand, is a natural part of human life in general and cannot, as such, define "work" in a legal context.

According to most of the commentaries, behaviour which can be regarded as "work" in the meaning of labour law may not be illegal or against the basic moral standards of the society.⁸⁵ Illegal behaviour as such may in some occasions clearly fulfil the criterion of "human behaviour which contains financial value". In a legal context there is, however, no reason to evaluate whether labour law could be applied to illegal behaviour – obviously, law does not aim to safeguard behaviour which goes against the law. Therefore, the requirement that the behaviour should be lawful may be added to the criteria of the concept of "work" in this setting. 'The basic moral standards of a society' is, on the other hand, a more difficult criterion to be evaluated. It goes without saying that immoral behaviour may be financially valuable. Without going into more theoretical

⁸⁵Kivimäki DL 1930 p. 297, Sipilä 1947 p. 43, Erma 1955 p. 102, Kairinen 1998 s. 65.

questions concerning the relationship between law and morality, it is sufficient to say that the main problem in using moral principles in this context is their identification. In other words, how to distinguish the basic moral principles of the society and, especially, how to evaluate whether a given behaviour is immoral or not.

The concept of "work" in the definition of the employment relationship may, for the purposes of a general description, be defined according to more recent doctrine.⁸⁶ Therefore, "work" in this context is first of all human behaviour. The requirement of financial value can theoretically be sustained even though assessing financial value may be somewhat difficult, especially the close relationship between financial value and remuneration of the behaviour has to be underlined. As additional criteria one may add that a behaviour which can be regarded as "work" in this context may not be illegal or against the basic moral values of the society.

It has to be strongly pointed out, however, that the construction of an exact legal definition of the notion of "work" for practical decision-making is not possible and, more importantly, not necessary, since behaviour which may be regarded as work in a legal context is strongly dependent on the values and beliefs of society in general. Behaviour which previously was not regarded as "work" will be considered as such only insofar as it starts to resemble other behaviour which are regarded as "work". Therefore, the concept of work

⁸⁶See Sarkko 1980 p. 23, Kairinen 1998 p. 65, Kahri - Hietala 1997 p. 18 to 19.

necessarily remains very vague allowing space for changes in how behaviour is classified in society. Because of this, the concept of "work" cannot be a valuable criterion in making practical decisions on the applicability of labour law - only at a very abstract level can it be distinguished from real world phenomena the types of human behaviour which potentially may be relevant in the context of the scope of labour law.

However, in a recent case KKO 1995:145 relating to the position of a (semi-) professional ice-hockey player the Supreme Court, at least according to the explicit argumentation, considered the notion of 'work' as a legal criterion. The Court stated:

"There can be no reason why playing and training could not be regarded as work within the meaning of Article 1 of the Contracts of Employment Act."

However, the Court did not give any further arguments as to what the notion of work could mean. As this case shall be analysed in detail in the context of the case law on sportsmen, further commentary shall be presented later.⁶⁷

⁶⁷ See Part III chapter 1.2.4.

1.4.3 A contractual basis

According to the prevailing understanding of the provisions defining the scope of different pieces of statutory Finnish labour law, work has to be performed on a contractual basis in order to fall within the concept of the employment relationship. Under Finnish law, the formation of a contract requires consistent declarations of intent from both of the contracting parties. The person willing to conclude the contract has to make an offer to the other party who, in turn, has to give his unconditional acceptance to the offer made.⁸⁸

The contract establishing the employment relationship has to create mutual obligations between the parties, i.e. the other party has to undertake to perform work while the other party undertakes to remunerate the former for the work performed. The employment relationship cannot be established by a unilateral promise given by either party.⁸⁹

The contract forming the employment relationship may at the same time fulfil the criteria of some other type of contract. According to the prevailing labour law theory ("ristikkoteoria" / "gratingtheory"⁹⁰), also the rules concerning a given other type of a contract may be applied to the relationship. The possible norm

⁸⁸See generally e.g. Hoppu 1998 p. 27 to 31.

⁸⁹Of case law see e.g. TN 1163 - 84. Of contracts, which only create a right to perform, works see Saloheimo TYV 1984 p. 163.

⁹⁰In Finnish "ristikkoteoria".

conflicts have to be decided on a case by case basis by taking into account the often mandatory nature of labour law.⁹¹

According to Section 4 of the Contracts of Employment Act, the drawing up of a contract of employment does not require a specified form. Therefore, a contract of employment may be concluded either in a written or an oral form.⁹² However, it has been generally accepted in the doctrine that even a tacit agreement is sufficient for concluding a contract of employment. Thus, it is enough that the parties, through their behaviour, imply that an agreement concerning the performance of certain work prevails.⁹³ As even a tacit agreement is sufficient to form a contract of employment, the practical importance of a contract as a distinguishing criterion of an employment relationship necessarily diminishes.

Also the impact of the nullity of a contract in the context of the criteria of the employment relationship has been discussed in the doctrine. For the purposes of this study it is sufficient to state that even a contract declared void may in some occasions form the basis of the employment relationship.⁹⁴

⁹¹See Vuorio p. 40 to 46, Kairinen 1979 p. 189 to 191 and 1998 p. 64.

⁹²The form of the contract has, however, some practical relevance since a fixed term employment contract which is intended to be in force for more than a year transforms on the basis of Article 4(2) *ipso jure* to an open ended contract if it has not been concluded in a written form.

⁹³See e.g. Pekkanen 1966 p. 78, Routamo p. 66, Kairinen 1998 p. 62 to 64.

⁹⁴On the basis of the principle of the protection of the employee it can not be reasonable to deny the application of protective legislation if the performance of the work has begun. See more in detail Sipilä 1938 p. 182 to 203, Sarkko 1980 p. 27 to 28, Kairinen 1998 p. 62 to 64.

The requirement of a contractual basis for the employment relationship means that work in the public sector based on public law falls outside the concept of the employment relationship.⁹⁵ This is directly expressed in Article 1(3) of the Contracts of Employment Act. Work as a civil servant is based on a unilateral administrative decision even though the decision requires the consent of the person in question. However, the practical implications of the difference between working as a civil servant or as an employee have substantially diminished during the recent years which naturally has led to a decrease in the importance of drawing this border-line.⁹⁶

Institutionalised persons, prisoners and persons fulfilling their military service may also perform work. This so called "semi-free work" normally falls outside the concept of the employment relationship and thus, of the application of labour law, because of a lacking contractual basis. It is possible, however, that on the basis of a specific provision, some parts of labour law may be applied to work performed in the above mentioned institutions.⁹⁷

A notable amount of work is also performed under different forms of leisure time and voluntary activities. Normally, this kind of work is not performed as a salaried employee. By definition, voluntary and leisure time work implies that

⁹⁵LVK 1908 p. 56, Kivimäki DL 1930 p. 158, Sipilä 1938 p. 91 to 92, Pekkanen 1966 p. 29, Sarkko 1980 p. 27 to 28, Kairinen 1979 p. 88 and 1998 p. 75 to 76.

⁹⁶Bruun - Mäenpää - Tuori 1995 p. 51 to 53. Of case law see e.g. KKO 1965 II 9, KKO 1965 II 41, KKO 1967 II 33, KKO 1971 II 34, VAKO 2.2.1979 Dnro 3994:78.

⁹⁷See e.g. Section 3 of the Accident Insurance Act and Section 1(2) of the Health and Safety Act.

the parties are not bound by any legal obligations whether based on private or public law. Therefore, a person performing work voluntarily can always withdraw from the activity without the fear of any negative legal sanctions – voluntary nature continues during the performance of the work and is not limited to deciding whether or not to enter into a contractual relationship.⁹⁸

The role of the criterion of a contractual basis for the existence of the employment relationship has been indirectly questioned in a relatively recent case decided by the Supreme Court of Finland.

In case KKO 1990:29 a person had, on a voluntarily basis, been working for an association in an institution for handicapped children. In exchange for these services she received a housing benefit, free meals, clothes and medical care and some pocket money. The court expressly stated that the work had been performed on a voluntary basis. Despite the lack of a contractual relationship the court ruled that an employment relationship did exist between the parties without really reflecting on whether this relationship could be construed as contractual.

⁹⁸In the case law the criterion of a contractual basis has been used as a decisive factor in a case concerning the borderline between leisure time activity and an employment relationship. In case KKO 1987:4 the Court of Justice of Finland had to decide whether a baseball referee was an employee or not. The referee was injured during a baseball game and applied for compensation from the insurance company where the club arranging the game was insured. The court ruled that since a contractual relationship between the club and the referee was lacking the referee was not in an employment relationship with the club despite of the fact that the club had paid a fee for the services performed and had withheld taxes of this fee. Furthermore, since the national baseball federation had, on request of the club, appointed the referee, a contractual relationship could not exist between the referee and the club. The fee paid and the withholding of taxes were not sufficient implications for the court to construct a silent agreement. Looking at the case from a wider perspective it is, however, possible that the court regarded the services of a referee as leisure time activity and the lack of an explicit contract offered only a formal criterion for the court to reach its conclusion.

In general, the case law has not often touched upon the criterion of "contract". The few cases seem to indicate that the role of the "contractual basis" - criterion of the relationship is restricted into drawing a formal border-line between the employment relationship and work as a civil servant in the public sector. This seems to be due to the fact that even a tacit agreement is considered sufficient in order to establish a contractual relationship in labour law. The role of this criterion, at least according to the judgements of the courts, seems to have more importance in situations where the other relevant criteria of the employment relationship are not clear and the evidence does not speak for a clear contractual relationship. This implies, however, that the courts use the lack of an expressed contract more as a formal argument than as a genuinely relevant factor. The situation, in addition to the issue of the border-line between the employment relationship and work as a civil servant, where the question of a contractual basis for the performance of the work is taken up, concern mainly the relationship between employment and different forms of work performed in voluntary and leisure time activities. While drawing the border-line between the employment relationship and self-employment, the contractual basis is rarely questioned. As a decisive factor the criterion of a contractual basis has only been used in cases where the existence of an employment relationship has been denied.⁹⁹

However, it seems as if labour law doctrine would be using the concept of a 'contract' in a particularly narrow way. The meaning of the word 'contract' in

⁹⁹See e.g. KKO 1987:4 above concerning the position of a sports referee.

the definition of the employment relationship has been restricted to signifying a vague agreement about the performance of work. In practise, it is enough that the employer allows the work to be performed and that the worker is willing to carry out the work without any specific expressions of intent.

It would seem reasonable to assume that the influence of the theoretical background of Finnish labour law has had an effect on this reductionist concept of a contract in this context. The essential elements of a bilateral contract have been split by the doctrine into separate criteria of the employment relationship. This in turn, has resulted in a definition of a contract, which in practise, as mentioned above, is only a vague agreement about the performance of a particular work. Partially this may be due to the fact that the Finnish language does not make a difference between the words 'contract' and 'agreement'.

However, the doctrine has, in a rather obscure way, attempted to reconcile the splitting up of the concept of contract. This has been done by stating that the requirement of a contractual basis has clear connections to the other criteria of an employment relationship. First of all, it has been stated that in the case of no clear contract, the fact that the work has been remunerated may indicate that a tacit agreement between the parties has prevailed.¹⁰⁰ Secondly, according to the doctrine, the requirement of a contractual basis means that the promise to perform work leads essentially to the fact that the work is "performed

¹⁰⁰See e.g. Pekkanen 1966 p. 78. As an example of the impact of a promise of remuneration see e.g. TN 1163 - 84.

for another person" which in turn, as will be seen, is one of the components of the employment relationship.¹⁰¹ However, it should be rather obvious that work performed for oneself cannot be the object of a contract. This construction of the doctrine has not been questioned at all and, the reason may simply be that the question regarding the existence of a contractual basis in practical border-line cases concerning the scope of labour law have been very exceptional.

It is also somewhat interesting to note that no particular attention seems to have been paid to the more fundamental question about how the general principles behind contract law fit with the idea of the employee as the weaker party to the contract. The doctrine on the employment relationship, with the possible exception of *Vuorio*, has taken the general principles of contract law more as a formality. This attitude would seem to be reflected also in case law.

One additional aspect relating to the requirement of a contractual basis should be taken up in this context. In general, on the basis of the principle of the freedom of contract, the parties may either take advantage of the types of contracts formed by the legislator or conclude a contract *sui generis*.¹⁰² However, in the context of labour law, the principle of the protection of the employee as the presumed weaker party restricts this freedom, since in case the contractual relationship in reality clearly fulfils the criteria of the employment relationship, the parties cannot avoid the application of labour law. In other words, according to an

¹⁰¹See e.g. Routamo 1972 p. 66.

¹⁰²See e.g. Telaaranta p. 43 to 44.

established principle of Finnish labour law, the parties of a contract concerning the performance of work cannot be left with full discretion upon the type of the contract since the object of labour law, the protection of the employee as the weaker party, could easily be invalidated by choosing another type of a contract.

It is, therefore, clear that the parties can not categorically set the application of labour law aside. Neither can any significance be given to the title given to the contract if its purpose is only to contract out the application of labour law. Therefore, the scope of labour law is not, in principle, contractual.¹⁰³

However, Finnish law gives the parties freedom to agree upon matters, which in practise may, under some circumstances, be relevant in deciding whether labour law is to be applied. Thus, it is possible, within certain limits, to indirectly contract out the application of the protective legislation. The possibility to agree upon some details of the work, which at the same time may affect the classification of the contract, is not, however, in contradiction with the principle of protecting the weaker party. In a difficult border-line case, a sufficient number of facts which imply that the relationship in question is not that of an employer - employee simply means that the other party is not in the need of protection - the application of labour law is the legal consequence of an employment relationship, not vice versa.

¹⁰³ Aurejärvi 1976 p. 189 to 194, Sarkko 1980 p. 27, Saloheimo, Oikeus 1989 p. 382 to 383, Paanetoja p. 113 to 114. Of case law see e.g. TN 1237 - 88, where the Labour Council stated that the expressed will of the parties can not have a decisive effect. In deciding the scope of labour law, the opinion of the parties can only be one fact among others to be taken into account. See also TN 1213 - 87.

1.4.4 "Performing the work for the other party"

In the doctrine, Article 1 of the Contracts of Employment Act has been interpreted as containing the criterion of "*performing work for the other party*" of the employment relationship.¹⁰⁴ Except for *Routamo*, there is no disagreement about the meaning of this expression.¹⁰⁵

By definition, this criterion requires that there is a legal (contractual) relationship between two parties. Therefore, as it has been stated, it is closely linked to the criterion of a "contract". It is essential that the relationship concerning the performance of work involve two legally capable persons. To conclude that the work has been performed for another person, the direct financial outcome of the work has to go to the supplier of the work. The compensation paid to the party performing the work is to be considered as remuneration for the benefits resulting from the efforts of the other party rather than as a direct financial benefit from the work.

¹⁰⁴See also Article 1 of Accident Insurance Act, Article 1 of the Vocational Training Act, Article 1 of the Protection of Young Workers Act. In Article 1 of the Annual Leave Act, Article 1 of the Act regulating the Employment Relationship of Domestic Servants and in Article 1 of Act of Working Time Regulation for Shops and Offices there is a reference to the Contracts of Employment Act.

¹⁰⁵See Sipilä 1938 p. 90, Pekkanen 1966 p. 35, Aurejärvi 1976 p. 102 to 103, Sarkko 1980 p. 23, Kairinen 1979 p. 87 and 1998 p. 65 and Kahri - Hietala 1997 p. 19 to 21. In his work concerning the Accident Insurance Act, Routamo is very critical in respect of the prevailing approach where an employment relationship is split to, at least in principle, separate and equally important criteria. However, he has himself used the same criteria at the level of the outline of the work, which has resulted in a somewhat arbitrary division of case law under different chapters (criteria). This approach, as much as the general idea of an overall evaluation is sustainable, is faced with obvious difficulties under the chapter (criterion) "performing work to another person". Without trying to give a more detailed interpretation of the expression in question, he practically identifies it with the criterion of "subordination". See Routamo p. 94 to 120.

This criterion has been mainly used by the courts in situations of work performed for a general partnership or an estate. If the work is performed solely on the basis of a partnership, it has been generally concluded that the financial outcome of the work comes directly to the person performing the work. However, it is also possible that a member of the partnership/estate is employed by the partnership or estate. Therefore, general rules are difficult to establish.¹⁰⁶

The case of the position of the upper management of a company/business in relation to the scope of labour legislation can also be briefly discussed in this context. Through significant shareholdings the upper management, in particular, may become close to a similar position as described above in the case of a partnership. Significant shareholding or otherwise significant power over the company may in practise lead to a situation where the financial value of the work comes directly to the person in question. According to Section 1(3) of the Accident Insurance Act and Section 2(6) of the Employment Pension Act, the statutes in question are not applicable to a member of the upper management of a limited company if he himself or his close relatives own more than 50% of the stock capital of the company or if the number of votes the shares they own give more than 50% of the total votes of the shares of the company. Also a member of the upper management of another form of corporation falls outside the scope of the above mentioned legislation if he can be considered as possessing equivalent power in the undertaking in question.

¹⁰⁶See e.g. Sarkko 1980 p. 23 to 24.

On the basis of the brief description presented above, it can be concluded that "performing work for another person" seems to be a rather formal criterion of an employment relationship. There is no evidence that it would have been used independently as a decisive criterion by the courts and its role as a relevant factor in case law has been limited to the above-mentioned situations of work performed for partnerships and estates and, additionally, to the problem of the legal position of upper management of companies. It has, however, occasionally been used also in other contexts.¹⁰⁷

However, as mentioned above, from the point of view of general contract law, the splitting up of the concept of an employment relationship into separate formal criteria seems very artificial, particularly as regards the attempt to separate the criteria "contractual basis" and "performing work to the other party" from each other. For the author of this study it would seem more coherent not to split up the notions of 'contract' and 'performing work for the other party'.

1.4.5 "Remuneration"

The definition of an employment relationship requires that work be performed for remuneration ('consideration')-unless there is an express exception under a given piece of legislation. A contract of employment is presumed to be for consideration according to Section 1(1) of the Employment Contract Act. This rule

¹⁰⁷ See e.g. KKO 1995:145.

has relevance in cases where an express agreement regarding remuneration is lacking. If a contract concerning the performance of work fulfils the other relevant criteria of the contract of employment, the work has to be remunerated unless "it can be concluded from the facts of the case that the work is not to be performed for remuneration".¹⁰⁸

The legal definition of remuneration has been given in Section 1 of the Accident Insurance Act, Section 1 of the Industrial Safety Act and in Section 1 of the Protection of Young Workers Act which state that as remuneration is considered any benefit which has financial value. In addition, in Section 18 of the Contracts of Employment act the same definition is given indirectly i.e. in addition to wages and specific performance, as remuneration is considered any other compensation containing financial value.

The criterion of "remuneration" can be looked upon from different angles although one can rarely find such distinctions made either in case law or in academic writings. First of all, it is necessary to define what kind of compensation can *qualitatively* be considered as "remuneration". Secondly, it is necessary to clarify whether a *quantitative* limit exists for the benefit to be classified as remuneration in a labour law context. Finally, "remuneration" can be approached from the point of view of its *basis of calculation*. However, the latter fits best into the analysis of subordination.¹⁰⁹

¹⁰⁸The wording in Finnish is as follows: "ellei asianhaaroista käy ilmi, että työ on tehtävä vastikkeetta."

¹⁰⁹See chapter 1.4.6 below.

As was stated above, any benefit containing financial value qualifies as "remuneration". The benefit has to be financially measurable. According to Article 18 of the Contracts of Employment Act, wages are to be paid primarily in the legal currency of the country in question. However, the parties may reach an agreement that goods or other specific performance is the price for the work.

The following benefits have been considered as fulfilling the criterion of remuneration in case law: *the possibility to receive training*¹¹⁰; *board and lodging*¹¹¹; and *four jars of honey*¹¹². Even a mere *opportunity for earned income* has been considered as a benefit with financial value.¹¹³ Also *reciprocal work* has been considered sufficient for the criterion of remuneration.¹¹⁴

Moreover, *voluntary work*¹¹⁵ has led to some decisions of the courts. Voluntary work can be divided into two separate groups. Work performed in the

¹¹⁰KKO 1953 II 161. A pupil of a driver's school had been following the work of mechanics in a garage without monetary compensation and had himself, under the direction and supervision of the mechanics, performed some tasks suitable for his skills. The aim of the pupil was to take a degree as a chauffeur for which he needed some garage training. The possibility for the training, arranged by the driver's school, fulfilled the criterion of remuneration of an employment relationship. See also VAKO 5.3.1976 Dnro 4297:75.

¹¹¹X had been placed to the farm of Y on the basis of the Child Welfare Act. After the contract of maintenance had expired, Y and the social welfare board had agreed that X would remain in the board and lodging of Y, but the municipality would not anymore pay a maintenance fee to Y since X was already capable of compensating the board and lodging with his work. The compensation received by X in the form of board and lodging was considered as remuneration in the meaning of Article 1 of the Accident Insurance Act.

¹¹²VAKO 31.3.1987 Dnro 290:87.

¹¹³See KM 1969 : A 25 p. 14; KKO 1951 I 9. See also VAKO 12.6.1984 Dnro 2853:83.

¹¹⁴See e.g. KKO 1952 I 7, KKO 1966 II 36, KKO 1979 II 44, VAKO 12.5.1967 Dnro 6966:66 and VAKO 11.6.1976 Dnro 7947:75.

¹¹⁵In the case of voluntary work the problem is not literally the quality of the compensation. The question is rather of a *sui generis* -type of a situation.

form of "traditional" help of neighbours and relatives has not been considered as being performed in an employment relationship regardless of some possible benefits in the form of food and drinks.¹¹⁶ On the other hand, if the remuneration is paid directly to e.g. charity or a non-profit association, the work is performed in an employment relationship.¹¹⁷

In the preparatory work of the Contracts of Employment Act, it was additionally required that the agreed remuneration was of the kind that could be sued for in court in case the employer failed to fulfil his obligation to pay. If the promise of consideration does not contain such binding force, the work may, according to the committee of the Contracts of Employment Act, be regarded as performed in an employment relationship only in the case that, without being obliged, the employer in practise remunerates the work.¹¹⁸ However, it would seem that the courts have not been faced with such a situation.

On the whole, it can be concluded that the legal definition of remuneration does not raise any significant problems from a qualitative perspective. The courts have not hesitated in qualifying several goods and reciprocal performances as remuneration.

¹¹⁶See e.g. KKO 1964 II 77 and Routamo p. 154.

¹¹⁷See e.g. VAKO 29.9.1977 Dnro 866:77 and Routamo p. 154 to 155 and the case law mentioned therein.

¹¹⁸KM 1969 : A 25 p. 14. As an example the committee refers to a situation where the employer has promised to mention the employee as a beneficiary in his will without eventually so doing, or where the employer has promised the employee free accommodation in a house the employee is building but recalls the promise after the construction work has begun.

From a *quantitative* perspective the situation does not look as clear. In literature *Sarkko* has concluded that the value of the remuneration is irrelevant for the analysis of the criterion of remuneration.¹¹⁹ Therefore, according to *Sarkko*, as remuneration qualifies any performance which is financially measurable without the need to balance the value of the mutual promises of the parties.¹²⁰ However, it has also been stated that at least a theoretical minimum level of reciprocity has to prevail between the compensation and the work performed. *Pekkanen* has concluded that the compensation for the work may not be, in relation to the financial value of the work, so low that it would be considered artificial.¹²¹ Also *Kahri* and *Hietala* are of the opinion that the value of the remuneration may not be so low that in practise it would be only ostensible.¹²² Apart from the comments referred to above, the relationship between the value of the work and the value of the remuneration has been ignored by the doctrine. Therefore, it is necessary to thoroughly analyse the case law in order to evaluate whether the disagreement in the literature can be resolved.

Prior to a very recent case regarding the position of a sportsman (KKO 1997:38), no direct argumentation referring to the quantitative relationship

¹¹⁹*Sarkko* 1980 p. 25.

¹²⁰As a slightly exaggerated example may be mentioned a situation where a consideration having the value of one unit of a given currency in return for a significant performance of work is sufficient to fulfil the criterion of remuneration.

¹²¹*Pekkanen* 1966 p. 94.

¹²²*Kahri - Hietala* 1997 p. 25.

between the remuneration and the work performed can be found from the case law. However, in several cases the courts had already prior to the recent case from the Supreme Court indirectly performed a balancing between the value of the remuneration and the value of the work. Some cases where this balancing is evident shall be presented hereafter.

In KKO 1990:29 a person had performed laundering work for an association for 20 to 30 hours per week. She was compensated for her work, in addition to some pocket money, in the form of free accommodation, free meals, clothing and health care. Despite the fact that the compensation undoubtedly contained financial value from a qualitative perspective, the main issue was whether the work was performed for remuneration or not. The Supreme Court of Finland answered in the affirmative.

From the case law of the Labour Council may be mentioned case 1044 - 78 where the issue was the application of the Industrial Safety Act to the work performed by a training director of a volunteer fire-brigade during fire alarm rehearsals. The members of the fire brigade were paid an hourly fee for rehearsals, fire alarms and emergency duty. In addition, those participating in rehearsals were paid a small monthly fee. Regarding the amount of compensation, the Labour Council concluded:

"Since the hourly fees have varied from 16,00 FIM to 7,20 FIM, the fees can be considered as forming a genuine remuneration for the work performed."¹²³

Also in TN 1139 - 83 a similar situation occurred. Despite of the fact that the hourly fees were lower than in the case above (3,50 FIM per hour for rehearsals and 13,50 FIM per hour for fire alarms), the Labour Council regarded the fees as forming genuine remuneration for the work performed.

From the case law of the Insurance Court may the following cases are relevant. In VAKO 31.3.1987 Dnro 290:87, the Insurance Court concluded that a person repairing the roof of his neighbour in exchange for four jars of honey (á 15 FIM, ~2,5 €) was an employee. The work was supposed to last for five hours and the total value of the agreed compensation was 60 FIM (~10 €). On the other hand, the Insurance Court denied the status of an employee to a person who was supposed to do forestry thinning for the owner of the land. It was agreed that the work would last for five to six days and the agreed compensation was that the person doing the work would have the right for all of the wood cut.¹²⁴ Additionally the Insurance Court did not grant the status of an employee to a student who, in

¹²³The dissenting members of the Labour Council considered the compensation to be so small that "at most it can be regarded as a compensation from the costs incurring from participating to the activities".

¹²⁴VAKO 2.4.1982 Dnro 703:81. The fact that the person performing the work was the son-in-law of the owner of the land may have influenced the decision even though this can not be concluded directly from the argumentation of the court.

exchange for a daily allowance, was performing the tasks of a group leader in a confirmation camp.¹²⁵

On the basis of the above-mentioned case law, it seems to be reasonable to state that in order to fulfil the criterion of remuneration the compensation has to exceed a certain limit which is dependent on the time and effort invested in the performance of the work. The recent case KKO 1997:38 would seem to confirm this. This case shall be analysed in detail while looking at the case law concerning sportsmen. However, in this context it is worth citing a paragraph from the ruling of the Supreme Court:

"Section 1.1. of the Contracts of Employment Act does not require that a payment should exceed a certain amount in order to qualify as genuine remuneration. However, the compensation cannot be so small that it is only ostensible."¹²⁶

However, it is impossible to draw a clear border-line in monetary terms as the emphasis is on a certain reasonable balance between the work performed and the compensation received. Nevertheless, it seems to be clear that the

¹²⁵ VAKO 14.5.1985 Dnro 238:84.

¹²⁶ In Finnish: "Työsopimuslain 1 §: 1 momentin säännöksessä ei edellytetä vastikkeelta tiettyä suuruutta. Vastike ei kuitenkaan saa olla niin vähäinen, että se jää täysin näennäiseksi."

performance of the work and the compensation provided do not have to be objectively of equal value.¹²⁷

In any case, a theoretical minimum limit cannot be set very high. Section 1 of the Occupational Employment Pension Act states that the act does not apply to employment relationships where the monthly earnings of the employee are below a certain amount¹²⁸. As earnings in the meaning of the act are considered monetary payments and benefits in kind which are considered as taxable in income taxation.¹²⁹ On the basis of the above mentioned provision of the Employment Pension Act, it seems to be reasonable to conclude that the criterion of remuneration can be fulfilled even when the monthly earnings do not reach the index-bound minimum level. According to the preparatory works of the Employment Pension Act, the idea behind the setting of an exact minimum level of application is to exclude minor part-time and secondary employment from the scope of the Act.¹³⁰ Therefore, full-time work or considerable part-time or secondary occupation in exchange for a payment which does not exceed the minimum index-bound limit would not, on the basis of the preparatory works, form

¹²⁷The evaluation of the value of a given work is very difficult in a situation where no guidelines can be used on the basis of a contract, collective agreement or custom. See especially Pekkanen 1966 p. 95 to 96.

¹²⁸This limit is index-bound and it is updated annually. See "Työeläke ja muu sosiaalivakuutus" p. 153.

¹²⁹Pentikäinen et al. p. 27.

¹³⁰HE 131/65 p. 1.

an employment relationship between the parties on the basis that the work is not performed for remuneration.

It would certainly seem desirable that the Supreme Court would, should the opportunity arise, continue the balancing act carried out in KKO 1997 : 38.

1.4.6 "Direction - Subordination"

In the provisions defining the scope of the Finnish statutory labour law, it is required that the work is performed under the direction and supervision of the employer. In the doctrine, this criterion has been named as the criterion of direction ("direktiötunnusmerkki"). Of all the different criteria of an employment relationship, the criterion of direction is regarded as the most important and often decisive. According to the written argumentation of the courts, this fact is undoubtedly true although the argumentation of the courts is often not very informative in substantive terms i.e. providing arguments why the criterion was fulfilled in a particular case.¹³¹

The wording "under the direction and supervision of the employer"¹³² is, of course, an attempt to describe the power relationship inherent in an employment relationship. In other words, an employment relationship requires that

¹³¹Generally of direction - subordination see Sipilä 1938 p. 133 to 168, Suviranta p. 289 to 290, Pekkanen 1966 p. 36 to 38, Routamo 123 to 151, Aurejärvi 1976 p. 122 to 154, Sarkko 1980 p. 25 to 27, Kahri - Hietala 1997 p. 21 to 24, Kairinen 1998 p. 66 to 67.

¹³²In Finnish: "työnantajan johdon ja valvonnan alaisena".

the person performing the work is in a *subordinate* position in relation to the person supplying the work. Without this feature, there would be no need to distinguish the employment relationship from other contractual relationships since the rationale of labour law is to balance the inequality between the contractual parties. However, although the doctrine seems to prefer using the concept of "direction", it is clear that the real issue is the unequal share of power of the parties which can be better described as a relationship involving a sufficient level of "direction - subordination".

The expression "under the direction and supervision of the employer" gives an image of the duty of the employee to follow the direct instructions the employer gives to him in the course of the work. The extent of this duty is defined in Section 13 of the Contracts of Employment Act. According to this provision, the employee is obliged to follow "the orders which the employer, within his competence, gives of the way of performance, quality, extent and time and place of the work"¹³³. The direction and supervision expressed in this provision should not, however, be confused with the meaning of "under the direction and supervision" within the several provisions defining the scope of labour law since the application of Section 13 of the Contracts of Employment Act is the legal consequence of fulfilling the criteria of the employment relationship. In the following, it will be shown that the "direction and supervision" expressed in

¹³³In Finnish: "niitä määräyksiä, mitä työnantaja työn suoritusajan, laadun ja laajuuden sekä ajan ja paikan suhteen toimivaltansa mukaisesti antaa".

Section 1 of the Employment Contract Act is essentially broader than the "technical direction" in Section 13.¹³⁴

In the context of the provisions defining the scope of Finnish labour law, "under the direction and supervision" is the expression which attempts to cover all the indicia which have to be taken into account by courts in evaluating the extent of dependence/independence of the person performing the work. On the basis of the case law, this group of relevant indicia is very heterogeneous. The common denominator of these factors is that none of them alone is necessarily strong enough to qualify a person as an employee or a self-employed (or, as the case may be, civil servant). In each individual case an overall evaluation is needed in order to decide whether a person is "under the direction and supervision of the other party". On the basis of the doctrine and a recent study analysing the case law, it is possible to identify the group of relevant factors in this context. These factors shall be presented in the following without going more into details of the case law since this is done by *Paanetoja* in her recent study "*Työlainsäädännön soveltamisalasta*". Therefore, the case law is mainly taken into account indirectly by referring to her study. The problems of the position of managing directors and other leading personnel of companies is not given much weight since the relevance of this problem is marginal in this context. As already mentioned above, it can be generally stated that the position of the leading personnel vis-à-vis labour law is decided first and foremost on the basis of their position in the

¹³⁴See Tiitinen 1979 p. 156 to 166, Kairinen TYV 1983 p. 53 to 54.

organisation of the company and their possible ownership of shares or other personal risk invested to the organisation.¹³⁵

The meaning of "direction - subordination"

*An express contract clause regarding the subordinated position of the person performing the work builds up a strong presumption of factual subordination. However, such a contractual clause has to reflect reality since the employment relationship requires a factual relationship of direction - subordination between the parties.*¹³⁶

A *de facto* subordinated position means, first of all, an obligation to follow the instructions regarding the performance of the tasks and, an obligation to submit oneself to supervision as regards the follow-up to the work. These obligations could be named as "the general direction of the work". In the more recent case law the general direction and supervision of the work has not, however, received particular attention. This is rather natural since the cases,

¹³⁵On the position of the general manager of a limited company see Bruun - Remes DL 1983 p. 211 to 247, Lyytikäinen DL 1986 p. 269 to 275, Häyhä DL 1986 p. 578 to 607 and Lamponen TYV 1991 p. 159 to 165. On recent case law see in particular KKO 1996 : 49 where it was considered that the General Manager of an association fell within the scope of section 1 of the Contracts of Employment Act although he had relatively large amount of freedom in the performance of his work. See more in detail Halila DL 1996 p. 829 to 836.

¹³⁶Pekkanen 1968 p. 74 to 76, Aurejärvi 1976 p. 128 to 136.

which have given rise for litigation, have usually concerned a situation where the worker has not been working in the premises of the alleged employer.¹³⁷

In her work regarding the "direction criterion" of the employment relationship, *Paanetoja* has concluded that the practical instructions concerning the performance of the work have a very limited role in defining the criterion.¹³⁸ She has, however, reached this conclusion solely on the basis of the case law. The situations in which the position of the worker has given rise to litigation do not represent the whole variety of different forms of employment since clear employment relationships do not give rise to disagreement. In fact, in situations where the general direction and supervision of the work is not obvious, the courts have, nevertheless, considered whether a sufficient amount of control of the work can be established through other indicia although this listing requires extensive research. Therefore, in defining the group of relevant indicia of the direction - subordination -relationship, the general direction and supervision of the work cannot be set aside.

The fact that the courts have not indicated why in a given case a given indicator has been relevant illustrates the rather "piecemeal" nature of the argumentation of the Courts in the context of the scope of labour law. However,

¹³⁷ See Sipilä, *Työväen vakuutus* 1/1960 p. 3 to 6 and 31 to 34, Pekkanen 1968 p. 74, Aurejärvi 1976 p. 124, *Paanetoja* p. 81 to 94. Of case law see e.g. TN 1029 - 77 where the Labour Council considered that an author who provided an article to a newspaper on a weekly basis was not to be considered as performing his task under the direction and supervision of the publisher of the newspaper. One of the arguments in reaching the conclusion was the fact that the author had retained the right to decide upon the place and time of his work. See also *Paanetoja* p. 82.

the recent case KKO 1995:145 stands out as an exception. As regards the criterion direction - subordination, the Supreme Court stated:

"The notion of the direction and supervision of work signifies, *inter alia*, the right of the employer to direct and decide upon the way the work is to be performed, the quality and extent of the work, and the time and place of the work. From the point of view of the employee this means an obligation to follow the instructions given to him by the employer or the deputy of the employer within the limits of their competence and, an obligation to allow the supervision and follow-up of the performance and results of the work."¹³⁹

The obligation to perform the work in a certain place and during a certain time has been regarded as a strong indication of an employment relationship.¹⁴⁰ However, according to Section 11 of the Contracts of Employment Act, the fact that the work may be performed in home or in another place decided by the worker does not, as such, preclude the possibility of a direction - subordination -relationship. The importance of the time and the place of the work

¹³⁸See Paanetoja p. 92 to 94.

¹³⁹ In Finnish: "Työn johdolla ja valvonnalla tarkoitetaan työnantajan oikeutta määrätä muun muassa työn suoritustavasta, laadusta ja laajuudesta sekä sen ajasta ja paikasta. Työntekijän kannalta se merkitsee velvollisuutta noudattaa työnantajan tai tämän sijaisen toimivaltansa rajoissa antamia ohjeita sekä sallia työnteon ja sen tulosten tarkastaminen."

¹⁴⁰See Routamo p. 170, Pekkanen 1968b p. 75, Paanetoja p. 64 to 70.

in the case law is rather understandable since a majority of the cases have concerned situations in which the work has been performed at home or otherwise under circumstances where the alleged employee has had considerable amount of freedom in the performance of the work. Therefore, the courts have been obliged to evaluate the relevance of this "physical freedom" in the performance of the work. On the other hand, the relevance of the time and place of the work in case law may at the same time explain the lack of a reference to the general direction of the work since the performance of the work in a certain place at a certain time implies the right and possibility for a more detailed direction and supervision.

According to Section 35 of the Contracts of Employment Act the employer has a duty to provide the employee with the necessary equipment and material unless the contract of employment or the prevailing custom do not otherwise stipulate. Regarding the scope of labour law, the duty to obtain or provide the equipment and material of the work has been relevant in evaluating whether the worker is in a subordinate position. In other words, the duty of the worker to obtain the equipment and material indicates a subordinate position.¹⁴¹ However, according to Section 12 of the Contracts of Employment Act, the fact that the worker has used his own machinery or equipment in the performance of

¹⁴¹Paanetoja p. 53 to 64. Of case law see e.g. TN 1174 - 85 where a lorry driver was considered an employee. The driver - salesman A had first been employed by B. Subsequently it was agreed that A would buy the lorry he was driving and that he would register as a self-employed in respect of taxation and other contributions. However, he did not possess a licence required from self-employed lorry driver, he was paid on the basis of results and he was responsible for the expenses in respect of maintaining the lorry.

the work does not automatically preclude the existence of an employment relationship. Furthermore, according to the same provision, the proportion of the total value of the work which the use of the machine owned by the worker forms cannot be decisive. Additionally, according to the preparatory works of the Contracts of Employment Act, it is often rather arbitrary which party is responsible for obtaining the necessary raw material of the work.¹⁴²

As was already mentioned during the analysis of the remuneration criterion, the basis for calculating the remuneration has had relevance in evaluating whether the work has been carried out under direction and supervision. According to case law as analysed by Paanetoja, remuneration based on time implies very strongly a subordinate position of the worker. Piecework pay has implied neither independence nor subordination. Remuneration based on commission has, on the other hand, often implied independence. This is particularly true in situations where the work has been performed at home or in another place decided by the worker. Also the reimbursement of expenses has usually indicated a subordinate position. The importance of the basis of calculating the remuneration has had strong relevance particularly in the case of travelling salesmen.¹⁴³

¹⁴²KM 1969 : A 25 p. 20.

¹⁴³Paanetoja p. 21 to 41. See also Pekkanen 1968b p. 75, Routamo p. 170 to 171, Aurejärvi 1976 p. 124. Of case law see e.g. TN 1107 - 89. A has signed a written contract to represent and sell leather for upholstery. According to the contract, he was paid a 3 % commission on the basis of the total payments of the customers. His travelling, telephone and other costs were not reimbursed. The company had also withdrawn his income tax payments. The work had been

According to Section 16 of the Contracts of Employment Act, an employee may not perform work for any other person without having the permission of the employer if the work could cause damage to the employer. Therefore, within certain limits, the employer has an exclusive right to the use of the labour of the employee. Regarding the scope of labour law, performing work to several contractors implies in principle greater independence than working for only one person. Thus, being contractually bound to only one supplier of work implies a subordinate position.¹⁴⁴ In particular, an express contractual clause restricting the right to work for others has implied a subordinate position.¹⁴⁵

Section 6 of the Contracts of Employment Act prescribes that the work has to be performed personally if not otherwise stipulated or unless it is implied that the engagement of assistants is allowed. According to the preparatory works of the Act, the worker can be considered as being in an employment relationship only if he is personally dependent on the alleged employer.¹⁴⁶ Independence in

mainly carried out at home by telephone with the exception of an annual 4 to 5 week's sales trip around the geographical area he was responsible for. The Labour Council considered him self-employed with a reference to the basis of remuneration.

¹⁴⁴Paanetoja p. 42 to 48, Pekkanen 1968b p. 75, Routamo p. 170, Aurejärvi 1976 p. 124. Of case law see e.g. TN 1246 - 89 concerning the work of translators where the Labour Council stated that "in considering whether the work was carried out under the direction and supervision of the employer, attention has been paid to the question whether the person has had the right to decide upon the time and place of the work and whether he has had the right to accept assignments from other providers of work and to refuse those assignments". In similar terms the Labour Council stated in TN 1249 - 89 that one factor to be considered was whether a journalist had the right to carry out work for other providers of work. See also Paanetoja p. 45.

¹⁴⁵Paanetoja p. 46 to 48.

¹⁴⁶KOM 1969 : A 25 p. 19.

the performance of work includes the right to decide upon the engagement of assistants and substitutes. Therefore, a right to engage assistants and/or substitutes implies an independent position vis-à-vis the employer.¹⁴⁷

Additional relevant indicia regarding the direction - subordination criterion have been presented by literature. Particularly the importance of the time needed for the execution of the work has given rise to comment. It has been concluded that if the execution of the work lasts only a very short period of time the direction - subordination relationship does not have time to take shape.¹⁴⁸

Regardless of the attempt to distinguish the relevant indicia in the analysis of the direction - subordination relationship, the argumentation has not always been consistent in different situations. In the context of different groups of professions the relevant factors have had differing weight in decision-making. This can be explained on the basis that the work of given professions have traditionally

¹⁴⁷Of case law see e.g. TN 1213 - 87 concerning the position of a person who had signed a contract to take care of the main wardrobe of the central hospital of an association of municipalities ('kuntainliitto'). According to the contract, the association of municipalities authorised the person to take care of the wardrobe. He was responsible for all costs and duties related to the wardrobe. The personnel were to be roistered on the basis of demand. The person was obliged to follow the instructions of the association on the opening hours and the payment for the services for which he needed the authorisation of the financial manager of the association. He was also obliged to follow the specific instructions of the association in respect of the special nature of the hospital. In return for his work, the person had the right to retain the payment due for the services. According to the arguments of the Labour Council, one of the essential elements for its decision to consider the person as falling within the scope of the Holidays Act was that he was obliged to perform the work personally. See also TN 953 - 74, TN 960 - 74, TN 1017 - 77 and Paanetoja p. 50 to 51.

¹⁴⁸Sipilä 1938 p. 163 to 168, Pekkanen 1968b p. 75, Routamo p. 170, Aurejärvi 1976 p. 124.

been considered as either employment or self-employment.¹⁴⁹ The decision-making process has not always been able to follow the changing forms of work.

As a whole, a wide range of factors has been considered relevant in the analysis of the direction - subordination relationship between the alleged employer and the employee. It is difficult to establish a hierarchy between these factors since in different situations they may be given a different weight. However, it seems to be reasonable to underline the importance of the role of the place where the work is to be performed since the majority of the litigations has concerned situations where the worker has considerable freedom to choose the place of the work. In the case of workers who perform their work in the premises of the employer the control element is naturally more intense and clear. However, changes in the traditional forms of work have given rise to a need to give weight to such factors as the basis of the calculation of remuneration, the personal duty to perform the work and the responsibility to obtain the necessary equipment and other material for the work. Nevertheless, these factors have been given weight only in situations where the direction - subordination -relationship is not obvious due to the considerable freedom enjoyed in the performance of the work.

One may argue that these different factors have been subsumed under the general notion of "direction – subordination" due to the splitting up of the criteria of an employment relationship. A different approach could certainly be adopted by openly arguing these factors under the idea of an "overall evaluation".

¹⁴⁹See Paanetoja p. 76 to 81, Aurejärvi 1976 p. 124, Routamo p. 170.

1.5 Summary

The scope of Finnish labour law has been subject to relatively extensive and theoretically-orientated research already prior to the first case law on the subject. At a very early stage the concept of a contract of employment as laid down by the (old) Contracts of Employment Act was identified for systematic reasons as the core of the emerging new area of law. However, the doctrine, and particularly Arvo Sipilä who became the first full time professor of labour law in Finland, preferred to use the concept of "the employment relationship" as the key common denominator of Finnish labour law. The central proposition of the "basic relationship theory" laid down by Sipilä was that the scope of different pieces of statutory labour legislation is identical and based on the 'legal criteria' of a contract of employment as described in Section 1 of the Contracts of Employment Act. It is important to note that the definition given in this provision, whether one has in mind Section 1 of the "old" or the "new" Contracts of Employment Act, nowhere indicates that a certain number of "legal" criteria could be distinguished as standing out from the formulation. Nor does the formulation state in any way that these criteria must always be fulfilled in order to qualify a contract as a contract of employment. This was developed by the doctrine although one should not forget the influence of the preparatory works of the old Contracts of Employment Act.

The courts have 'wholeheartedly' endorsed the approach constructed and developed by the doctrine. It is difficult to trace any cases which would stand out as examples of a clear challenge to the idea of a unified scope and the five criteria presented by the doctrine although during the 1950s the then new forms of work did not fit entirely to the formulations presented before the war. However, these cases were rapidly taken on board to confirm the "truth" of the main proposition of the basic relationship theory. The argumentation of the courts is in most cases very limited although the Supreme Court and the Labour Council have over the past decade or so started to be more thorough in giving the reasons for their decisions.

However, it is beyond doubt that the theory is still strongly influencing the thinking of the legal profession in Finland. Two examples are sufficient to illustrate this fact. The recent monograph of *Jaana Paanetoja* is a statement of the dominance of the basic relationship theory. As mentioned already above, she states in a clear manner

"All the criteria described in the Contracts of Employment Act must be present in each individual employment relationship. ... All the legal criteria of an employment relationship are equally important for the fulfilment of this legal relationship."¹⁵⁰

¹⁵⁰ Paanetoja 1993 p.2 and 8. In Finnish: "Jokaisessa yksittäisessä työsuhteessa on oltava työsopimuslaissa mainitut työsuhteen tunnusmerkit....Kaikki työsuhteen legaaliset tunnusmerkit ovat oikeussuhteen täyttymisen kannalta yhtä tärkeitä."

Secondly, and obviously more importantly, the Supreme Court in a clear and precise way recently confirmed the hegemony of the theory in case KKO 1995:145.

To summarise, according to the dominant interpretation of Section 1 of the Contracts of Employment Act, the following criteria must be fulfilled in order that a person falls within the scope of labour law in Finland:

1. *The performance of "work"*: As work can be considered any human behaviour, which has financial value. However, criminal activities and activities which go against the basic moral standards of society cannot be considered as work in a labour law context.
2. The work has to be performed *for the benefit of the other party*. In other words, the direct financial outcome of the work has to go to the supplier of the work i.e. the employer. The compensation paid to the party performing the work is to be considered as remuneration for the benefits resulting from the efforts of the other party rather than as a direct financial benefit of the work.
3. An employment relationship must have a *contractual basis* although a contract declared void may in some occasions form the basis of an employment relationship.

4. The work must be performed in exchange for *remuneration*. As remuneration qualifies any payment which has financial value. The payment cannot, however, be of so insignificant value that it must be considered only ostensible.

5. Work is performed in an employment relationship only and insofar as it is performed *under the direction and supervision of the employer*. The employer must have the right to direct and decide upon the way the work is to be performed, the quality and extent of the work, and the time and place of the work. From the point of view of the employee this means an obligation to follow the instructions given to him by the employer or the deputy of the employer within the limits of their competence and, an obligation to allow the supervision and follow-up of the performance and results of the work. Also other factors may be relevant in deciding whether a direction - subordination relationship exists.

All the above mentioned criteria must be present in an employment relationship. As stated by the Supreme Court in KKO 1995:145 when ruling that the contract in question was to be regarded as a contract of employment:

"The contract concluded has, thus, fulfilled all the criteria of a contract of employment as laid down by Section 1 of the Contracts of Employment Act."¹⁵¹

It has become commonplace to state that in difficult cases the courts will perform an overall evaluation of the situation and in some circumstances they may, in addition to the criteria presented above, take into account the general socio-economic situation of the individual. The elements of this balancing act are, however, rarely openly presented.

It would seem safe to say that the approach presented by Prof. Sipilä in 1938 is still strongly influencing the judicial attitudes in Finland. The formulation in Section 1 of the Contracts of Employment Act is considered to contain five different criteria, which must concurrently be fulfilled. However, the provision itself does not list these criteria in any particular way. This "listing" has been carried out by academic research and fully endorsed by the courts. One may question whether such a purely conceptual approach is up-to-date in the context of modern legal thinking and modern industrial relations.

¹⁵¹ In Finnish: "Pelaajasopimus on siis täyttänyt kaikki työsopimuslain 1 §:n mukaiset tunnusmerkit."

2. The contract of service / employment under English law

2.1 Introduction

In England, the employment relationship has been legally regulated since the fourteenth century. However, having contract as the model of regulation is a rather modern phenomenon since before the mid-nineteenth century the relationship between a "master" and a "servant" was shaped, on the one hand, by criminal law, through statutes imposing compulsory labour and giving magistrates the power to fix wages and, on the other hand, by civil law through the regulation of the status of different categories of persons.¹⁵²

The nineteenth century brought about a rapid change in the traditional forms of work. With the collapse of the guild system, state direction of labour, and police and penal laws, the obstacles for a free labour market, required by the new forms of production, were gradually removed.¹⁵³ In England, the legal attitude towards the employment relationship changed during the first half of the nineteenth century. The basic legal model of the employment relationship being part of the law dealing with personal status transformed by taking gradually the expanding law of contract as the basis for the system. Instead of looking at the parties from a paternalistic 'master and servant' point of view, as the old law did,

¹⁵²Napier 1986 p. 327 to 328. For a more thorough analysis of the regulation of the pre-contractual regulation of the employment relationship, see e.g. Fox 1974 p. 186 to 190, Kahn-Freund 1977 508 to 528, Veneziani 1986 pp. 33 to 45, Wedderburn 1991 p. 2 to 6.

¹⁵³Veneziani 1986 p. 54, Deakin – Morris 1998 p. 25 to 27.

the new law of contract regarded the parties as formally free and equal. However, the employer's control over the employee remained largely unaffected, but was now under the guise of contract.¹⁵⁴ The undoubted fact that regardless of the formal equality of the parties, the employer remained the stronger party is well illustrated in the common law concepts of 'master' and 'servant', which the courts continued to use even during the new era of contract. This inequality of power did not fit well with the idea of a contract as a bargain between two equal parties. Therefore, it is no surprise that the whole idea of a contract of employment as a contract has been questioned. As Fox puts it:

"Such was the inequality of power between the employer and the individual employee that to describe 'agreements' between them as 'freely-bargained promises' obscured the high probability that for much of the time the latter felt virtually coerced by the former into settling for whatever he could get."¹⁵⁵

In the very beginning of the new model of contractual employment, it was not very important to classify any further the different types of contracts to perform work for another. However, already at the end of the nineteenth century, as tort liability became increasingly important, a necessity to distinguish between

¹⁵⁴See Napier 1986 pp. 328-329, Veneziani 1986 pp. 54 to 55, Deakin – Morris 1998 p. 27 to 29.

¹⁵⁵ Fox 1974 p. 182.

the acts of servants and those of independent contractors emerged since the employer was considered vicariously liable for the acts of his servants. In addition, the late nineteenth century and increasingly the twentieth century saw legislative intervention to maintain minimum standards of civilised conditions of labour. The new statutory law deployed, at least formally, the contract of service as a means for determining the scope of the new provisions.¹⁵⁶ However, it would seem that a 'unitary' model of the contract of employment was not established before sometime after the Second World War. The pre-war labour legislation paid considerable attention to different groups of wage earners, the dividing line being rather their social status than dependence – independence. Nevertheless, already the Workmen's Compensation Act of 1906 and the National Insurance Act used the contract of service as a means to define the scope *rationae personae*.¹⁵⁷

Distinguishing between the common law contract of service (a contract of employment) and contract for services became increasingly important particularly after the 1960s since the modern employment protection law generally covered only workers hired under a contract of employment.¹⁵⁸ In other words, the scope of the modern labour law has been, until recently, predominantly defined by

¹⁵⁶ Napier 1986 pp. 330 to 332. Deakin considers that the adoption of a contractual model of employment is not at all as straightforward as often presented. See Deakin 1997 p. 2. Where he states: "This received wisdom exaggerates the unity and doctrinal clarity of the nineteenth century common law of employment and presents a misleading picture of the evolution of contract within it." This observation would seem to have strong merits but in the context of this study it is not possible to go more into details.

¹⁵⁷ As Deakin points out, there were a number of exceptions, which essentially restricted the scope of the legislation to manual workers. See e.g. Deakin 1997, p. 4 to 6.

¹⁵⁸ See Leighton 1982 p. 433.

using the common law concept of contract of service / employment. However, there are new developments where statutory legislation uses the wider notion of 'worker' for defining the scope of employment legislation.¹⁵⁹ Nevertheless, the contract of employment continues to be important for defining the scope of labour/employment law.

There is no, and there has never been, a material statutory definition of a contract of employment. For example, the Employment Rights Act 1996 defines the contract of employment as a

'contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing'.

Consequently, the definition of the notion has been left to the courts. The question has been the subject of an extensive case law.

2.2 Identifying the contract of service / employment

2.2.1 The general principles of the law of contract and the contract of employment

¹⁵⁹ For instance, the National Minimum Wage Act 1998 and the Working Time Regulations 1998 define the notion of worker as "an individual who has entered into or works under (or, where the employment has ceased, worked under)- (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

English law does not generally require any formalities for the creation of a contract. A contract may be created by writing, orally, by conduct or by a combination of these methods.¹⁶⁰ This is also true for the creation of a contract of employment, i.e. there are no formal requirements for a contract of service and it may even be inferred from conduct.¹⁶¹ This is recognised in statutory law. As already mentioned, Section 230(2) of the Employment Rights Act 1996 defines a contract of employment as '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing*'.

The formation of the contract of employment rarely presents great difficulties.¹⁶² The general rules regarding offer¹⁶³, acceptance¹⁶⁴ and

¹⁶⁰Atiyah 1995 p. 163.

¹⁶¹See e.g. Crump 1980 p. 1.

¹⁶²See Freedland 1976 p. 8 to 9. Napier 1986 p. 335.

¹⁶³ Generally an *offer* means a promise by the offeror to do or abstain from doing something provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer. Therefore, a legally valid offer contains two essential components: 1) an implication of willingness to be bound, and 2) a declaration of the price demanded. The offer may be made expressly in words, but it may as well be implied from the language of the offeror or it may even be deduced from his conduct. However, not all expressions of a willingness to make a contract amounts to a legal offer since an expression of willingness is often only the first step in the formation of the contract. Thus, it is generally necessary to distinguish an offer from a mere invitation to do business ('invitation to treat'). See more in detail e.g. Atiyah 1995 p. 56 to 58.

¹⁶⁴ In order to complete the formation of the contract, the offeree has to accept the offer made. Before *acceptance* there is only an offer which as such binds nobody. However, after acceptance, subject to the presence of other elements of a contract, there is a completed contract, which is legally binding upon both parties. Just as the offer, the acceptance consists of two essential ideas, 1) the acceptance of the proposition of the offeror, and 2) either the promise requested by the offeror or the performance of the act required. A legally valid acceptance has to be absolute and unconditional. It must indicate a willingness to contract on the terms put by the offeror. In the case the alleged acceptance attempts to add to, or vary, some of the terms of the offer, it does not constitute a legally valid acceptance, although it may be considered as a counter-offer, which may be subsequently accepted by the original offeror. The acceptance of the offer must also be communicated to the offeror. It is essential that the offeree either by words or by an act makes it clear that he is willing to accept the offer. See more in detail e.g. Atiyah p. 65 to 66.

consideration¹⁶⁵ are relevant although the structure and the particularities of the contract of employment may not always fit well with the presentation of the principles of general contract law.¹⁶⁶

¹⁶⁵ In order to come into existence, the agreement, consisting of a legally valid offer and acceptance, has to be *supported by consideration*. The doctrine of consideration has been a crucial factor in English law since the sixteenth century and is generally considered as a set of rules, which restrict the freedom of individuals to make legally binding promises. Consideration can be briefly defined as the "act or promise offered by one party and accepted by the other as the price of that other's promise". According to Atiyah, the doctrine of consideration consists of two main propositions. The first is the idea that a promise is legally binding if it is given in return for some benefit, which is rendered, or to be rendered to the promisor. The second is the notion that a promise becomes binding if the promisee incurs a detriment by reliance upon it, or, in other words, if he changes his position in reliance on the promise in such a way that he would be worse off if the promise were broken than he would have been if the promise had never been made at all. Consideration has been divided into three categories: executed, executory and past. However, only a consideration belonging to the first two categories is legally valid. In this context, it is only worth concentrating to executory consideration since executed consideration usually arises only in the case of unilateral contracts and, as mentioned above, past consideration is usually not legally valid consideration. A contract of employment is typically a bilateral contract, which consists of mutual promises. These promises are themselves regarded as consideration for each other since otherwise a contract consisting of mutual promises could not exist. In the context of employment the employer's promise to pay wages and the employee's promise to perform work to the employer form the mutual promises of the contract which at the same time form the consideration of the contract. Generally speaking, any act promised or performed by the promisee is sufficient consideration if it is of some 'value' to the promisor or if it involved some real detriment to the promisee. However, it may be difficult to evaluate what can be considered as having 'value' in order to conclude that the bargain is supported by consideration. In principle, there are two possibilities: either the contracting parties are free to decide subjectively upon whether a promise has 'value' or not or there is some kind of an 'objective' limit to what may be considered as legally valid consideration. According to classical contract law, the real value of the consideration (the adequacy of the consideration) is immaterial. However, this may lead to a situation where a contract can be held valid even though the exchange involved in it is very unequal. From the case law one finds clear examples of situations where a contract has been held valid even though a gross inequality between the economic value of the promises has prevailed. However, holding that any reason for making a promise would be considered as good consideration leads to a clear inconsistency in the law since this would lead to the abolition of the whole doctrine of consideration. According to Atiyah, it is very doubtful that any general rule can be found which could reconcile this inconsistency. Therefore, one has to simply recognise that certain gratuitous promises are likely to be treated as without consideration while other promises of little or no economic value may be treated as valid, because the promisor is considered to be able to decide for himself whether the promise is worth something to him. See more in detail e.g. Atiyah 1995 p. 118 to 126, Chesire, Fifoot & Farnston 1991 p. 79 to 88.

¹⁶⁶ Freedland 1976 p. 32 to 33.

Courts have not often referred in broad terms to the more general elements of contract law. However, in *Ready Mixed Concrete Ltd. v. Minister of Pensions and National Insurance*, MacKenna presented a three-stage approach to the question of the definition of a contract of service. According to MacKenna, the first criterion of a contract of service was that

"the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master."¹⁶⁷

The wording used by MacKenna in *Ready Mixed Concrete* regarding the underlining of a general contractual basis was subsequently repeated by Cooke in *Market Investigations v. Minister of Social Security*¹⁶⁸ a year later.

Over the past couple of decades the courts have also established the requirement of "continuing mutual contractual obligations". This question, which essentially has emerged as a response to the growing number of casual workers, should be distinguished from the mutuality required in the context of the formation of the contract (offer, acceptance, consideration). Thus, in relation to the contract

¹⁶⁷*Ready Mixed Concrete (SouthEast) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497.

¹⁶⁸*Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173 at 183. "I begin by pointing out that the first condition which must be fulfilled in order that a contract may be classified as a contract of service is that stated by MacKenna J in the *Ready Mixed* case, namely, that A agrees that, in consideration of some form of remuneration, he will provide his own work and skill in the performance of some service for B."

of employment the 'mutuality of obligation' has a specific meaning referring to the mutual promises to maintain the contractual relationship over a given time. In other words, a contract of employment contains a second level of obligations, which consist of mutual promises in respect of future performance.¹⁶⁹ The test of mutuality has mainly been used as a 'means' to deny the status of an employee with respect to casual and non-standard workers.¹⁷⁰

2.2.3 The evolution of the 'tests' for distinguishing between the contract of service and the contract for services

2.2.3.1 Introduction

The majority of the case law regarding the definition of the contract of employment has concentrated on drawing the line between employees and self-employed, or, as the common law terminology goes, between the contract of service and the contract for services. In order to understand the meaning of these key concepts, and in order to genuinely carry out the comparative task undertaken in this study, it is essential to present the evolution of case law from the very origins of the contractual model regulating the employment relationship. The necessity to look at this development from a historical perspective is particularly

¹⁶⁹ See e.g. Freedland 1976 p. 19 to 20, Deakin – Morris 1998 p. 164 to 165.

¹⁷⁰ See e.g. 1. McLeod and others v. Hellyer Brothers Ltd. 2. Wilson and another v. Boston Deep Sea Fisheries Ltd. [1987] IRLR 232; Nethermere (St Neots) Ltd. v. Gardner [1984] IRLR 240, Carmichael and Another v. National Power Plc. House of Lords 18 November 1999 (not yet reported).

important because the question on the legal position of sportsmen in relation to labour law had to be answered very early.

In the doctrine, the evolution of the contract of employment is often presented as the evolution of different tests for distinguishing the contract of service from the contract for services. This method will also be used hereafter. However, contrary to the rather normal way of approaching the issue, the analysis will not try to establish clear-cut changes in the formulation of the tests. It is asserted herein that changes in case law have often taken place after a long process of upholding and dismissing old and new tests.¹⁷¹ The disadvantage of a presentation of the historical evolution of the tests is that it disregards the possibility that in different specific areas of law, such as tort law or social security law, the notions may, at least to some extent, vary. Differentiating between different areas of law and between different contexts is, without doubt, more ambitious than what is needed for the purposes of this study. Therefore, the alternative approach, which one could perhaps be referred to as 'functional', must be set aside in this context.¹⁷² One must admit that the "evolutionary approach"

¹⁷¹ Kahn-Freund is an exception in this respect. See Kahn-Freund 1951 p 505 where he concludes "...it can be said that, as frequently happens with decisions of fundamental importance, the case under review is merely the final consummation of a development which had been going on for many years."

¹⁷² Benedictus and Bercusson state that: "The case law ranges over a variety of tests for determining whether the relationship in question is one of employment. ... None of these has proven adequate by itself, and in combination many give conflicting indications." Consequently they do not present an evolution of the tests and their presentation is rather based on whether the test relates to the work, to the worker or to the employer's role. See more in detail Benedictus – Bercusson 1987 p. 13. Deakin and Morris have also referred to the possibility of differing concepts in different situations particularly with regard to the notion of 'mutual obligations'. See Deakin – Morris 1998 p. 167 – 168.

adopted here carries the risks of over-simplifying the comparison with the Finnish system.

The references to the doctrine and the different labour/employment law textbooks in this chapter do not follow an extensive literature review. This is intentional as the main aim of the chapter is to build up a general overall picture with a view to using English law as a comparative benchmark for the purposes of the study. Doctrinal works have essentially been used as a source for the relevant case law. The analysis itself being based on case law in a chronological order.

2.2.3.2 The hegemony of 'control'

As described above, following the industrialisation of the economy, new forms of work started to gain ground. This development gradually led to using contract as the legal basis for employing labour. However, as has been pointed out, this development was not necessarily straightforward.¹⁷³ The old master and servant legislation was not without significance at the beginning of the contractual form of employment.

¹⁷³ See e.g. Fox 1974 p. 186 to 190 and Deakin 1997 p. 6 to 8 where he states at p. 8: "The use of the control test was a doctrinal innovation which enabled the courts to give restrictive interpretation to social legislation whose element of compulsion made clear they found repugnant. The control test narrowed the scope of the new legislation in two ways: on the one hand it reinforced the status-based distinction between the 'labouring' and 'professional' classes, while on the other hand it excluded casual and seasonal workers to whom the employer made a limited commitment of continuing employment.

However, it would seem fair to say that in the beginning of the contractual model of employment the notion of 'control' became essential in defining the scope of the emerging protective legislation of manual labour. As will be seen later, this scope was only very gradually widened to cover white-collar workers.

In *Yewens v. Noakes* [1880] 1 Tax Cas 260, Bramwell LJ concluded that

"a servant is a person subject to the command of his master as to the way he shall do his work."¹⁷⁴

This phrase contains the main proposition of the "old fashioned" control test where the crucial issue is whether the assumed master can not only tell the worker *what* to do but also *how* to do it.¹⁷⁵ This criterion was to become the "yardstick" for distinguishing the contract of service from the contract for services under English common law. However, the argumentation in *Yewens v. Noakes* still represents the old vocabulary on 'master – servant' relationships and one can certainly wonder whether the use of the case as an authority in later cases was,

¹⁷⁴ The case concerned the position of a rather highly paid clerk in the context of taxation (inhabited house duty). Thesiger LJ was still putting more emphasis on to the status of the person rather than to an abstract test of contract of service: "It appears to me that the Legislature, in using the term "servant", is using that term in the ordinary and popular sense of it; that is to say, not in the sense in which any clerk or manager is called the servant of his employer ... but in the sense of the ordinary menial or domestic servants." In literature this case is often mentioned as first laying down the traditional control test. See e.g. Kahn-Freund 1951 p. 505, Elias - Napier - Wallington 1980 p. 386 , Leighton 1983 p. 198, Wedderburn 1986 p. 112, Napier 1986 p. 335, Deakin – Morris 1998 p. 159 to 160.

¹⁷⁵ See e.g. Kahn-Freund 1951 p. 505 to 506.

as *Deakin* has put it, a means to narrow down the scope of the relevant statutory legislation.¹⁷⁶

However, the control test was not accepted without criticism. In *Simmons v Heath Laundry Company* [1910] 1 K.B. 543¹⁷⁷, all of the members of the panel of the Court of Appeal had difficulties with the control test. Cozens Hardy MR openly admitted his inability to lay down a complete or satisfactory definition of the contract of service¹⁷⁸ while Fletcher Moulton LJ underlined the importance of the control of the master but from a wider point of view than in previous cases since he saw control as a question of degree rather than a clear-cut dichotomy.¹⁷⁹ However, the third member of the panel, Buckley LJ, was openly willing to attempt to modify the control test:

¹⁷⁶ *Deakin* 1997 p. 7 to 8.

¹⁷⁷ The case concerned the position of a laundry girl who was injured in the course of her employment. In addition to her work at the laundry, she also gave piano lessons to a man's children at his house. The question to be decided was whether the appellant was entitled to add the income from giving the piano lessons into the calculation of the compensation under the workmen's compensation statutes. According to *Deakin*, this case is a leading case in respect of the application of the 'control' test. Although from the point of view of the outcome of the case this conclusion can be sustained, the argumentation of the judges does not really support a straightforward application of the control test. See *Deakin* 1997 p. 7, *Deakin - Morris* 1998 p. 160.

¹⁷⁸ at 547: "I confess my inability to lay down any complete or satisfactory definition of the term "contract of service".

¹⁷⁹ at 549 to 550: "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service."

"Suppose that a motor car can lawfully be driven only by a person who holds a certain licence and is thereby bound to conform to certain public regulations. The driver may be the servant of the owner of the car, although the owner cannot control his work in the particulars in which the driver is controlled by the regulations. But broadly stated, a contract of service does import that there exists in the person serving under the contract an obligation to obey the orders of the person served."¹⁸⁰

From this passage one finds the main defect, as pointed out by Kahn-Freund¹⁸¹, of the traditional control test, i.e. it was difficult to adjust it to the technological and structural changes of the labour market which were taking place with increasing pace. However, these changes were still rather minor at the time of the case.

In applying the law to the facts of the case Buckley LJ, instead of using a re-formulated control test, laid down a set of questions to be asked in order to determine the position of the appellant. In addition to questions regarding the amount of control, he used questions such as: "Was his contract a contract of service within the meaning which an ordinary person would give to the words?" and "Was it a contract under which he would be appropriately described as the

¹⁸⁰idem at 552.

¹⁸¹Kahn-Freund 1951 p. 505 to 506.

servant of the employer?".¹⁸² However, this kind of a "layman's approach" was too radical to gain support until several decades later.¹⁸³

Despite the occasional hesitations, the control test remained the yardstick under pre-war common law. In *Performing Rights Society Limited v. Mitchell and Booker (Palais de Danse) Limited* [1924] 1 K.B. 762¹⁸⁴, McCardie J applied the control test in its traditional form:

"It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, only one of several to be considered, but it is usually of vital importance. ... A master is one who not only prescribes to the workman the end of his work, but directs also, or, as it has been put, 'retains the power of controlling the work'"¹⁸⁵

Although McCardie J openly gave weight also to other indicia, such as the nature of the tasks undertaken, the freedom of action given, the magnitude of

¹⁸²idem at 553.

¹⁸³See dicta of Somervell LJ in *Cassidy v. Ministry of Health* [1951] 2 K.B. 343 at 353 and dicta of Denning LJ in *Stevenson, Jordan & Harrison Ltd v. MacDonald and Evans* [1952] 1 T.L.R. 101.

¹⁸⁴The case concerned the position of the members of a band who engaged themselves to play music in a dance hall. The band played two songs the copyright of which belonged to the plaintiffs. The question arose whether respondents were vicariously liable for the infringement of the copyright.

¹⁸⁵idem at 767 to 768.

the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, the case is a clear statement that 'control' had become established as the crucial element of the contract of service. Without the right to detailed control over the way the work was to be performed there would be no contract of service.¹⁸⁶

2.2.3.3 The gradual decline of the hegemony of the control test

It was not before the 1940s that the hegemony of the 'traditional' control test started to gradually break down. It has been argued that the reforms to social legislation and the growth of collective bargaining played an important part in this development.¹⁸⁷

In *Chadwick v. Pioneer Private Telephone Co. Ltd.* [1941] All ER 522¹⁸⁸, the control test was still applied without serious difficulties, but already a year later in *Gold and Others v. Essex County Council* [1942] 2 All ER 237, the

¹⁸⁶ See also e.g. Elias - Napier - Wallington 1980 p. 387, Napier 1986 p. 335, Hepple - Fredman 1992 p. 78 to 79, Ewing 1992 p. 72 to 73, Smith - Wood - Thomas 1993 p. 10.

¹⁸⁷ Deakin 1997 10 to 13. An aspect, which would seem to be disregarded in the English context is the possible impact of the war on general attitudes about industrial relations and social legislation. It is often stated in the Finnish context that the war changed attitudes in the area of industrial relations. See e.g. Kairinen 1998 p. 21.

¹⁸⁸ The case concerned the position of a travelling salesman who was employed on the basis of payment of his expenses and commission on orders obtained. Stable J held at 523 that "A contract of service implies an obligation to serve, and it comprises some degree of control by the master". One may perhaps argue that the wording 'some degree of control' was already a departure from the old-fashioned control test. What is essential though is that the use of the control test did not lead to obvious difficulties. See also Elias - Napier - Wallington 1980 p. 387.

practical difficulties of application of the test were obvious. The case regarded the position of a radiographer employed by a county council at one of its hospitals. The radiographer committed an error, which led to a failure of treatment, and the question arose whether the County Council was vicariously liable to the appellants. The panel of the Court of Appeal unanimously held that the radiographer was employed by the respondents. In arguing the case only Goddard LJ attempted to fit the case within the rather narrow scope of the control test. The two other members of the panel (Lord Greene, McKinnon LJ) simply concluded without further argumentation that the radiographer was employed by the respondents. By referring to an older case regarding the position of nurses Goddard LJ concluded:

"No one can seriously dispute that there is a contract of service in the case of nurses and people who are engaged on such terms as [the radiographer] in the present case. Farwell LJ¹⁸⁹ assumed that the nurses were the servants of the governors. I think that all he intended as regards nurses was, that *once they were in the operating theatre they were necessarily under the control and orders of the surgeon, so that, if they carried out his orders....*"

¹⁸⁹Referring to *Hillyer v. St. Bartholomew's Hospital (Governors)* [1909] 2 K.B. 820.

What is interesting in this short passage is that the control of the presumed employee could only be reconstructed since in practice the specialist radiographer could not receive any instructions from anyone because he was employed for his special skills, which nobody in the 'operating theatre' had. One could perhaps use the expression "control through the organisation of the work". As will be shown, the next two decades saw "control" and "organisation" as the key words in defining the contract of service.

The first case after *Simmons v. Heath Laundry* to openly question the omnipotence of the control test was *Short v. J & W Henderson Ltd.* [1946] S.C. (H.L.) 24. A gang of dock labourers was engaged in discharging cement from a ship for a lump sum payment, which was to be divided among the workers. While doing the work one of the workers suffered injuries and applied for workman's compensation. The House of Lords unanimously held that the injured dock labourer was under a contract of service. Lord Thankerton delivered the unanimous decision of the lawlords. According to his ruling, the four indicia of a contract of service were: a) the master's power of selection of his servant; b) the payment of wages or other remuneration; c) the master's right to control the method of doing the work; and d) the master's right of suspension and dismissal. Furthermore, Lord Thankerton held that a contract of service might still exist if some of these elements are absent altogether, or present in an unusual form. The principal requirement of a contract of service, according to the ruling, was still the

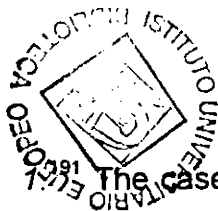
right of the master in some reasonable sense to control the method of doing the work. However, Lord Thankerton continued by stating that,

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if and when appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these indicia."

The approach taken by Lord Thankerton, in relation to the previous rulings regarding the test of a contract of service, was undoubtedly revolutionary. Without trying to further evaluate the indicia adopted by the House of Lords, the fact that, at least in theory, the control of the work was not anymore a necessary condition for a contract of service was a radical attempt at change. Additionally, the express reference to the discrepancy between the modern industrial conditions and the old test was a clear indication of the beginning of a new era.¹⁹⁰

However, the approach of Lord Thankerton in *Short v. J & W Henderson* was, perhaps, too radical since the House of Lords only some months later reaffirmed, though in a somewhat new way, the control test in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Limited and Another* [1947] A.C.

¹⁹⁰According to Ewing, *Short v. J & W Henderson* is the first case, which laid down the 'multiple test' which, is a common name to the modern tests. See Ewing 1992 p. 73.



The case concerned the vicarious liability of either a harbour authority or a firm of stevedores. The harbour authority had let a mobile crane to the firm of stevedores for loading a ship. During the work the crane was driven negligently causing an injury to a third person. The House of Lords held that the harbour authority as the general permanent employer was liable, since it had not discharged the heavy burden of proof so as to shift to the stevedores its prima facie responsibility for the negligence of the craneman, who in the *manner of his driving was exercising the discretion it had vested in him*. This time the control test was applied by assuming that the respondent harbour authority had the burden of proof of showing that it was in fact the stevedores company which could either direct or which would have the authority to delegate to the workman the manner in which the vehicle was to be driven.¹⁹²

The possibility of delegating the manner of doing the work to the workman was a necessary novelty to uphold the old test. It is rather clear that this kind of approach ignores the reality even though it acknowledges that the control test in its traditional form cannot be an answer in all situations. First of all, without having a foreman inside the crane or any other possible vehicle, it would be impossible to direct the manner of driving the vehicle. Having a foreman for each

¹⁹¹See also Kahn-Freund 1951 p. 506 to 507, Hepple - Fredman 1992 p. 78 to 79, Smith - Wood - Thomas 1993 p. 10 who classify Mersey Docks as a clear manifestation of the control test.

¹⁹²The ruling of the House of Lords was predominantly based on the dicta of Viscount Simon who concluded at 12: "I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workman, the manner in which the vehicle is driven." The other lawlords simply repeated the old-fashioned control test.

individual workman using a vehicle would be, not only ridiculous, but also very costly. Secondly, a rule, which assumes that the employer may delegate the manner of using a particular vehicle to the workman, can only be needed to uphold the control test in principle. It is rather obvious that the lawlords were more interested in the definitions of the common law than taking the realities of working life into account. Additionally, even though the counsel for the respondent company referred to it in argumentation, the lawlords completely ignored the dicta of Lord Thankerton in *Short v. J. & W. Henderson*.

It needed another rather obscure conclusion to speed up the gradual process of dismissing the control test. *Collins v. Hertfordshire County Council and Another* [1947] 1 K.B. 598 concerned the position of, on the one hand, a resident junior house surgeon and, on the other hand, a visiting surgeon who committed an error during an operation causing injury to the patient.¹⁹³ In his ruling, Hilbery J concluded that,

"in the case of the resident junior house surgeon the managers of the hospital had, and in the case of the visiting surgeon they had not, *the power to direct him or her what to do and how to do it*".

The factual position of the two surgeons differed in the way that, while the resident junior house surgeon as a member of the permanent staff was under

¹⁹³See also Hepple and Fredman 1992 p. 78.

specified staff regulations, the visiting surgeon, standing on the medical register, working for the hospital two days each week fixed number of hours and, additionally, being on call for certain other days, was not formally under those regulations. However, the actual work the two surgeons performed was in all essential ways identical. In the argumentation, Hilbery J referred to *Yewens v. Noakes* and to the then recent case *Mersey Docks v. Coggins and Griffith* as authority for the application of the control test:

"The proper test is whether or not the hirer had authority to control the manner of execution of the act in question."¹⁹⁴

He continued by concluding that the authorities of the hospital were able to control how the resident house surgeon was to perform his duties while in the case of the visiting surgeon they could not. The crucial difference was that the resident house surgeon was performing his duties under the staff regulations.

It is quite clear that, as in *Mersey Docks v. Coggins & Griffith*, the outcome of the case was rather dismissive of reality. Both surgeons were performing essentially the same work but the other was formally under general staff regulations. In practice, it is rather obvious that any kind of staff regulations could not have given any additional means to direct or control the actual

¹⁹⁴at 616.

performance of the work of a highly specialised surgeon. Once again, the control test was upheld by a juridical construction.

The development of updating the test of a contract of service to match the changes occurring in the labour market was taken a step further in *Cassidy v. Ministry of Health* [1951] 2 K.B. 343.¹⁹⁵ The case concerned, as was the situation in *Collins*, the possible vicarious liability of the hospital authority on the basis of negligent treatment. Somervell and Singleton LJJ, placed emphasis on the fact that the doctors and nurses were permanently employed and salaried members of the staff. Somerwell LJ paid special attention to fact that they were subject to the standing orders of the hospital authority while Singleton LJ emphasised that the corporation was in a position to make rules concerning the organisation as distinguished from the performance of the doctors' work. As Kahn-Freund has put it, the hospital authority was in a position to rule 'where' and 'when' rather than 'how'.¹⁹⁶ Somerwell LJ went even further by suggesting a layman's test of "was his contract a contract of service within the meaning which an ordinary person would give to the words?" referring to the dicta of Buckley LJ in *Simmons v. Heath Laundry*. On the whole, the approach taken in *Cassidy* clearly suggested that

¹⁹⁵A thorough case review is provided by Kahn-Freund in the *Modern Law Review*. See Kahn-Freund 1951 p. 504 to 509.

¹⁹⁶Kahn-Freund 1951 p. 507.

being a part of an "organisation" was to be preferred to the old control test in defining the border-lines of the contract of service.¹⁹⁷

The transformation from the hegemony of the control test towards emphasising "organisation" continued in *Stevenson, Jordan & Harrison Ltd. v. MacDonald and Evans* [1952] 1 T.L.R. 101.¹⁹⁸ What was implied in *Cassidy* was now stated openly with the result that Denning LJ expressly set the control test aside. Evershed MR still held on to the control test in its traditional form but admitted that defining the contract of service is a difficult if not impossible task. Denning LJ, on the other hand, was willing to redefine the common law concept of the contract of service. He admitted the difficulties of the task by stating that,

"It is often quite easy to recognise a contract of service when you see it, but very difficult to say wherein the difference lies".¹⁹⁹

However, Denning LJ eventually did give his definition which in the doctrine has been given the name of the "integration" or the "organisation test".²⁰⁰

¹⁹⁷ See also e.g. Kahn-Freund 1951 p. 507, Elias - Napier - Wallington 1980 p. 387, Hepple - Fredman 1992 p. 78, Ewing 1992 p. 72, Smith & Wood 1993 p. 10, Deakin - Morris 1998 p. 162.

¹⁹⁸ The case regarded an alleged infringement of a copyright. An employee of the plaintiffs wrote a book setting out the principles of the business in which the Plaintiffs were engaged. The Plaintiffs sued to restrain publication of the book on the ground that it contained confidential information, which the employee was not entitled to disclose. The question, inter alia, was whether the book was written during the course of the employment.

¹⁹⁹ The comment is remarkably similar to that made by Prof. Sarkko in the Finnish context. See above p. and Sarkko 1980 p. 30 to 33.

"One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it."

The same Denning LJ restated his view in a subsequent case *Bank voor Handel en Scheepvaart N.V. v. Slatford and Another* [1952] 2 All ER 956 by referring to Cassidy and his own dicta in *Stevenson*.²⁰¹ The wording used this time was to be "part and parcel of the organisation".²⁰² It was clear after these cases that the control test had, to say the least, been seriously contested. To say that it was set aside was, however, still premature.

The control test was still applied at least twice before it was generally replaced with a test, which would take "modern industrial conditions" into account. In *Garrard v. A. E. Southey & Co. and Standard Telephones and Cables Ltd.* [1952] 2 Q.B. 174, Parker J applied the test formulated in *Mersey Docks and*

²⁰⁰See e.g. Elias - Napier - Wallington 1980 p. 387, Napier 1986 p. 336, Ewing 1992 p. 73, Hepple - Fredman 1992 p. 78 to 79, Smith - Wood - Thomas 1993 p. 10.

²⁰¹See also Ewing 1992 p. 73.

²⁰²at 971. The case regarded the liability of a custodian of war enemy property to income tax. To be exempted from tax liability, it had to be established that the custodian had a crown status. Only Denning LJ took up the issue of the test for defining a contract of employment. One can argue whether the dicta of Denning LJ was genuinely necessary in order to decide the case since even he himself did not use the test in applying the law to the facts. Therefore, it raises a suspicion that the motive of Denning LJ was to strengthen the position he took in *Stevenson, Jordan & Harrison v. MacDonald and Evans*.

Harbour Board v. Coggins and Griffith.²⁰³ A similar approach was taken by Streatfeild L in *Gibb v. United Steel Companies, Ltd. and Another* [1957] 2 All ER 110 some years later.²⁰⁴ Both of the cases regarded a situation where the principal employer hired out manual labour. The rather straightforward use of the control test in these kind of situations can, from a practical point of view, be understood since they represented still similar forms of employment for which the control test was originally formulated. The general trend was, however, clear, the control test was to be replaced or at least modified by adding new elements to it. It seemed though that the "organisation/integration" test formulated especially by Denning LJ in the *Stevenson* and the *Bank voor Handel* cases was not an entirely satisfactory answer to the problem since the courts continued to wrestle with the idea of the control of the master over his servants.

The long history of the control test and the, at least partial, reservations towards the organisation test²⁰⁵ compelled the courts to go back to the analysis of the old criteria of distinguishing the contract of service. In *Amalgamated Engineering Union v. Minister of Pensions and National Insurance* [1963] 1 All ER 864, Megaw J, although concentrating on the analysis of control, took a very

²⁰³ Elias, Napier and Wallington consider that this case represents the integration/organisation test. This opinion can not be shared since the application of the control test is very clear. See Elias – Napier – Wallington p. 387.

²⁰⁴ Streatfeild J applied the control test in its traditional form. At 113 he concludes: "The proper test is: Who has the right at the moment to control the manner of the execution of the acts of the servant?" See also Elias - Napier - Wallington p. 386.

²⁰⁵ At this point, explicit reservations towards the organisation test had not been made. However, the fact that the courts were not keen on arguing the problem from this point of view meant that the organisation test was not considered as the right answer.

critical approach to its exclusiveness. He considered control as an important element in deciding whether the contract is a contract of service, but continued that it is a test or criterion, which is far from being an absolute one. According to Megaw J,

"the nature of the control which is required in order to bring the employment within the scope of the contract of service varies almost infinitely with the general nature of the duties involved".²⁰⁶

This kind of a "qualitative" analysis of control was a novelty, which, however, from a practical point of view offered little help for the general problem.

Gradually though, the ideas expressed in the cases where the organisation test had been formulated began to gain acceptance. However, except for *Whittaker v. Minister of Pensions and National Insurance* [1967] 1 Q.B. 156, in which Mocatta J expressly applied the dicta of Denning LJ in the *Stevenson* case²⁰⁷, the organisation test was used as a way to show that the control test in its original form had been more criticised than applied as such. In

²⁰⁶ Megaw J at 871.

²⁰⁷ The case regarded a trapeze artist, engaged by a circus company to perform her act. She undertook also to help in moving the circus from place to place and to carry out usherette duties during performances. During her performance, she fell and broke her wrist asking subsequently compensation according to national insurance.

Mocatta J held: Looked as a whole, the plaintiff's contract with the circus was to carry out her duties under it as an integral part of the business of the circus, and not accessory to it. Per curiam he further noted: "The test of control is not as determinative as used to be thought the case, although still of value in that the greater the degree of control exercisable by the employer, the more likely it is that the contract is one of service."

Morren v. Swinton and Pendlebury Borough Council [1965] 2 All ER 349²⁰⁸, Lord Parker (Marshall J and Widgery J agreeing) applied the indicia quoted by Lord Thankerton in *Short v. Henderson* and, in addition, heavily criticised the control test by stating per curiam:

"The factor of superintendence and control is of little use as a test where the person concerned is a professional man, engaged for his skill and experience."

This passage contains the main problem of the 'old-fashioned' control test, i.e. the traditional forms of work had transformed increasingly towards a situation where the skills required for the new forms of work made the performance of the work more autonomous.²⁰⁹ It was clear that, on the one hand, the control test was out-of-date as regards the position of skilled labour and, on the other hand, the organisation test was too vague to give a satisfactory answer to the problem. Regarding the position of blue-collar workers, the control test was still producing results where the outcome could be generally accepted. However, it was predominantly the position of skilled professional workers which was

²⁰⁸Elias, Napier and Wallington have classified the case under the "organisation" test. However, since the indicia quoted by Lord Thankerton were applied and the dicta by Denning LJ in *Stevenson* were considered, it is misleading to conclude that the case would represent the organisation test. See Elias - Napier - Wallington 1980 p. 387. Hepple and Fredman, on the other hand, consider that the case contained clear criticism towards the control test without clearly classifying it under a particular test. This approach can be shared here. See Hepple - Fredman 1992 p. 78.

creating the majority of the litigation on the issue. The gradual covering of the skilled professionals would set aside the essentially class orientated nature of labour law leading to a 'unitary' model of the contract of employment extending to all categories of wage-earners.²¹⁰

2.2.3.4 The "modern approach"

Confusion reigned regarding the proper test for defining the contract of service. The courts, depending on the facts of the case and the personal preferences of the particular judge were using the tests in a rather arbitrary way. At the end of the 1960s two important cases were decided where an approach which has been called the "*multiple*" test or the "*modern approach*" was adopted.²¹¹ What is particularly interesting in these cases is that, not only that the test formulated was different from the earlier cases, but that also the method used to reach the conclusions was new. In order to re-formulate the English common law concept of contract of employment, a *comparative method* was used.

²⁰⁹ See also Kahn-Freund 1951 p. 505.

²¹⁰ Deakin argues that only through the decline of the control test the 'unitary' model of the contract of employment came into being. In other words, through the criticism of the traditional control test the coverage of the protective legislation was extended to all categories of wage earners and the 'class element' of the old contract of service lost ground. See Deakin 1997 p.10.

²¹¹ See e.g. Elias - Napier - Wallington 1980 p. 387, Leighton 1983 p. 198, Napier 1986 p. 336, Wedderburn 1986 p. 113, Ewing 1992 p. 73 to 74, Hepple - Fredman 1992 p. 79 to 80, Smith - Wood - Thomas 1993 p. 10 to 11. Deakin and Morris differentiate between 'multiple test' and 'economic reality test'. However, such a distinction would not seem particularly helpful. Although the wordings under different 'modern' cases may differ, the idea of 'indication clustering' is the essential novelty in relation to the 'control' and 'organisation' tests. See Deakin and Morris 1998 p. 162 to 164 and 168 to 171. Collins has named the test as 'risk test'. However, it would seem that he overemphasises the aspect of risk while the other indicia used in addition to risk are totally disregarded. See more in detail Collins 1990 p. 369 to 371.

In the first of these two cases, *Ready Mixed Concrete (SouthEast) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497²¹², MacKenna J presented a three stage test for a contract of service. The first criterion, as already discussed above, was that the general elements of a contract must be present, i.e.

"the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master".

Secondly, and still holding in principle to the control test, the servant had to agree expressly or implicitly that,

"in performance of the service he would be subject to the control of the other party sufficiently to make him the master".

²¹²The case regarded a situation where a driver was under a written contract transporting concrete with a vehicle owned by him for a company selling and marketing concrete. The vehicle was financed by a finance organisation associated with the concrete company. The driver was paid by mileage rates at his own expense, he was to obtain a carrier's license and to maintain, repair and insure the vehicle, which was to be painted in the company's colours, and an attached mixing unit belonging to the company. He was to drive the vehicle himself but might with the company's consent hire a competent driver would he be unable to drive at any time. He was obliged to wear the company's uniform and to comply with the company's rules and was prohibited from operating as a carrier of goods except under the contract. The company had control over major repairs to the vehicle and power to ensure that the driver's accounts were prepared by an accountant in a form approved by the company.

The third stage of the test was to check that the contract on the whole fitted to the stereotype of a contract of service. By using MacKenna's words,

"the other provisions of the contract" had to be "consistent with its being a contract of service".

To state that the obligation to do work was subject to the other party's control was not necessarily a sufficient condition of a contract of service, and was not a real novelty. However, what clearly was new under English common law was that MacKenna used other factors, such as investment and loss, in addition to the power of deciding the work to be done, the means to be employed in doing it, the time when and the place where it shall be done.²¹³ Therefore, according to MacKenna J,

"in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk".²¹⁴

In contrast with the old test, MacKenna J openly attempted to formulate a test, which would take into account economic realities.

²¹³at 515 and 522.

²¹⁴at 520 to 521.

What makes the case perhaps even more interesting is the *method* used to reach the conclusion. MacKenna openly criticised not only the traditional control test but also the 'organisation' test formulated by Denning LJ ("it raises more questions than I am able to answer"²¹⁵), and the 'four indicia' -test stated by Lord Thankerton. In practise, he entirely set aside the English common law tests of defining the contract of employment. In order to find a better solution MacKenna J used a *comparative method* by referring to cases from the other common law countries where the courts had reacted much earlier to the discrepancy between the economic reality and the common law concepts. Among the cases he used as models in order to form his own test were *Queensland Stations Proprietary Ltd. v. Federal Commissioner of Taxation*²¹⁶; *Zuijs v. Wirth Brothers Proprietary Ltd.*²¹⁷; *Montreal v. Montreal Locomotive Works Ltd.*²¹⁸; and

²¹⁵ at 524.

²¹⁶ [1945] 70 C.L.R. 539. In this Australian case Dixon J stated "There is, of course, nothing to prevent a drover and his client forming the relation of employee and employer....But whether they do so must depend on the facts. In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered. That a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract appears from..."

²¹⁷ [1955] 93 C.L.R. 561. Albeit emphasising control the approach in the case is clearly wider. "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."

²¹⁸ [1947] 1 D.L.R. 161. In this Canadian case Lord Wright argues that "in earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated test have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving 1) control; 2) ownership of the tools; 3) chance of profit; 4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the ship owner

U.S. v. Silk.²¹⁹ When applying the test formulated, he openly concluded that the status of the driver was, using the words of the judgement in *Silk's* case, a "small business man", and not a servant.²²⁰

The second important case, which represents the 'modern approach', was decided only a year after the *Ready Mixed Concrete* case. *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173²²¹ can be regarded as further developing the issues taken up in *Ready Mixed Concrete*. Just as MacKenna J had done, Cooke J adopted a three-stage approach in which

though the character can direct the employment of the vessel. Again, the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it for himself or on his own behalf and not merely for a superior."

²¹⁹(1946) 331 U.S. 704. In this American case the judges held that "...where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

²²⁰From a contemporary point of view the test formulated by MacKenna has been criticised as being meaningless in the absence of objective criteria for determining what would normally be regarded as consistent with a contract of employment. See Ewing 1992 p. 74. See also Elias - Napier - Wallington 1980 p. 386, Leighton 1983 p. 198, Napier 1986 p. 336, Hepple - Fredman 1992 p. 79 to 80, Smith - Wood - Thomas 1993 p. 11 to 12, Deakin and Morris 1998 p. 168 to 169. One can perhaps agree with this conclusion if one looks only the formulation of the test itself. However, under the three criteria laid down by MacKenna, it is clear that an indication clustering method is used.

²²¹The case regarded, in the context of national insurance, the position of a member of a panel of part-time interviewers of a company engaged in market research. She was supplied with the company's "Interviewer's Guide" which gave detailed instructions as to the method to be used in the interviews. The interviewer might be asked if she was willing to do a number of days' work within a fixed period, and if she agreed, the company would send detailed instructions of the assignment. Additionally, she might be asked to attend the briefings of the company or might receive instructions from a supervisor. She was paid for the number of days the company estimated that the tasks would take plus expenses. Otherwise she was free to choose the time when to fulfil the assignment. She was allowed to work for others and the company could not dismiss her.

the first condition was the fulfilment of the general elements of a contract. Secondly, following the rulings in *Morren v. Swinton* and in *Ready Mixed Concrete*, he stated that that control was a matter of consideration but not decisive. Finally, instead of underlining the consistency of the contract with an abstract notion of a contract of service, Cooke J formulated his own test, which he named as the 'fundamental test',

"whether the person engaged to perform [the] services was performing them as a person in business on his own account and thus under a contract of service".

He continued by stating that in making this decision no exhaustive list of the relevant indicia or their weight could be compiled. However, in arguing the case he listed the following indicia as possibly relevant: 1) whether the man performing the services provides his own equipment; 2) whether he hires his own helpers; 3) the degree of financial risk he takes; 4) the degree of responsibility for investment and management he has; and 5) whether and how far he has an opportunity of profiting from sound management in the performance of his task.²²²

The method applied by Cooke J followed very closely the method used by MacKenna J in the previous case. The same cases from the other common law countries were used as the primary argument alongside the *Ready Mixed* case.

²²²at 184.

However, this time the organisation test formulated by Denning LJ was not dismissed but used rather as an argument in favour of the formulated 'fundamental test'. One could perhaps argue that the 'business on his own account' formulation represented an organisation test with material contents. Without going into more details of the case, it was clear that the "modern approach" had been established.²²³

For the following two decades the test formulated by Cooke J became the core of the English common law definition of a contract of service even though its nature as the 'fundamental test' has been denied.²²⁴ However, in some rare occasions also other approaches have been taken.²²⁵ During the past few years the "business on his own account" test has been used in a more critical way since after the ruling of the Privy Council in *Lee v. 1. Chung and 2. Shun Shing Construction & Engineering Co. Ltd.* [1990] IRLR, the courts have underlined that

²²³See also Elias - Napier - Wallington 1980 p. 385 to 387; Leighton 1983 p. 198, Ewing 1992 p. 74 to 75, Hepple - Fredman 1992 p. 79 to 80, Smith - Wood - Thomas 1993 p. 10 to 11, Deakin - Morris 1998 p. 162 to 163.

²²⁴The test formulated by Cooke J has been upheld at least in the following judgements: *Global Plant Ltd. v. Secretary of State for Health and Social Security* [1971] 3 All ER 385; *Beloff v. Pressdarn Ltd. and Another* [1973] 1 All ER 241; *Young & Woods Ltd. v. West* [1980] IRLR 201; *Hitchcock v. Post Office* [1980] ICR 100; *Addison and Others v. London Philharmonic Orchestra Ltd.* [1981] ICR 261; *Withers v. Flackwell Heath Football Supporters' Club* [1981] IRLR 307; *Warner Holidays Ltd. v. Secretary of State for Social Services* [1983] ICR 440; *O'Kelly and Others v. Trusthouse Forte Plc.* [1983] IRLR 369; and *Nethermere (St Neots) Ltd. v. Taverna and Gardiner* [1984] IRLR 240 where the fundamental nature of the test was though denied.

²²⁵In *Challinor v. Taylor* [1972] ICR 129, the National Industrial Relations Court upheld the "layman's test" which was originally formulated by Buckley LJ in *Simmon v. Heath Laundry* and subsequently used by Somerwell LJ in *Cassidy v. Ministry of Health*. The Employment Appeal Tribunal in *Thames Television Ltd. v. Wallis* [1979] IRLR 136 upheld the same test. In *Midland Sinfonia Concert Society Ltd. v. Secretary of State for Social Services* [1981] ICR 454, the Queen's Bench Division of the High Court (Glidwell J) gave priority to the control test even though both the organisation test and the business on his own account test were considered.

there is no single test for determining whether a person is an employee or an independent contractor.²²⁶ However, the courts have not genuinely attempted to modify the test formulated by Cooke J in *Market Investigations*. Nevertheless, in a recent case *Lane v. Shire Roofing Company (Oxford) Ltd.* [1995] IRLR 493, the Court of Appeal evidenced, at least in principle, some signs of change. The control test was given more attention than it had ever received since the adoption of the modern approach by underlining that in the first place the element of control is very important in determining the legal nature of the contract. However, the court (Henry LJ) continued that in the case of skilled employees the control test may not be decisive. In such a case the question has to be broadened to ask "whose business is it". In practical terms the difference in relation to *Market investigations* is not necessarily great. An indication of this is the passage by Henry LJ in the afore mentioned case where he comments on the rulings which have formed the core of the so called modern approach:

²²⁶ The exact wording of the Privy Council was: "Whilst there is no single test for determining whether a person was working as an employee or as an independent contractor, the standard to be applied was best stated by Cooke J in *Market Investigations v Minister of Social Security* where he set out the fundamental test as being: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". In determining that question, according to Cooke J, consideration will always have to be given to control but that cannot be regarded as the sole determining factor. Other matters which may be of importance are whether the worker provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility he has for investment and management and whether and how far he has the opportunity to profit from sound management in the performance of his task." See also *Andrews v. King (Inspector of Taxes)* [1991] ICR 846 and *Hall (H M Inspector of Taxes) v. Lorimer* [1994] IRLR 171.

"The overall employment situation is very different today than it had been at the time when those cases were decided. First, for a variety of reasons there are more self-employed and fewer in employment. There is a greater flexibility in employment, with more temporary and shared employment. Second, there are perceived advantages for both workman and employer in the relationship between them being that of independent contractor."

The second factor mentioned by Henry LJ leads us back to the beginning of the "modern approach", which since the 1970s brought about substantial changes in the form of statutory rights granted to employees. This development made the question of the legal nature of the contract clearly more important than before. For the employer this meant increasing costs of employment and thus, gave an incentive to avoid the use of the contract of service as a form of hiring out workers. Also the employee had, at least in the short term, an incentive to avoid employee status, because being an independent contractor brought about important tax advantages. It is natural that this development led to increased attempts to use self-employed status as a means to avoid the employment protection legislation. Thus, the courts had to decide how to assess the *will of the parties* in the formation of the contractual relationship.

Already in the Ready Mixed Concrete case, MacKenna J had had to take a position on an express declaration by the parties that the person in

question would be an independent contractor. Without any hesitation MacKenna J held that

"if the contractual rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant".²²⁷

He softened his position slightly by stating that the declaration of the parties is not always ineffective. In an unclear situation the declaration of the parties could help to resolve the doubt.

The ruling in the Ready Mixed case was strengthened by Cooke J in *Construction Industry Training Board v. Labour Force Ltd.* The declaration of the parties was, among other factors, to be taken into account in the overall evaluation of the nature of the contract. Even though other opinions have also occasionally been expressed²²⁸, this position became the rule to be followed. One may, perhaps, cite the ruling of Lord Denning in *Massey v. Crown Life Insurance Co.* [1978] IRLR 31:²²⁹

²²⁷ at 512-513.

²²⁸ In *Ferguson v. John Dawson & Partners (Contractors) Ltd.* [1976] IRLR 346 Megaw LJ at 349 was willing to take the position that a declaration of the parties, if it be incorporated to the contract, ought to be wholly disregarded. Lawton LJ on the other hand at 351, was exactly of the opposite opinion: "There is no reason why in law a man cannot sell his labour without becoming another man's servant even though he is willing to accept control as to how, when and where he shall work."

²²⁹ See also *Global Plant Ltd. v. Secretary of State for Health and Social Security* [1971] 3 All ER 385; *Thames Television Ltd. v. Wallis* [1979] IRLR 136; *Young & Woods Ltd. v. West* [1980] IRLR 201;

"Whilst the parties cannot alter the truth of their relationship by putting a different label upon it, when the situation is in doubt or is ambiguous an agreement between the parties stipulating what the legal relationship was between them affords strong evidence as to what is the real relationship and may be decisive."

2.3 A summary of case law under English law

The concept of the contract of service, or as it was to be called, the contract of employment, has been subject to a gradual and, occasionally a confusing, evolutionary process. In the beginning of the contractual model of employment, the notion of 'control' was considered decisive in distinguishing between 'servants' and those in the liberal professions. However, in the disguise of the notion of contract the old judicial attitudes on 'master – servant' relationships continued to flourish. The notion of control was used to limit the scope of the statutory legislation to manual workers. Thus, despite of the 'fiction' of the employer – employee relationship as a contractual bargain, the notion of the contract of service continued to be class orientated.

Gradually, through legislative changes, increased collective bargaining and changes in the organisation of work, the pressure grew to widen the concept of the contract of service to encompass new categories of workers who were predominantly skilled professionals with a certain degree of autonomy in the practicalities of the performance of the work. Detailed control over the way in which their work was carried out was not possible. This development led to attempts to re-formulate the relevant test by distinguishing the contract of employment from other types of contract. At first, formulations, which emphasised the fact of "being part of an organisation", gained ground. However, this formulation did not receive unanimous support and was soon replaced by what was to be called the "multiple test" or the "modern approach". Although this development of the relevant 'tests' was far from straightforward, it had the impact of widening the notion of the contract of service/employment. Conversely, the contract of employment became less class-orientated.

Two cases stand out in formulating the multiple test.²³⁰ Both of them were decided in late 1960s in the context of rapidly expanding statutory legislation. Control remained an important aspect of the test but a number of relevant indicia were listed none of which as such were considered conclusive. This "indication clustering" has remained the test to be applied although control has always had a central role.

²³⁰ Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance [1968] 2 Q.B. 497; Market Investigations Ltd. v. Minister of Social Security [1969] 2 Q.B. 173

What is essential for the purposes of this study is that this evolution has not been interrupted by statutory law or case law, which would have entirely overturned previous case law. The direction of this evolution has, particularly after the Second World War, been to widen the notion of the contract of employment in order to cover new professions. To put it succinctly, it would seem that those occupations which were considered to fall within the scope of a contract of service during the first decades of the century would continue to do so even if the relevant test was amended to take account of the new developments. To put it very generally, new occupations have been covered by the notion of the contract of employment. However, the increased use of casual workers has raised new problems relating to this essential distinction. Although one can conclude that the notion of the contract of employment has become wider over time in respect of workers with a full-time, open ended contract, the proportion of workers working under a contract of employment has not necessarily increased as the courts have often considered casual workers as not working under a contract of employment due to the lack of 'mutuality of obligation' between the parties. However, for the purposes of this study the problems related to the classification of casual workers is less important than the observation that the general test for distinguishing between employees and self-employed has become wider over time.

Why is this? It is simply that this development allows us to compare English case law with Finnish case law in respect of professional sportsmen in team sports as the relevant decisions on their legal position were taken at a very

different time. As will be seen later, since in England a football player was considered as falling within the rather narrow scope of the 'contract of service' in 1910²³¹, it makes the question about controversial case law in Finland in 1990s much more interesting. However, before going into the details of the specific cases of sportsmen it is necessary to look at the concept of 'worker' in the context of European Community law.

²³¹ Walker v. The Crystal Palace Football Club, Limited [1910] 1 K.B. 87. See more in detail Part III paragraph 2.2. above.

3 The concept of "worker" in the meaning of Article 39 (ex-Article 48) of the EC Treaty

3.1 Introduction

As mentioned earlier, the concept of worker under Article 39 of the Treaty makes the distinction between employees and self-employed for the purposes of free movement of workers. However, as the European Court of Justice has indicated in *Case 105/84 A/S Danmols Inventar*, the concept has also been used as an interpretative benchmark in defining the respective concepts under Council Directives which in turn refer the question of the scope *rationae personae* to the relevant national legislation.²³²

However, before analysing the concept of 'worker' in detail, any other concepts under the Treaty that could be relevant for the purposes of the study must be ruled out.

3.2 Free movement of persons under Community law: the relevant categories of persons

The categorisation of persons determines the scope of the provisions concerning free movement of persons.²³³ Persons entitled to free movement are

²³² See more in detail Part 1 chapter 2 and in particular footnote 23 thereunder.

²³³ See in general e.g. Martin 1996 p. 22 to 27, Bercusson 1996 p. 381 to 411; Nielsen and Szyzcszak 1997 p. 69 to 72, Blanpain – Engels 1998 p. 172 to 174, Garrone 1993 p. 22 to 44. See also Sundberg-Weitman 1977 p. 137 to 147, Watson 1980 p. 58 to 75, Neri 1982 p. 36 to 61, Philip 1985 p. 145, Banks

divided into different categories in the Treaty and the secondary legislation implementing the provisions of the Treaty. This division is not only formal since the extent and the possible preconditions for the exercise of the right to move freely may vary between these categories. The exercise of this right is, therefore, always dependent on the fulfilment of certain preconditions, and it may also be limited from a temporal perspective.²³⁴

Four categories of persons entitled to free movement are mentioned in the Treaty itself, namely '*a citizen of the union*'²³⁵, '*a worker/an employed person*'²³⁶, '*self-employed*'²³⁷ and '*the provider of services*'²³⁸. Additionally, the

1990 p. 1 to 6, Burrows 1987 p. 117 to 125, Stibbe, Blaisse & De Jong 1990 p. 26 to 27, Catala - Bonnet 1991 p. 72 to 73, Lyon-Caen - Lyon-Caen 1991 p. 182 to 184, Evans 1991 p. 190 to 191, O'Keeffe 1992b p. 89, Fernandez 1992 p. 327 to 330, Siskind 1992 p. 902 to 906, Picard 1992 p. 647 to 659, White 1992 p. 522 to 527, Van Dijk 1992 p. 280 to 283, Van der Woude and Mead p. 117 to 128. The analysis of Martin is carried out in detail. However, it is somewhat surprising that he seems to consider that the case law which relates to the interpretation of the notion of 'worker' under labour law and equality of treatment directives concern also the notion of 'worker' under Article 39 of the Treaty. It is somewhat obvious that such an approach cannot be shared. This becomes clear also through the case law itself. The Court always refers to the concept of worker "in the meaning of Article 39 (48)".

²³⁴ See generally e.g. Blanpain - Engels 1998 p. 174 to 180, Picard 1992 p. 649 to 651 and O'Keeffe 1994 p. 93 to 94.

²³⁵ Articles 17 to 18 of the Treaty. The concept of 'a citizen of the Union' was not used before the Treaty establishing the European Union. Council Directive 90/364/EEC concerns the freedom of movement for 'nationals of Member States who do not enjoy this right under other provisions of Community law'. Since the direct effect of Article 8a of the Treaty is still an open question and since no secondary legislation has been adopted on the basis of Article 8 (a) (2), the concept of 'other national' shall be used instead of the concept of 'a citizen of the Union'.

²³⁶ These concepts are equivalent. In Article 39 of the Treaty the words 'worker' and 'employment' are used. In the secondary legislation implementing the Treaty provisions concerning free movement of workers both concepts are used. See for instance Regulation 1612/68/EEC. OJ L 257 19.10.1968 p.2.

²³⁷ Article 43 of the Treaty.

²³⁸ Article 50 of the Treaty.

secondary legislation recognises the following categories: *'student'*²³⁹, *'the recipient of services'*²⁴⁰, *'employee or self-employed person who has ceased his occupational activity without using his right to free movement'*²⁴¹ and *'worker or self-employed residing in a Member State after having been employed or pursued activity in a self-employed capacity'*²⁴². Since the free movement of persons belonging to the two latter categories require the fulfilment of the criteria of either *'worker/employee'* or *'self-employed'* they are not treated separately hereafter.²⁴³

The extent of the right to free movement for different categories of persons varies in terms of the temporal limits of the right and the requisite substantial preconditions for the exercise of the right. In other words, the "amount" of freedom varies between different natural persons willing to move from one Member State to another. Without going into detail, *'workers / employed persons'* and *'self-employed persons'* have, in principle, the right to reside in another Member State *permanently* and in order to exercise the right they *are obliged to provide only a valid identity card or passport and a certificate of employment (employees) or proof of belonging to the category of self-employed.*²⁴⁴ Additionally

²³⁹ Council Directive 93/96/EEC. OJ L 317 18.12.1993 p. 59.

²⁴⁰ Article 1 (b) of Council Directive 64/220/EEC. OJ 056 4.4.1964 p. 845.

²⁴¹ Council Directive 90/365/EEC OJ L180 13.7.1990 p. 26.

²⁴² Commission Regulation 1251/70/EEC. OJ L 142 30.6.1970 p. 24.

²⁴³ Of the division of the categories of persons in the Treaty and secondary legislation see also O'Keeffe 1992a p. 4 to 6.

²⁴⁴ Article 5 of Council Directive 64/220/EEC and Article 4 of Council Directive 68/360/EEC OJ L 257 19.10.1968 p.13.

workers are covered by specific secondary legislation as regards, e.g. equal treatment.²⁴⁵ For *'the providers and recipients of services'* there are no additional requirements concerning the conditions of entry but residence in another Member State is restricted to the period during which the services are provided²⁴⁶. Since the provision of services without using the form of a legal person means that the person in question is in fact a self-employed person pursuing his/her activity without permanently residing in the territory of the host State, there is no need to distinguish between self-employed persons and the providers of services for the purpose of this study.²⁴⁷

In order to move freely from one Member State to another, *'students'* and *'other nationals'* of the Union who do not enjoy the right to freedom of movement under other provisions of Community legislation have to fulfil two substantial preconditions in addition to the requirement of the possession of a valid identity card or passport. First of all they have to *be covered by sickness insurance* for all risks in the host Member State. They also have to *be in possession of sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence*²⁴⁸. Since the division between

²⁴⁵ Council Regulation 1612/68/EEC. For instance, on the basis of Article 7 (2) of the regulation guarantees migrant workers the same social and tax advantages as national workers.

²⁴⁶ Article 3 (2) of Council Directive 64/220/EEC.

²⁴⁷ See also O'Keeffe 1992a p. 5 and Stibbe, Blaisse & De Jong 1990 p. 31 to 32.

²⁴⁸ Article 1 (1) of Council Directive 90/364/EEC (OJ L 180 13.7.1990 p. 26) and Article 1 (1) of Council Directive 90/365/EEC (OJ L 180 13.7.1990 p.28).

'students' and 'other nationals' of the Member States is made by the formal requirement of providing proof of being enrolled in a recognised educational establishment and since a sportsman as such can not fall into the category of a 'student', there is no reason for distinguishing 'student' from the category of 'other nationals' for the purpose of this study.

Thus, there are three relevant categories for analysing the position of a sportsman in the light of Community law, namely 'worker/employee', 'self-employed' and 'other national'²⁴⁹. In drawing the boundaries between these categories, the concept of 'worker' has been essential to the case law of the Court of Justice.²⁵⁰ First of all the concept of 'self-employed' is explicitly defined in the case *Roosmalen*²⁵¹ by stating that

"The expression 'self-employed person'.... applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an

²⁴⁹ It has to be underlined that the notion of 'other national' is used here in the meaning of Council Directive 90/364. This concept may be further be divided into subcategories for other purposes.

²⁵⁰ It should be underlined here that the substantial importance of the borderline between 'workers' and 'self-employed' is rather limited since the content of the right to free movement for both of these categories of persons is in all essential elements equivalent. Only in certain exceptional situations does this borderline have material relevance. This question will be examined later in more detail. In Case C-363/89 *Danielle Roux v Belgian State* the Court ruled that "Member States are obliged to issue a residence permit to a national of another Member State where it is not disputed that he is carrying on an economic activity, without there being any need in that respect to classify that activity as employment or activity as a self-employed person." See also e.g. Sundberg-Weitman 1977 p. 142, Nielsen and Szysczak 1997 p. 65 to 66, Picard 1992 p. 649 to 650.

²⁵¹ Case 300/84 *A.J.M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097.

occupation in respect of which they receive income permitting them to meet all or some of their needs, even if that income is supplied by third parties benefiting from the services of a missionary priest."

Secondly, the notion of 'other national' requires by definition that every other possible category of the addressees of the provisions concerning free movement of persons is ruled out. Article 1 of Council Directive 90/364 explicitly narrows its application to "nationals of Member States who do not enjoy this right under other provisions of Community law".

On the whole, since the concept of 'self-employed' is defined negatively in relation to the concept of 'worker' and since the application of provisions concerning 'other nationals' requires that other categories be ruled out, it is essential for the purpose of this study to draw the boundaries of the concept of 'worker/employee'.

As was mentioned above, it is clear that the distinction between 'workers' and 'self-employed' for the purposes of the free movement of workers is made in the context of access to the EU market rather than in the context of defining the rights and obligations of an established employment relationship. However, as explained in the introductory chapter, the situation is, in essence, at least from the formal point of view, functionally equivalent to that of distinguishing between employees and self-employed for the purposes of determining whether the other party to a work relationship should be subject to the relevant protective

legislation. At the same time, however, it must be underlined that for the purposes of the free movement of persons, the division between employees/workers and self-employed is often less important than the boundary between 'other nationals' and those performing 'economic activities' i.e. the workers and the self-employed. However, the dynamic nature of European integration and the development of Community law may, occasionally, shift this balance if important restrictions for the free movement of workers are introduced. Such is the case in respect of transitional periods in the event of the enlargement of the Union.

3.3 "Worker" in the meaning of Art. 39 of the Treaty

3.3.1 Introduction

The concept of worker in the meaning of the provisions concerning free movement of persons has not been defined either in the Treaty itself or in the secondary legislation implementing these provisions²⁵². Therefore, it has been the task of the Court to identify the addressee of these provisions. This case law will be presented hereafter. As will be seen, the concept has been the subject of a gradual evolution where case by case the Court of Justice has defined the

²⁵² However, in Article 1 (a) of Council Regulation 1408/71/EEC there is a definition of an 'employed person' which refers to national social security legislation. Since the Regulation was adopted on the basis of Article 51 (new Article 42) of the Treaty for the purpose of the application of social security schemes to employed persons (later extended also to self-employed on the basis of Art. 235 (new Article 308) of the Treaty) and since for other purposes the Court has defined the concept of 'worker' / 'employed person' in a different way, there are in fact two separate concepts of an employed person within the provisions concerning free movement of workers.

concept in more detail. The cases are analysed by putting emphasis on the modifications each case has brought into the concept of 'worker' in relation to previous cases.

3.3.2 Towards a general Community definition

In *Hoekstra (née Unger) v. Bedrijfsvereniging Detailhandel*²⁵³ the Court was for the first time faced with a question concerning the scope of the provisions concerning free movement of workers. It was asked to interpret the words 'wage-earner or assimilated worker' in the meaning of Article 19 of Regulation 3 which was adopted on the basis of Article 51 (new Article 42) of the Treaty.²⁵⁴

Mrs Unger, the wife of Mr Hoekstra, was compulsorily insured against sickness by a contract of employment. This contract came to an end and she was afforded, at her request, the advantages of a voluntary insurance scheme under the law permitting the continuation on a voluntary basis of a previously compulsory insurance scheme 'when the person in question carries on or will carry on in the future a trade or calling or an independent occupation or when it is reasonable to suppose that they will accept a new contract of employment should the opportunity arise'. It was this second alternative which was applied. One

²⁵³ Case 75/63 Mrs. M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] ECR 177.

²⁵⁴ Regulation 3 was later replaced by Regulation 1408/71 OJ L 149 5.7.1971 p. 2.

month later, Mrs Unger fell ill while staying with her parents in Germany and had to receive medical attention. When she returned to the Netherlands, she tried to obtain reimbursement of her medical expenses but this was refused, by reason of legislation laying down that voluntarily insured persons had the right to reimbursement of medical expenses incurred during temporary residence abroad 'only if they have been authorised, under conditions laid down for this purpose in the provisions concerning supervision, to stay abroad in order to convalesce'.

Mrs Unger then brought an action against the refusal relying in particular upon the provisions of Regulation No 3 of the Council concerning social security for migrant workers according to which,

'a wage-earner or assimilated worker, affiliated to an institution in one Member State and permanently resident in the territory of the said State, shall receive benefits during temporary residence in the territory of another Member State if his state of health necessitates immediate medical care, including hospitalisation. The foregoing shall also apply to a worker who, although not affiliated to the said institution, is entitled to benefit from that institution or would be so entitled if he were in the former State's territory.'

Since the provisions of Regulation 3 made no distinction between compulsory and voluntary insurance, the decisive issue was the interpretation of

the concepts of 'wage-earner or assimilated worker' in the meaning of the Regulation. As the Regulation was adopted on the basis of Article 51 (new Article 42) of the Treaty, the case involved directly the scope of Articles 48 to 51 (new Articles 39 to 42) of the Treaty.

As a starting point in its argumentation the Court referred to the freedom of movement of workers as being among the 'foundations' and main objectives of the Community. The possibility for each Member State to modify the meaning of the concept of worker, and to eliminate at will the protection afforded by the Treaty to workers, would deprive Articles 39 to 42 of all effect and therefore the above mentioned objectives of the Treaty would be severely frustrated. Additionally, the Court referred to the wording of the provisions stating that the fact that Art. 39 (2) mentions certain elements of the concept of 'workers' such as employment and remuneration, shows that the Treaty attributes a *Community meaning* to that concept. Furthermore the Court added that nothing in Articles 39 to 42 leads to the conclusion of leaving the concept to be defined according to national legislation. The Court concluded with a definition, which did not, however, contain any material criteria for distinguishing workers from other persons²⁵⁵.

"The concept of 'wage-earner or assimilated worker' employed in Regulation No 3 of the Council of the EEC concerning social security for migrant workers has, like the term 'workers' in Articles [39 to 42] of the

²⁵⁵ See also e.g. Sundberg-Weitman 1977 p. 141.

EEC Treaty, a Community meaning referring to all those who, as such and under whatever description, are covered by the different national systems of social security."

The fact that the Court referred to the national systems of social security gave the concept of a worker a very wide, but at the same time vague, meaning since it ignored the possible differences in the scope of the social security systems in different Member States. Despite the underlining of the importance of a Community meaning, the Court in fact defined the scope of the provisions in question by referring to national legislation.²⁵⁶ Regulation no 3 was later replaced by Council Regulation 1408/71 in which the definition of 'worker/employee' laid down in *Hoekstra* was, in all its essential elements, adopted.

However, in this context it is essential to note that the definition has not been confirmed in the more recent cases concerning other aspects of free movement of persons. Therefore, the concept of worker/employee differs between social security matters and other aspects of free movement.²⁵⁷ The essential outcome of *Hoekstra* is therefore that the concept of 'worker' has a Community/Union meaning excluding, however, social security matters. Hereafter, the definition in Regulation 1408/71 will be set aside since it does not contain any

²⁵⁶ See also e.g. Watson 1980 p. 61.

²⁵⁷ See also e.g. Watson 1980 p. 61 to 65.

substantial criteria for distinguishing between the different categories of persons with regard to the provisions concerning free movement.

In *Sotgiu v Deutsche Bundespost*²⁵⁸ the Court was in an indirect way challenged with the interpretation of the concept of 'worker' in the meaning of the Treaty.

Giovanni Maria Sotgiu, of Italian nationality, was engaged as a skilled worker by the Deutsche Bundespost under a written contract of employment. Mr. Sotgiu was paid in accordance with the collective wages agreement for Federal Post Office workers. During his employment, Mr. Sotgiu's family was living in Italy. From the beginning of his employment Mr. Sotgiu received a separation allowance of 7.50 DM a day, on the same basis as workers of German nationality employed away from home. During the time of his employment, the separation allowance for workers employed away from their place of residence within the Federal Republic of Germany was increased to 10 DM per day, but for workers whose residence at the time of their initial employment was situated abroad, the amount of separation allowance remained at 7.50 DM per day. Mr. Sotgiu, who continued to receive the lower rate, brought an action before the Arbeitsgericht of Stuttgart claiming that he was the victim of discrimination which was forbidden by Council Regulation No 1612/68 on freedom of movement for workers within the Community.

In essence, the question raised referred to the extent of the exception rule in Art. 39(4) concerning employment in public service. By underlining the

²⁵⁸ Case 152/73 Giovanni Maria Sotgiu v Deutsche Bundespost [1974] ECR 153.

fundamental nature of the principles of the freedom of movement and equal treatment of workers within the Community, the Court stated that the exceptions laid down in Article 39(4) cannot have a scope going beyond their aim. Therefore only certain activities in the public service can be restricted from foreign nationals²⁵⁹. According to the Court, the fact that a person had already been admitted to the public service was proof that those interests of the state which justify the exceptions to the principle of non-discrimination permitted by Art. 39(4) were not at issue.

The Court went even further by assessing the more abstract question of whether the extent of the exception provided for by Art. 39(4) can be determined in terms of the designation of the legal relationship between the employee and the employing administration. Indirectly confirming the ruling in *Hoekstra* by referring to the 'danger' of possible variations in legal designations in national legislation of different Member States, the Court ruled that the nature of the legal relationship between the employee and the employing administration is of no consequence in determining the extent of the exception made by Article 39(4).

For the concept of 'worker' this ruling of the Court has had the effect that free movement of workers is not limited to persons who perform services under contractual relationships governed by private law. In other words, employment

²⁵⁹ The concept of public service was later defined in Case 225/85 *Commission v Italy* [1987] ECR 2625. Two criteria were distinguished: 1) the direct or indirect participation in the exercise of powers conferred by public law and 2) the duties have to be designed to safeguard the interests of the State or other public authorities. There has been debate over whether these criteria are cumulative or alternative. The majority is, however, of the former opinion. For details see Nielsen - Szyczak 1997 p. 71 to 72, O'Keeffe 1992b p. 96 and Handoll 1988 p. 234.

relationship in the context in question does not require the relationship to have a contractual basis as it is often the case at the national level in several countries.

Sport subsequently challenged the scope of the provisions concerning free movement of persons. In *Walrave and Koch v AUCI*²⁶⁰, the Court emphasised the importance of pursuing *economic activity* as a precondition for applying provisions 39 to 55 of the Treaty.

Two Dutch nationals, Walrave and Koch, offered their services for remuneration to act as pacemakers on motorcycles in medium distance cycle races with so-called stayers, who cycle in the lee of the motorcycle. They provided these services under agreements with the stayers or the cycling associations or with organisations outside of the sport (sponsors). These competitions included the world championships, the rules of which, adopted by the first defendant, included a provision that 'as from 1973 the pacemaker must be of the same nationality as the stayer'. The plaintiffs considered that this provision was incompatible with the Treaty in so far as it prevented a pacemaker of one Member State from offering his services to a stayer of another Member State and brought an action against the three defendants for a declaration that the rule is void and an order that the defendants allow teams made up of the plaintiffs and stayers

²⁶⁰ Case 36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federacion Española Ciclismo* [1974] ECR 1405. No distinction between workers and self-employed was necessary in this case since both categories were covered by similar provisions. The Court ruled: "(T)he exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services."

who are not of Dutch nationality to take part in the world championships provided that such stayers are nationals of another Member State.

The question put to the ECJ by the national court was based on two alternatives as regards the appropriate Treaty provision. The distinctive feature of these two alternatives was the question whether the relationship between the pacemaker and the stayer was an employment relationship or a contract for services. However, the practical questions following the choice of the correct provision of the Treaty were identical with the exception of the potential direct effect of Article 49 of the Treaty.²⁶¹

In its ruling the Court first of all stated that the practice of sport is subject to Community law if it constitutes an economic activity within the meaning of the Treaty. The material criteria for distinguishing sport as an economic activity from non-economic sport was, not surprisingly, *remuneration*, i.e. the sphere of economic activities was defined by using the expressions 'gainful employment' or 'remunerated service'. However, the Court regarded the composition of national sport teams as a question of purely sporting interest which, as such, has nothing to do with economic activity. Therefore, the reasoning of the Court seems to imply that a certain activity can, by its nature, be regarded as non-economic. How this was possible was not clarified.

²⁶¹ At the time of the ruling of the Court, Article 39 (at the time Article 48) of the Treaty had been considered to have direct effects within the legal orders of the Member States. See in particular Case 167/73 *Commission v French Republic* [1974] ECR 359.

However, what is perhaps even more important from the point of view of this study is the distinction made between Articles 39 and 49 of the Treaty. According to the Court, the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services. However, the Court did clarify the difference between Article 39 and 49 by stating that:

"The activities referred to in Article [49] are not to be distinguished by their nature from those in Article [39], but only by the fact that they are performed outside the ties of a contract of employment."

This statement has to be kept closely in mind in the context of the subsequent rulings of the Court in the context of Article 39 of the Treaty, i.e. Article 39 of the Treaty was intended to cover economic *activities performed under a contract of employment*.

In *Levin v Staatssecretaris van Justitie*²⁶² the Court was again, as in *Hoekstra and Sotgiu*, faced with a question concerning the possibility of indirectly defining the scope of provisions concerning the free movement of workers by referring to national legislation.

Mrs D. M. Levin, a British national, applied for a residence permit in the Netherlands. Her application was rejected for the reason that she had not been in

²⁶² Case 53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECR 1035.

work during the time of the application and that even though she had meanwhile taken up employment, it did not provide sufficient means for her support since the income did not reach the minimum legal wage prevailing in the Netherlands. Additionally the Staatsecretaris van Justitie argued that the applicant did not have the subjective will to pursue an occupation, since she took up employment in order to enable her husband, a citizen of a non-member country, to take advantage of the rights guaranteed to the members of the family of a migrant worker. Mrs Levin, on the other hand, claimed that she must be treated as a 'favoured EC-citizen' in the Netherlands because she was the national of another Member State and was employed in the Netherlands. Additionally she claimed that she and her husband had property and income with which she was able to support herself.

First of all, the Court, following its ruling in *Hoekstra* and expressing the importance of the freedom of workers as a fundamental part of the common market, in a general way stated that the concepts of 'worker' and 'activity as an employed person' have a Community meaning that cannot be dependent on the national legislation of the different Member States. If this were not case the Member States would have an indirect way of defining the scope of the provisions in question. Additionally the Court underlined the importance of a *broad interpretation* by stating that "the concepts of 'worker' and 'activity as an employed person' define the field of application of one of the fundamental freedoms guaranteed by the Treaty and as such may not be interpreted restrictively."

Perhaps the most important outcome of the Levin case for the abstract definition of 'worker' was, however, the way the Court specified the criteria of 'pursuing an economic activity'. First of all, as a precondition before evaluating whether the activity is economic in nature, it has to fulfil a "quantitative" element, namely the activity has to be '*effective and genuine*' excluding activities of "such a scale as to be regarded as purely marginal and ancillary". The way the Court approached the limit of 'effective and genuine economic activity' was by *relating working time to the financial compensation of the work*. In assessing certain activity in light of the criteria of 'economic activity' it is not sufficient that services are performed and compensation is paid, but additionally there has to be a reasonable balance between "pay and hours". In the case in question, Mrs Levin was granted the status of 'worker' even though her earnings did not exceed the minimum wage level in the Netherlands since she was working only part time (about 20 hours per week).

Additionally, the Court had to assess whether the *subjective motives* for seeking employment have any significance as regards the position of a person in relation to the provisions concerning free movement. The answer was clear, i.e. provided that a person pursues or wishes to pursue an activity which is to be regarded as effective and genuine economic activity, the subjective aims behind the activity are of no consequence in determining his/her position in light of the provisions in question. In other words, subjective motives cannot be used as

criteria in evaluating whether a person fulfils the requirements of a 'worker' and only objectively assessable facts can be referred to as decisive.

Furthermore the Court stated in Levin that, in defining the meaning of these concepts

"it is appropriate ... to have recourse to the generally recognised principles of interpretation, beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty".

This "interpretation-rule" seems to be slightly ambiguous in its content since defining the concepts of 'worker' and 'activity as an employed person', an ordinary meaning can only be construed by referring to the meaning at the national level while at the same time it should be taken into account that these concepts have a Community meaning. The Court did not, however, clarify the "interpretation rule" by giving a general definition of the concepts in question.

However, the Court did not give a general definition of the concept of 'worker' until *Lawrie-Blum v Land Baden-Württemberg*.²⁶³ Mrs. Lawrie-Blum, a British national, studied at the University of Freiburg and took the Gymnasium (secondary school) teacher's examination with Russian and English as her main subjects. She then applied to the Oberschulamt Stuttgart (Secondary Education

²⁶³ Case 66/85 Deborah Lawrie-Blum v Land Baden Württemberg [1986] ECR 2121.

Office, Stuttgart) in the Land of Baden-Württemberg to be admitted to the period of preparatory service for the profession of teacher at a Gymnasium. It was her intention to teach in a private Gymnasium after completing her training. However, the Oberschulamt refused her application for admission to preparatory service. According to the Order on Preparatory Service and the Examination for the Profession of Teacher at a Gymnasium, only persons who satisfy the requirements for appointment as civil servants may be admitted to preparatory service. According to the Law of the Land Baden-Württemberg on the Civil Service, only Germans within the meaning of the Constitution may be appointed to posts having civil service status. Mrs. Lawrie-Blum brought an action before the Administrative Court for Freiburg against the refusal. Her action was dismissed on the ground that in principle only German nationals were entitled to be admitted to preparatory service. According to the Administrative Court, this rule was not contrary to Article 39 of the EEC Treaty since Article 39(4) expressly provided that that provision did not apply to employment in the public service. Mrs. Lawrie-Blum then appealed to the Higher Administrative Court for Baden-Württemberg. Her appeal was again dismissed. Besides referring to the nationality requirement, the Higher Administrative Court stated that employment as a teacher in State schools does not come within the scope of free movement of workers since the Treaty applied only to activities which are a part of economic life within the meaning of Article 2 of the Treaty. According to the Court that was not the case in the State

school system, which did not come within the scope of economic policy and was not a form of economic activity but essentially an instrument of education policy.

In a narrow sense the question addressed to the Court concerned only the exceptional rule of public service in Article 39 (4) of the Treaty. However, the Court approached the question from a wider point of view by analysing the scope of Article 39, in general, by giving an abstract broad definition of the concept of 'worker' in the meaning of the afore mentioned provisions. First of all, the Court confirmed the rulings in *Hoekstra* and *Levin*, stating that the concept of 'worker' has a Community meaning, which must be interpreted broadly. The Court then went on to give its interpretation:

"That concept ('worker') must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

In applying this test to the case in question, the Court distinguished three essential criteria of an employment relationship.²⁶⁴ They can be thus

²⁶⁴ Picard has used slightly differing wording of the three criteria of an employment relationship. From the *Lawrie-Blum* case he distinguishes the following essential criteria:

summarised: 1. the provision of services of some economic value for a certain period of time; 2. remuneration; and 3. subordination. Additionally, the Court cited four sub-criteria in evaluating whether the criterion of 'subordination' was fulfilled. The Court did not, however, conclude that these sub-criteria would constitute an exhaustive list to be used in other cases. The Court asked the following questions:

Does a person have

1. freedom to choose the services he performs;
2. freedom to choose his working hours;
3. the obligation to carry out the instructions of the person for whom the services are performed; and
4. the obligation to observe the rules set out by the person for whom the services are performed

The four features of the 'subordination' criterion used in the Lawrie-Blum case are in fact different sides of the traditional 'direction-subordination test' used

In order to classify as a 'worker' a person has to

- 1) furnish a prestation i.e. any kind of work
- 2) act under the supervision or the orders of someone else
- 3) receive a payment per contra.

See Picard 1992 p. 652.

at the national level of several countries.²⁶⁵ As was mentioned earlier in the context of the *Walrave* case, Article 39 of the Treaty was to be applied to legal relationships falling within the scope of a contract of employment. In *Lawrie-Blum*, the Court for the first time attempted to define this concept in the context of Article 39 of the Treaty.

By referring to *objective* criteria, the Court expressed its reluctance towards the possibility of giving discretion to either the parties themselves or to national legislation in determining the scope of the provisions in question. Whether an employment relationship exists is, therefore, to be evaluated in accordance with objective circumstances in an individual case. The way the relationship is labelled according to national legislation or the parties themselves has therefore, at the most, an ancillary role in the evaluation of whether the provisions concerning free movement for workers are applicable.

The underlining of objective criteria by the Court can also be evaluated in light of the "interpretation-rule" in *Levin*. The general definition seems to reflect the common features of an employment relationship in the national legislation of several countries.²⁶⁶ The way in which the "context of the terms and the objectives of the Treaty" are taken into account is essentially the very limited, if not non-existent, possibility of classifying, even in an indirect way, the nature of the relationship by the parties themselves or by national legislation.

²⁶⁵ See generally Nielsen 1990 p. 261 to 262 and Barbagelata 1982 p. 37 to 40.

²⁶⁶ See generally Barbagelata 1982 p. 37 to 40.

In *Betray v Staatssecretaris van Justitie*²⁶⁷ the Court was again challenged with a question concerning the motives of employment. This time, however, from a different perspective to that in *Lawrie-Blum*. The general definition of a 'worker' was left untouched.

Mr Betray, a German national, came to the Netherlands on 15 July 1980. He applied twice for a residence permit, indicating as the purpose of his stay in the Netherlands 'to reside with his fiancée and later marry' and 'marriage and residence with his fiancée and residence in a therapy centre for drug addicts' respectively. The applications were rejected. In the meantime Mr Betray did undergo treatment intended to cure his drug addiction and resided for that purpose in a therapy centre. Having begun to work for an undertaking, a job which was offered to him under the Social Employment Law, he submitted a new application for a residence permit in which he indicated as the purpose of his stay in the Netherlands 'work as an employed person'. His application was rejected. Mr Betray then applied to the *Staatssecretaris van Justitie* for review. He rejected the application on grounds that work under the Social Employment Law does not take place under normal economic conditions and is not, therefore, in the nature of an economic activity within the meaning of the Treaty. Mr Betray appealed to the *Raad van State*, which stayed the proceedings and referred the question to the Court of Justice.

²⁶⁷ Case 344/87 I. *Betray v Staatssecretaris van Justitie* [1989] ECR 1621.

The question asked of the Court required the interpretation of the notion of 'economic activity' in the meaning of the Treaty in a situation where the *objective motive* of the employment is social rather than economical. In its reasoning the Court rejected the view of the appellant and stated that:

"Activities pursued under national rules intended to provide work for the purpose of maintaining, re-establishing or developing the capacity for work of persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal conditions cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned."

Basically the ruling of the Court is clear: if the objective motive of the employment is purely social, the person in question is not to be regarded as a worker in the meaning of provisions concerning the free movement of persons. In practice it may, however, be difficult to establish whether the purpose of the employment is 'merely a means of rehabilitation or reintegration'. In general, for the abstract concept of 'worker' the ruling of the Court added the criteria, which will be later referred to as 'objective social motives of employment'. Additionally, the Court stated that the *level of productivity of the person* cannot have any consequences in evaluating his position in this context.

The general test formed in *Lawrie-Blum* and confirmed in *Bettray* was clearly not, however, accurate enough to be used in a case concerning the boundary between 'workers' and 'self-employed persons'. This issue was raised in *Queen v Ministry of Agriculture, Fisheries and Food ex parte Agegate Ltd*²⁶⁸, the Court had to add new criteria to the test of an employment relationship.

In 1983, the Government of the United Kingdom, concerned by the number of Spanish vessels obtaining registration and fishing licences in the United Kingdom, passed legislation providing that, in order to be able to fish within United Kingdom fishery limits, at least 75 % of the members of the crews of British fishing vessels must have British nationality or that of another country of the Community. Agegate Ltd operated such a fishing vessel, which, after being properly registered in the United Kingdom in 1981, flew the British flag. However, the crew of the vessel continued to be composed essentially of Spanish fishermen who, moreover, were remunerated by a share of the proceeds of the sale of their catches. The act of accession of Spain contained transitional provisions on freedom of movement for workers but not on the freedom to provide services. Since these transitional provisions concerned Spanish workers until 1 January 1993, it had to be decided whether the nationality requirement in the above-mentioned national legislation of the United Kingdom was fulfilled. In order to

²⁶⁸ Case 3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459.

make this evaluation it was necessary to make a distinction between employed and self-employed persons.

By referring to Lawrie-Blum, the Court confirmed the general test for distinguishing an employment relationship. However, the Court had to go further in order to make the distinction between a 'worker' and a 'self-employed person' since the traditional direction-subordination test was not sufficient in the case in question. The Court had to face the fact that a general definition of an employment relationship is not sufficient in all situations since the possible variety of different "circumstances and arrangements" is too great to be taken into account in advance.²⁶⁹ By underlining the importance of an "overall evaluation" of a particular situation, the Court stated that:

"The question whether a given relationship falls outside such an employment relationship must be answered in each case on the basis of all the factors and circumstances characterising the arrangements between the parties, such as, for example, the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants. In any event, the sole fact that a person is paid a 'share' and that his remuneration may be

²⁶⁹ The role of a general definition is therefore more descriptive and gives the decision-maker only a starting point for further argumentation. In the Finnish context see Sarkko 1980 p. 30 to 33.

calculated on a collective basis is not of such a nature as to deprive that person of his status of worker."

Additional criteria for identifying an employment relationship were mentioned, first of all, 'the sharing of the commercial risks of the business'²⁷⁰. In other words, the more the person who is performing the services in question shares the commercial risks with the person who is providing the work, the more likely he is to be considered a self-employed person. Secondly the Court mentioned 'the freedom to engage one's own assistants'. An implication of a subordinate position is, therefore, the fact that the person performing the work has to obtain the consent of the provider of the work in order to engage an assistant for the execution of the services. Furthermore, as in *Lawrie-Blum*, the Court referred to the possibility of choosing one's own working hours as an implication of an independent position. Finally the Court indirectly used the criteria of the 'way of calculating the remuneration for the work'. The fact that a person is paid a 'share' or that in general the financial compensation is calculated on a collective basis cannot be solely decisive. Since the Court used the word 'solely', it is clear that the way of calculating the financial compensation can, however, be used as a criterion among other 'circumstances and arrangements' in deciding the nature of the relationship in question. Thus, an individual basis (e.g. time) is to be regarded

²⁷⁰ By referring to 'the sharing of the commercial risks of the business' the Court was probably indicating the possibility that a person might either have capital invested in the business for which he is working or

as a factor indicating a subordinate position, and a collective basis (e.g. a share) as an implication of an independent position. The aforementioned examples are, however, only at the extremes of what is a wide range. The different combinations of computing the pay also have to be evaluated in each individual case.

In *Raulin v Minister van Onderwijs en Wetenschappen*²⁷¹ concerned an "on-call" employment where the person was obliged to work only when the employer called him to work.

Ms Raulin, a French national, moved to the Netherlands at the end of 1985. In March 1986 she concluded an employment contract covering the period from 5 March to 3 November 1986, which expressly stipulated that no guarantee could be given as to the number of hours to be worked, and that the employer was liable to pay wages and grant holiday rights and so forth only in so far as the plaintiff had worked as a waitress when called upon to do so by her employer. Under that contract the plaintiff performed some work during the period from 5 March to 21 March 1986 (a total of 60 hours). On 1 August 1986, without having a residence permit, she began a course of full-time day studies at an arts college in Amsterdam. Claiming that she was a 'worker' for the purposes of Article 39 of the Treaty she applied for study finance according to Article 7 (2) of Council Regulation No 1612/68/EEC. Her application was rejected.

that he might be personally responsible for the engagements of the business. A typical example would be owning a significant part of the shares of a limited company.

²⁷¹ Case C-357/89 V.J.M. Raulin v Minister van Onderwijs en Wetenschappen [1992] ECR 1027.

First of all, the Court confirmed the general test of an employment relationship adopted in *Lawrie-Blum*. The Court added that an "on-call" employment relationship does not as such prevent the employed person in question from being regarded as a worker within the meaning of Article 39 of the Treaty even in the case that the person works only a very limited number of days per week or hours per day. However, the Court went on to state that the fact that the employment is irregular in nature and limited in duration may be an indication that the activities exercised are purely marginal and ancillary and, therefore, not sufficient to grant the person the status of worker.

For the first time the Court did not conclude whether the person in question fulfils the requirements for being a worker in the context of free movement. Instead, it only stated the relevant questions to be asked by the national court when judging the case. For the criteria of 'worker' the *Raulin* case added the criterion of 'irregular nature and limited duration of the employment'. These features were seen as implications working against the fulfilment of the "quantitative" precondition of 'effective and genuine activities'. Therefore, a person may not be a worker in the meaning of Article 39 of the Treaty if his employment exceeds a certain limit of irregularity and does not exceed a certain limit of duration. Whether these limits are exceeded in an individual case are to be evaluated by the national court.

The wording of the general definition of a 'worker' was slightly modified in *Bernini v Minister van Onderwijs en Wetenschappen*.²⁷² However, the essential question of the case concerned the criterion of 'genuine and effective activity'.

Mrs Bernini, an Italian national, had lived continuously in the Netherlands from the age of two. She completed all her schooling in the Netherlands where she then underwent occupational training. In the course of that training she was from 21 March 1985 to 31 May 1985 as a paid trainee in a furniture factory. Later she left for Italy where on 5 November 1985 she began architectural studies at the University of Naples. During her studies she applied for study finance from the Netherlands. Under the terms of Article 7 of the Law on Study Finance, the benefit of that law is reserved to students of Netherlands nationality and to foreign students resident in the Netherlands and assimilated to Netherlands nationals for the purposes of the study finance scheme. Mrs Bernini's request was rejected on the grounds that she was considered resident in Naples and therefore not in the Netherlands, and thus did not meet the precondition for receiving study finance under the terms of the aforementioned law. Mrs Bernini appealed to the College van Beroep Studiefinanciering putting forward the argument that as a result of her training period in the Netherlands she became a migrant worker and was, therefore, entitled to study finance under Article 7 of Regulation 1612/68/EEC.

²⁷² "The essential characteristic of the employment relationship is the fact that a person performs services for a given period of time for the benefit and under the direction of another person in return for

Since the Court had in two previous cases ruled that a person does not lose his status as a migrant worker if he can demonstrate a link as regards the content between the nature of the work previously undertaken and the studies subsequently undertaken²⁷³, the Court had to, among other questions, clarify the criteria of 'effective and genuine economic activity' in order to evaluate whether Mrs Bernini had in the first place become a migrant worker in the meaning of the Treaty.

First of all, the Court confirmed its ruling in *Betray* by stating that a low level of productivity does not preclude a person from having the status of a 'worker'. Additionally the Court expressly confirmed the argumentation that it had implicitly used in several previous cases by stating that limited remuneration is sufficient in the case that a person works only a small number of hours per week. Furthermore, the Court added that there is a certain quantitative limit for regarding the work as 'effective and genuine'. In order to fulfil this limit a person has to complete a sufficient number of hours *in order to familiarise himself with the work*.²⁷⁴ What is sufficient for becoming familiar with a given work is, therefore, to

which he receives remuneration." Case C-3/90 *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR 1071.

²⁷³ Case 39/86 *Lair v University of Hanover* [1988] ECR 3161 and Case 197/86 *Brown v Secretary of State for Scotland* [1988] ECR 3205.

²⁷⁴ The wording of the Court was very clear: "(T)he national court is entitled, when assessing the genuine and effective nature of the services in question, to examine whether in all the circumstances the person concerned has completed a sufficient number of hours in order to familiarise himself with the work." Despite the fact that the Court referred to 'hours completed', it is clear that the longer the employment lasts the more hours are completed and consequently, the more the person becomes familiar with the work. Additionally the Court explicitly mentioned that it is irrelevant that the trainee works only a small number of hours per week.

be decided in each individual case according to the requirements of the profession in question.

In April 1990, the Tribunale di Genova (District Court, Genoa) made a reference to the Court for a preliminary ruling under Article 177 of the EEC Treaty on two questions concerning the interpretation of Articles 7, 30, 85, 86 and 90 of the Treaty (Articles 14, 28, 81, 82 and 86 as modified by the Treaty of Amsterdam). The questions arose in the course of proceedings between *Merci Convenzionali Porto di Genova SpA* and *Siderurgica Gabrielli SpA* (hereinafter referred to as "*Siderurgica*") concerning the unloading of goods in the port of Genoa.²⁷⁵ In Italy, at the time of the proceedings, the loading, unloading, transshipment, storage and general movement of goods or material of any kind within the port were reserved to dock work companies whose workers, who are also members of these companies, had to be of Italian nationality. Any failure to respect the exclusive rights vested in the dock work companies resulted in the imposition of penalties. Italian law granted to dock work undertakings the right to organise dock work on behalf of third parties. For the performance of dock work such undertakings, which are, as a general rule, companies established under private law, must rely exclusively on the dock work companies. *Siderurgica*, under the Italian rules, applied to *Merci*, an undertaking enjoying the exclusive right to organise dock work in the Port of Genoa for ordinary goods, for the unloading of a

²⁷⁵ Case C-170/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, ECR [1991] I-5889.

consignment of steel imported from the Federal Republic of Germany, although the ship's crew could have performed the unloading direct. For the unloading Merci in turn called upon the Genoa dock work company. As a result of a delay in the unloading of the goods, due in particular to strikes by the workforce of the docking company, a dispute arose between Siderurgica and Merci in the course of which Siderurgica demanded compensation for the damage it had suffered as a result of the delay, and the reimbursement of the charges it had paid, which it regarded as unfair having regard to the services performed.

The emphasis of the case was on competition aspects and the free movement of goods.²⁷⁶ However, in respect of the nationality requirement laid down by Italian legislation, the Court clearly wished to affirm its previous case law and the general definition of 'worker' as laid down first in case the Lawrie-Blum case according to which,

²⁷⁶ The reference was as follows:

"(1) In the present state of Community law, where goods from a Member State of the Community are imported by sea into the territory of another Member State, does Article 90 of the EEC Treaty, together with the prohibitions contained in Articles 7, 30, 85 and 86 thereof, confer on persons subject to Community law rights which the Member States must respect, where a dock-work undertaking and/or company formed solely of national dock workers enjoys the exclusive right to carry out at compulsory standard rates the loading and unloading of goods in national ports, even when it is possible to perform those operations with the equipment and crew of the vessel?

(2) Does a dock-work undertaking and/or company formed solely of national dock workers, which enjoys the exclusive right to carry out at compulsory standard rates the loading and unloading of goods in national ports constitute, for the purposes of Article 90(2) of the EEC Treaty, an undertaking entrusted with the operation of services of general economic interest and liable to be obstructed in the performance by the workforce of the particular tasks assigned to it by the application of Article 90(1) or the prohibitions under Articles 7, 30, 85 and 86 thereof?"

"the concept of 'worker' within the meaning of Article 48 of the Treaty presupposes that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

However, in the *Merci* case there was a small detail relating to the fact that the workers were linked to each other through an association which warranted a further clarification in respect of the notion of 'worker'. The Court stated:

"That description [the definition of worker] is not affected by the fact that the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association."

3.4 Summary

The Community law meaning of the concept of 'worker'/'employee' under Article 39 (ex-Article 48) of the Treaty has been the subject of a gradual transformation process where new criteria have been added without radical changes of interpretation. The vast majority of the cases assessed above have, even though rarely expressed openly, concerned the boundary between the concepts of 'worker' and 'other national' i.e. nationals of a Member State whose possible right to free movement is not based on the exercise of economic activity

within the meaning of the Treaty. This is understandable on the basis that the provisions concerning free movement of persons are and have been in essence equivalent for both employed and self-employed persons. However, as the Court in the Walrave case clearly stated, Article 39 regulates economic activities performed under a *contract of employment*. The later case law has only strengthened this statement by giving material contents to the concept of 'worker' under Article 39 although the case law on the public service exception under Article 39(4) would seem to widen the concept to the sphere of administrative appointment. However, it is clear that this definition is very close to the concept of a contract of employment in the legislation of the great majority of the Member States.

The only case where the boundary between employed and self-employed persons has been an essential question was the case concerning the transitional provisions in the Act of accession for Spain and Portugal, where the free movement of workers came into force later than for self-employed persons. However, the Court has, on a number of occasions, considered it important to lay down the general criteria of a 'worker' for the purposes of free movement of persons. As much as it is true that under the Treaty itself the difference between employed and self-employed people is often of little significance, one should not underestimate the importance of the distinction since the enlargement of the Union is far from being an arcane issue and transitional provisions are very likely to have a growing importance in the system of Community law.

On the other hand, one can also say that after the adoption of Council Directives 90/364/EEC, 90/365/EEC and 93/96/EC, which entitled all nationals of the Member States to move freely within the territory of other Member States if certain preconditions are fulfilled, the need for distinguishing between those performing an 'economic activity' and other categories of persons has become less important.

At this stage, the essential elements of an employment relationship under Article 39 of the Treaty can be summarised in the following way:

By referring to a Community definition, the Court has ruled out the possibility of modifying the definition of a 'worker' by national legislation.²⁷⁷ Therefore the formal nature of the legal relationship is of no consequence in deciding whether a person falls within the limits of the concept in question.

The activities a person is pursuing have to as such fulfil certain preconditions. From a 'quantitative' perspective the services performed must be effective and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. This precondition is fulfilled if the person in question has completed a sufficient number of hours in order to familiarise himself with the work. 'Qualitatively' the activities must be economic in nature. In evaluating whether the activity in question is to be regarded as economic, an essential precondition is that a financial compensation be paid.

²⁷⁷ For the purpose of the application of social security schemes for migrant employees and self-employed persons the concepts of 'employee' and 'self-employed' are, however, defined by referring to the scope of national social security legislation. Council Regulation 1408/71/EEC, Article 1 (a).

Furthermore, there has to be a reasonable balance between the services performed and the financial compensation paid. The subjective motives of the person performing the services are of no account in the evaluation of whether a person falls within the category of 'worker'. The objective motive of the employment relationship may, on the other hand, be relevant in the categorisation since pure social employment does not come into the sphere of economic activity.

The essential feature of an employment relationship is that for a certain period of time a person performs services for the benefit of, and under the direction of, another person, in return for which he receives remuneration.

Despite the general definition of an employment relationship, every individual case has to be evaluated by reference to all the factors and circumstances characterising the arrangements between the parties. Additional criteria mentioned by the Court (at least in a situation concerning the borderline between an employee and a self-employed person) are the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants and the way in which the remuneration of the work is calculated. Finally, a person may be considered a 'worker' even when he is linked to other workers by a relationship of association.

4. A Comparison of the concepts

The three relevant concepts, 'employment relationship' under Finnish law, 'contract of employment'/'contract of service' under English common law, and the concept of 'worker' under European Community law have been described above. All three concepts have been subject to a gradual transformation process without essential statutory interventions.²⁷⁸ From a very general point of view, this transformation process has been 'linear' in the sense that new professions and activities have been covered by the definitions. In other words, the substantial coverage of the three essential notions has become wider over time. To put it simply: a given individual/profession who/which was considered to fall within the scope of labour law/employment law in Finland and England and within the scope of Article 39 of the Treaty under Community law, has/have continued to do so regardless of the evolution, i.e. widening of the scope of these concepts. However, this is not to say that the evolution would have been without controversy. Particularly, the evolution of the notion of contract of service under English common law was for long influenced by the old concepts and attitudes relating to pre-industrial 'master – servant' relationships with the result of a relatively restrictive interpretation of the concept during the pre-war period. Finnish law, on the other hand, stands out as being subject to strong doctrinal

²⁷⁸ The notion of 'contract of employment' was clarified further in the context of the adoption of the Contracts of Employment Act of 1970. However, the actual definition was left substantially untouched and the different 'interpretative provisions' in Articles ... simply aimed at codifying the case law.

influence where the academic and judicial thinking has been strongly linked with each other. Finally, the development of the Community law concept of 'worker' in the context of free movement has essentially been driven by the general deepening of the European integration process where the role of the Court has been important. 'Reserving' the notion of 'worker' for the Community level is just one example of the strong role of the Court in the development of Community law.

From a purely textual point of view one can find clear differences regardless of whether one looks at the current situation or at the evolution of the concepts. Finnish law contains a statutory definition with supplementary statutory interpretation rules while English and Community law provide a material definition only through case law.

However, the initial differences on the basis of a superficial textual comparison do not seem that important if one looks at the relevant indicia for determining in a concrete case whether one is falling within one or the other category. 'Direction-subordination' or 'control', whichever word one prefers, is and has been an essential element in the context of all concepts. This is natural as this power relationship is the *raison d'être* of labour/employment law. The key indicia, which have been considered relevant in the context of the three different concepts, can be summarised as follows:

1. Finnish law:

- the right to direct and decide upon the way the work is performed, the quality and extent of the work and the time and place of the work;
- the duty to provide the necessary equipment and material;
- the basis for calculating the remuneration;
- the reimbursement of expenses;
- the right to perform work to another person; and
- the right to engage assistants.

2. English common law (Market Investigations Ltd. v. Minister of Social Security)

- Whether in the performance of the service the person is subject to the control of the other party sufficiently to create a master – servant relationship and in that respect:
- whether the man performing the services provides his own equipment;
- whether he hires his own helpers;
- the degree of financial risk he takes;
- the degree of responsibility for investment and management;
- whether and how far he has an opportunity of profiting from sound management in the performance of his task

3. Community law (Queen v. Ministry of Agriculture, Fisheries and Food ex parte Agagate Ltd.)

- freedom to choose the services he performs;
- the obligation to carry out the instructions of the person for whom the services are performed;
- the obligation to observe the rules set out by the person for whom the services are performed;
- the sharing of the commercial risks of the business;
- the freedom for a person to choose his own working hours;
- the freedom to engage his own assistants; and
- the basis of remuneration.

Under all three legal systems it is acknowledged that the list of relevant indicia is not exhaustive. Furthermore, regardless of the differing formulation, the list of indicia is very similar. However, the Finnish system stands out in the sense that one cannot trace such a list from any 'leading cases'. The list has been established here using references in the Contracts of Employment Act, the existing scholarly works and the case law for the purposes of this study. As case 1995:145 illustrates, the dominance of the elements of the basic relationship theory is beyond doubt.

An additional important element under all three concepts is the requirement that the performance of work should be remunerated. Under English law this requirement falls under the general theory of 'consideration' but the essential point is the same, i.e. the performance of work without being

compensated does not fulfil the requirements of the three concepts. Finnish labour law and the notion of 'worker' under Community law would seem to require a balance between the work performed and the remuneration while under English law the situation is less clear. Under traditional English law even a nominal value would be sufficient. However, this difference between English law, on the one hand, and Finnish and Community law, on the other hand, would not seem to be relevant for this study.

Both Finnish labour law and English law require that the work is performed under a contract while this is not always necessary in order to qualify as a 'worker' under Article 39 of the Treaty establishing the European Community. Here we see clearly the difference between the 'traditional' labour law context and the context of the free movement of persons under Community law. However, for the purposes of this study this difference is not really relevant. The extension of the notion of 'worker' to some public sector 'functions' under Article 39 of the Treaty must be seen from the perspective of the aim of that provision. Some functions may in some Member States of the EU be only performed on the basis of 'appointment' rather than 'contract' without at the same time falling under the exceptions permitted under the Article. Thus, such functions must be open to the citizens of other Member States and, therefore, these functions must be covered by the notion of 'worker'. In all essential ways, the distinction between 'workers' and 'self-employed/providers of services' is, for the purposes of this study, functionally equivalent with this distinction in a traditional labour law context.

However, there is an important difference between the Finnish system, on the one hand, and the English and Community systems, on the other. English law and Community law are far more open about the "indication clustering" method while the Finnish system is still very much tied up by the different "legal criteria" as defined and built up by the doctrine.

Nevertheless, it would seem safe to say that the three concepts are very much comparable from the point of view of contemporary law. The formulation and the relevant indicia are, if not identical, at least very similar.²⁷⁹ All three concepts perform the same contextual function, i.e. they define the boundary between 'employees'/workers' and 'self-employed' in their respective jurisdictions. Therefore, should the application of these three concepts differ substantially in respect of a given group of persons or an identical factual situation, the explanation of a different outcome or radically different argumentation must be related to other factors than simply conceptual differences. When one takes into account the gradual widening of all three concepts, it is all the more surprising if one system has had difficulties in considering an identical factual situation as falling within the scope of the relevant concept under its contemporary formulation

²⁷⁹ In the light of the previous comparative research this conclusion is certainly not a novelty. See e.g. Barbagelata 1982, p. 37 to 40; Final report: Transformation of labour and future of labour law in Europe, p. 15 to 16. Prof. Alain Supiot wrote the final report of the expert group set up by the European Commission. The other members of the group were Prof. Maria Emilia Casas, Prof. Jean De Munck, Prof. Peter Hanau, Prof. Anders Johansson, Prof. Pamela Meadows, Prof. Enzo Mingione, Prof. Robert Salais and Prof. Paul van der Heijden. The group analyses in detail the trends and the debate on the limits of the scope of labour law. See also Nielsen 1990 p. 261 to 262.

while the other has had no difficulties in considering such a situation as falling within the relevant scope for decades. However, as will be seen, this is the case.

PART III: CASE LAW ON THE POSITION OF SPORTSMEN UNDER THE THREE CONCEPTS

1. Case law in Finland concerning the legal position of players in team sports

1.1. The context: The professionalisation of Finnish team sports

Sport professionalised gradually in Finland during the 1970s and 80s. To be successful, a sportsman had to invest more time and energy to training than ever before. The development of the modern media and the increasing interest of companies to use sports as a means to market their goods and services meant that more money was involved in top level sports. The career of sportsmen became longer and more sportsmen became financially dependent on the earnings potential they had from engaging in sport. This was particularly evident in the so-called team sports. The results of a survey carried out in 1992 – 93 give a detailed overview of the context in which the courts had to face the legal challenge.²⁸⁰

²⁸⁰ In context of another research project, the author of this study carried out a survey to map out the socio-economical position of professional sportsmen in six different team sports. A questionnaire containing 31 questions on the contractual and personal situation of the players was sent to all male sportsmen in football, ice hockey, basketball, volleyball, Finnish baseball and handball at the highest competitive level. To take into account the seasonal differences of the sports the survey was carried out during summer 1992 in football and Finnish baseball and in November – December 1992 in ice hockey, basketball, volleyball and handball. The questionnaires were sent to the representatives of the clubs who distributed them further to the players. Also the return of the questionnaires was organised through the management of the clubs. In order to maximise the rate of replies, the survey was kept anonymous. In all 276 replies were given of which one reply was disregarded as wrongly filled in. The following table gives the approximate reply percentage in respect of different sports:

The level of professionalisation can be analysed from both an objective and a subjective point of view. From an objective point of view, at least, the following factors would seem to be relevant in the analysis of the level of professionalisation: a) the frequency of practising sport on the basis of a legal obligation (player contract); b) the level of compensation paid and; c) the frequency of working whilst engaged in professional sport, i.e. having a "civilian profession".

From a subjective point of view it is important to look at the opinion of the players themselves with regard to, on the one hand, their financial dependency from the income they receive from practising sport and, on the other, their level of professionalisation on a scale between amateur - professional.

The great majority of the players who replied to the questionnaire had concluded a written player contract with the club they were representing. Under a player contract a player "undertakes to play and practice [a given sport] under the direction of the coaching management in a team indicated by the club

	Total number of replies	%
Ice-hockey	107	~35
Football	44	~23
Basketball	44	~40
Volleyball	26	~33
Finnish baseball	41	~25
Handball	13	~11

Due to the low reply rate in handball, the further analysis of those replies was not carried out.

management".²⁸¹ In exchange for these "services" the player is normally paid an individually negotiated financial compensation, which may consist of monetary compensation or compensation in kind, or their combination. The figure below describes the frequency of a written player contract on the basis of the survey undertaken:

Figure 1

	Written contract	No written contract
ice-hockey	97 %	3 %
Football	91%	9 %
Basketball	71 %	29 %
Volleyball	96 %	4 %
Baseball	95 %	5 %

A written player contract was clearly the rule. According to the rules of the respective federation/league, a written player contract is obligatory at the highest level in volleyball and football.²⁸² Only in basketball was the proportion of players playing without a written contract significant.

The players playing and practising under a written contract are normally paid a monetary compensation. Of the five sports, which took part in the survey, only in basketball were there players who received only reimbursement of their

²⁸¹ Clause 1 of the standard player contract of the Finnish ice-hockey league. A similar provision can be found from all standard player contracts drafted by the sporting leagues and federations in Finland. See annex I.

expenses. Equally, even in basketball these players were a clear minority (24%). The figure below presents the general level of the earnings of players in different sports. The figures are presented as total earnings per playing season. In order to increase the number of replies, the players were asked to indicate an earnings category instead of exact sums in their contract. The figures are presented in Finnish marks.

Figure 2

	Dispersion	Median
ice-hockey	max 12000 – 400 000	100 001 – 150 000
Football	max 12 000- 150 000	50 001 – 75 000
Basketball	Expenses-150 000 ²⁸³	12 001 – 25 000
Volleyball	max 12 000- 150 000	25 001 – 50 000
Baseball	max 12 000- 150 000	50 001 – 75 000

Particularly in ice hockey the earnings of the players were relatively high. Also in other sports the earnings of the players may have exceeded the average earnings of employees in Finland (FIM 110 000 in 1989).²⁸⁴ However, the

²⁸² Despite of the obligation of a written player contract a few players in these sports are were playing without a written contract.

²⁸³ The only player in basketball whose earnings exceeded FIM 100 000 was a foreign player. The highest earnings of a Finnish player were between FIM 75 000 and 100 000 per season.

²⁸⁴ See Finnish Official Statistics 1992 p. 322.

disparity between different sports, on the one hand, and within a given sport on the other, was relatively significant.

Equally, these figures do not necessarily correspond with the taxable earnings of the players. First of all, players often receive a significant part of their payments in the form of (non-taxable) reimbursements of expenses, which often clearly exceed real expenses.²⁸⁵ Furthermore, the contract between the player and the club may often be concluded on the basis that the payments are to be made free of taxes, i.e. the taxable income of the player exceeds the nominal value of the contract with a sum equivalent to income tax.²⁸⁶

Since it seems that there were significant differences between different sports and different players with regard to the payment of taxes, i.e. whether the nominal annual contractual payments are presented free of income tax or not, the

²⁸⁵ This is entirely legal since according to case law a sportsman does not have a fixed place of work. This means that the player can, in the form of transportation expenses etc., deduct a significant amount from his earnings before his taxable income is established. See more in detail e.g. Linnakangas 1984 p. 281 to 299 and urheiluverotuksen käsikirja p. 63 to 73.

²⁸⁶ According to income statistics received from the County Tax Office of Uudenmaa, the dispersion of the earnings under Section 6 of the Act of withholding of taxes ("income from sporting activity") of players in that County were in 1990 as follows:

	Dispersion
ice-hockey	4 400 - 247 920 (n=51)
Football	18 214 - 197 512 (n=20)
Basketball	2 000 - 64 835 (n=18)
Volleyball	12 408 - 49 300 (n=3)

Only the figures of players who played in a team of that County for the entire calendar year of 1990 are presented since the playing season in these sports lasts always from autumn to spring. Thus, only players who have played in the same team for two consecutive playing seasons can be compared with regard to their annual earnings. In ice hockey, two players earned more than FIM 200 000 in the County of Uudenmaa even though they played for their team for only one season. This implied that their annual earnings would be approximately FIM 400 000 - 500 000.

figures presented above should be analysed on the basis of contractual practice in different sports with regard to taxation.²⁸⁷ The following figure describes how the payments in different sports were made.

Figure 3

	Before taxes	After taxes	Combination
ice-hockey	95 %	5 %	0 %
football	39 %	59 %	2 %
basketball	63 %	34 %	3 %
volleyball	48 %	52 %	0 %
baseball	75 %	23 %	2 %

On the basis of information about the practices in different sports, it is clear that the taxable income of the players was generally higher than the figures on the annual earnings of the players presented above. This is particularly true for football and volleyball. In addition to monetary compensation, the players may be provided with compensation in kind or through fringe benefits.

In addition to the financial benefits the players received, the frequency of those pursuing a "civilian profession", i.e. having a normal job in addition to playing and engaging in sport, would seem to indicate the actual level of professionalisation. It is assumed that the less common it is to have another job, the higher the level of professionalisation. However, since a significant proportion

²⁸⁷ Since the players were not asked to reveal their exact annual earnings, it is not possible to provide precise statistics on taxable income. Thus, in this context the practice in different sports has to be sufficient.

of the players were/are studying, the absence of a "civilian profession" does not necessarily mean that the players are only playing and engaging in sport. However, since the age structure in different sports is very similar, the figures below show the relative professionalisation between the different sports (the figures in brackets indicate the proportion of players having a full-time job²⁸⁸).

Figure 4

	Yes	No
ice-hockey	21 % (13 %)	79 %
Football	43 % (27 %)	57 %
Basketball	47 % (33 %)	53 %
Volleyball	54 % (46 %)	46 %
Baseball	63 % (63 %)	37 %

Working alongside playing was relatively rare, particularly in ice hockey, which also, on the basis of the earnings of the players, was and continues to be clearly the most professionalised sport in Finland. In baseball, full-time work was common. However, with the exception of ice hockey, every second player had a part-time job at least. This result corresponds well with the level of earnings described above.

From a subjective point of view the level of professionalisation can be evaluated by using the opinions of the players with regard to, on the one hand,

²⁸⁸ The criterion used for distinguishing full time job and part-time job is 30 hours/week. See more in detail KM 1988:33 p.1-2.

economic dependence from income derived from sport and, on the other, their position on the scale amateur - professional.

The players were given five alternatives with regard to financial dependence from the income derived from sport²⁸⁹. These were as follows: 1 not dependent; 2 minor dependence; 3 relatively dependent; 4 dependent; and 5 very dependent.²⁹⁰ The spread of responses was as follows for the different sports:

Figure 5

	1	2	3	4	5
IH	3 %	1 %	10 %	33 %	53 %
FB	7 %	19 %	21 %	30 %	23 %
BB	47 %	7 %	23 %	14 %	9 %
VB	15 %	23 %	38 %	12 %	12 %
FBB	20 %	27.5 %	37.5 %	12.5 %	2.5 %

The great majority of ice-hockey players considered that they were either dependent or very dependent on the income they received from playing. Equally, in football financial dependency was evident. In volleyball and baseball the replies were rather evenly distributed, while in basketball nearly half of the players did not consider themselves to be dependent on the income derived from sport. Again the results correspond well with the relative level and distribution of income described above.

²⁸⁹ IH = ice-hockey, FB = football, BB = basketball, VB = volleyball, FBB = Finnish baseball

The players were also asked to evaluate their own position on a scale amateur - semi-professional - professional (0-10). Figures 0-3 were characterised as "amateurs", 4-6 as "semi-professionals" and 7-10 as "professionals". Figure 6 below presents the response spread in different sports (the figure in brackets represents the highest figure within the respective sports):

Figure 6

	Amateur	Semi-prof.	Professional
Ice-hockey	3 %	38 %	59 % (10)
Football	14 %	39.5 %	46.5 % (10)
Basketball	54.5 %	38.5 %	7 %
Volleyball	31 %	46 %	23 %
Baseball	45 %	42.5 %	12.5 %

In ice hockey and football the great majority of players regarded themselves as at least semi-professionals. In addition almost 60% of ice-hockey players regarded themselves as professionals. In other sports the replies were more evenly distributed. In basketball, players who regarded themselves as amateurs were in the majority.

On the basis of this brief overview, it is safe to say that at the time of the controversial case law, there were a substantial number of players who were practising sport in a professionalised manner.

²⁹⁰ The alternatives in Finnish were: 1 en lainkaan 2 melko vähän 3 jonkin verran 4 melko paljon 5 erittäin paljon.

However, the contracts made between a sportsmen and the clubs they were representing were not considered to be contracts of employment even though the earnings of the sportsmen often exceeded the average earnings of full-time employees. Consequently, sportsmen were entirely excluded from the advantages of labour and social security law at the same time as they were liable to income taxation on the basis of their earnings from sporting, and related, activities.

Thus, it was not a great surprise that the question of the position of sportsmen vis-à-vis labour law was taken up in the courts. In fact, it is surprising that it took so long before the first cases emerged, even though, particularly in ice hockey, players were playing under a written player's contract in exchange for monetary compensation as early as the late 1960s.²⁹¹

During the 1990s the situation changed radically. Within a few years the Supreme Court (KKO), the Insurance Court (VAKO) and the Labour Council (TN) gave eight judgements regarding either directly or indirectly the position of a player in the context of the scope of labour law. This case is very controversial and will be presented in detail later in the text.

²⁹¹ See more in detail Aalto p. 100 to 102.

1.2 The legal challenge: Controversial case law on the legal position of sportsmen in team sports

1.2.1 The first challenge: still a leisure-time activity?

For the first time in, VAKO 12.5.1992 dnro 1365:91, the supreme courts in Finland were faced with the question of whether an athlete could be considered as an employee. The case concerned the position of a player of American football in the context of the Accident Insurance Act. The player in question had, according to a signed written contract, undertaken to play American football for a club during the 1990 playing season (1.4.1990 - 30.9.1990). As compensation for playing and training the player was paid, according to the evidence presented, 200 FIM²⁹² for the entire playing season. During the course of a game, the player injured his knee. He applied for compensation as an employee according to the Accident Insurance Act.

The insurance company dismissed the application on the basis that the player did not fulfil the criteria of an employment relationship. The player appealed to the Accident Insurance Appeal Board. The Appeal Board dismissed the appeal, arguing that:

"Taking into account that the case regards leisure-time activity, and that the fee paid to the player has to be considered as a subsidy for this kind

²⁹² Approx. 35 €.

of activity, the Accident Insurance Appeal Board considers that the question was not of an employment relationship in the meaning of Article 1 of the Accident Insurance Act.²⁹³

The decision can hardly be described as anything other than 'obscure'. There is no reference to the criteria of an employment relationship although, as described in Part II chapter 1.5., the dominance of the traditional approach of basic relationship theory had become very strong over the years. One can always assume that the Accident Insurance Appeal Board decided to make an "overall evaluation" of the situation. However, if this was the case, the quality of the analysis is not particularly striking. It would seem that other motives were behind the decision.

The player appealed to the Insurance Court. The Insurance Court, without further arguments, dismissed the application with a reference to the arguments of the Accident Insurance Appeal Board.

Regardless as to whether one agrees with the material outcome of the case, the fact that the Insurance Court upheld the argument of the Accident Insurance Appeal Board is striking. One has to use a lot of imagination in order to find any tangible arguments, which could fulfil even the most elementary

²⁹³In Finnish: "Otaen huomioon, että kysymyksessä on ollut harrastustoiminta ja että pelaajalle maksettua palkkiota on pidettävä tällaisen harrastustoiminnan tukemiseksi annettuna avustuksena, tapaturmalautakunta katsoo, että kysymyksessä ei ole ollut tapaturmavakuutuslain 1 §:n 1 momentissa tarkoitettu työsuhde."

requirements of legal argumentation. If one looks at the situation from the point of view of the conventional approach of basic relationship theory, it may be agreed that the small monetary payment in no way represented a reasonable balance with the obligations of the player. However, it would seem that the essential message of the Insurance Court was that playing a sport was a hobby *per se*. If one compares the case to the case law presented by *Paanetoja*²⁹⁴, there is no doubt that the Insurance Court did not argue the case in the conventional way, as was usually the case.

1.2.2 A clear semi-professional; still "a hobby"

Less than a year after the first decision, the Insurance Court was faced with a more serious challenge since this time the case involved a clear semi-professional football player active in the Finnish championship (VAKO 11.2.1993 Dnro 1400:91).

Miika Juntunen, a Finnish footballer playing league football, applied for pension rights on the basis of his earnings from playing football under a player contract. He claimed to be an employee under the terms of Section 1 of the Occupational Employment Pension Act and Section 1 of the Contracts of Employment Act. He had signed a written player contract with the 'Tampereen

²⁹⁴ See *Paanetoja* 1993 pp. 21.

Ilves' football club of the Finnish league for the period of 1.12.1989 - 30.11.1991. The contract was named as a "player contract", including a clause which stated that the contract does not create an employment relationship between the parties.

On the basis of the contract, he had undertaken to play and train football according to the orders of the coach and management of the club in a team decided by the management of the club. In practice, this included training 5-6 times per week for 2 hours, plus matches. Additionally, the player was obliged to wear the club uniform and use the equipment provided by the club. The right to have a separate equipment contract was conditional on the permission of the club. The player did not have the right to practice any other sport, or to participate in any other football event, except for those specified in the contract, without the permission of the club. Furthermore, in his private life, the player was expected to behave in a way, which would not give rise to negative publicity for the club or the sport in general. In addition, the contract contained detailed contractual penalty clauses.

The club agreed to pay monetary compensation to the player based on the performance of the team and the player. A certain minimum pay was guaranteed. In practice, the average pay per month was approximately FIM 6000²⁹⁵. In addition, the player was compensated with a lump-sum payment when joining the club since his status as a "free-agent" permitted him to transfer to the club without the club paying a transfer fee.

²⁹⁵ Approx. 1000 €.

In its decision, the Central Pension Security Institute concluded that the player was in fact an employee of the club, and therefore was entitled to pension rights according to the Employment Pension Act. The CPSI argued:

"A contract of employment can be concluded regarding all work. As a performance of work is considered any human behaviour which contains financial value. Miika Juntunen has, in the player contract between him and Tampereen Ilves, agreed to play and practise football. Performing work to another requires that the worker performs the work personally and that the financial value of the work comes directly to the employer. The worker benefits indirectly through the remuneration paid to him for his efforts. Miika Juntunen has a duty to perform work personally. The club benefits from selling tickets for the matches and receives also additional income. Furthermore, the performance of the players, the results of the games and the fame connected to success are evaluated first and foremost on the basis of the whole team. Therefore, the club receives direct benefits from the playing of Juntunen. From the point of view of the employer, direction and supervision means, among other things, the right to decide upon how the work is to be performed, the time and the place of the work, and the quality and extent of the work. The employer has the right to supervise that the work is done according to the instructions given. From the point of view of the employee,

direction and supervision means an obligation to follow the instructions given by the employer or his substitute, and to allow the supervision of the work and its results. The contract in question contains an express clause regarding direction and supervision. This clause has been materialised in practise. Miika Juntunen has undertaken to play and practise football according to the orders of the coaching management in a team decided by the management of the club. He is prohibited from playing for another club and he does not have a right to participate in other sports. An additional criterion of the employment contract is remuneration, i.e. the work is intended to be performed in exchange for a salary or other compensation. The guaranteed salary, bonuses and possible additional income on the basis of the player contract are remuneration for the agreed work. The payment for the transfer is not, however, to be regarded as remuneration in exchange for work. The fact that the worker may be performing work for another employer is irrelevant in evaluating whether the criteria of an employment relationship are fulfilled. The provisions defining the scope of the Employment Pension Act are mandatory law and can not, therefore, be set aside by a contract clause. A clause in the contract in question containing a statement that the contract is not an employment contract and that the Employment Pension Act is not applicable can not be

decisive since the relationship fulfils all the criteria of the employment relationship."

One could hardly imagine a more thorough and detailed presentation of the traditional approach on the basis of the basic relationship theory. The difference between the decision of the Insurance Court in the previous case and the decision of the CPSI is more than striking although the decision of the CPSI was already in the "pipeline" waiting for the decision of the Insurance Court when the previous judgement was given.

The club appealed to the Pension Appeal Board asking it to reverse the decision of the Central Pension Security Institute.²⁹⁶ The Pension Appeal Board was not convinced by the argumentation of the Central Pension Security Institute. It reversed the decision of the CPSI and concluded that the player did not have an employment relationship with the club. The argumentation of the Appeal Board agreed with the ruling of the Insurance Court in the previous case regarding the position of the player of American football. It concluded that the activity in question, i.e. playing and practising football, is a leisure-time activity *per se* without any further arguments. As in the previous case, it only added that the

²⁹⁶ The CPSI gave its statement where it referred to the fact that the evaluation of the concept of the employment relationship has gradually transformed to include new forms of social activities. According to the CPSI, the professionalisation and commercialisation of sports means that the position of the players vis-à-vis labour and social law has to be (re-)evaluated. Referring to its decision the CPSI stated that since all the essential elements of an employment relationship are present, there is no other possibility than to conclude that the player in question is in an employment relationship.

"pay" which had been given to the player was to be considered as financial aid of a leisure-time activity.

In order to obtain a precedent which could be used in evaluating the legal position of players in other possible cases, the Central Pension Security Institute appealed²⁹⁷ to the Insurance Court. In its appeal the CPSI referred to the professionalisation process of sport and stated that in practice sportsmen are in a position, which contains features analogous to an employment relationship.

The Insurance Court was not convinced. It dismissed the appeal and upheld the decision of the Pension Appeal Board.²⁹⁸ The argument used was, however, completely different. This time the Court did not approach the case from a general hobby v. work point of view but referred rather to the facts of the case. This approach did not, however, result in a more sophisticated and clear decision. Indeed, the obscure nature of the argumentation deserves a quotation:

"By taking into account the nature of the player contract between Miika Juntunen and Tampereen Ilves ry., the nature of playing football and the nature of the remuneration paid to Juntunen for playing football, and additional facts of the case, the Insurance Court considers that the

²⁹⁷ Under the judicial system on matters relating to pension rights the CPSI has a right to appeal to the Insurance Court on a precedent basis even though it is the decision-making authority in the first instance. Such an unusual system is based on the fact that the CPSI is the competent authority on pension rights and has the obligation to guarantee that occupational pension rights are granted and that pension payments are made.

²⁹⁸ The Insurance Court reached its decision after voting. By 5 votes to 2 it decided to affirm the decision of the Pension Appeal Board.

playing of football by Miika Juntunen in Tampereen Ilves does not constitute an employment relationship in the meaning of the Employment Pension Act"

Once again, the approach was unconventional. However, the result was, if possible, even more obscure than in the previous case. The Insurance Court simply referred to the 'nature' of football as a reason to deny the applicant's occupational pension rights. Taking into account that the CPSI had argued the case in detail one could have expected that the Insurance Court would have at least mentioned some of the points raised by the CPSI. However, the Insurance Court was obviously aware of the practical meaning of the decision. Thus, instead of attempting to deal with the question in conventional way, it decided instead to hide behind obscurity. However, since the Court decided to change the argument of the Pension Appeal Board, it indirectly admitted that a player might be considered as an employee under some circumstances, although such an interpretation may not have crossed the mind of the judges. In any case, the Court did not dare go as far as to recognise the practise of sports as gainful activity. As a whole, it seems as if the Court tried to do its best in avoiding an authoritative interpretation of the position of a player. The arguments put forward by the Court provided no help to the Central Pension Security Institute in its task of guaranteeing employment pension to those entitled to it. The Insurance Court simply refused to take responsibility for the issue.

1.2.3 A full-time foreign basketball professional: an indirect acceptance of the employment relationship of a player by the Supreme Court

In KKO 1993:40 the Supreme Court was indirectly faced with the issue of the legal position of a player. An American basketball player Baskerville Holmes and "Uudenkaupungin Urheilijat" ,-basketball club, had signed a written player contract according to which the player agreed to play and train basketball for the 1990 - 1991 season in the first team of the club in exchange for \$ 42,500, housing and car benefit. The contract contained a so-called "no cut clause" according to which the club had no right to cancel the contract after a specified date. However, the club cancelled the contract after this date on the basis of continuous breach of contract.²⁹⁹ The player claimed damages by referring to the "no cut clause" of his contract, which he considered a contract of employment.

The district court dismissed the claim on the basis that the player had lost the right to refer to the no cut clause of the contract since he was liable for intentionally violating the contract. However, the district court reached the decision on the basis of the general principles of Finnish contract law and, therefore, did not regard the contract as a contract of employment.

²⁹⁹ According to the evidence, the player had several times explicitly refused to play and practice even though the management of the team had given him a warning of his conduct.

The player appealed to the Appellate Court of Turku, which upheld the decision of the district court from the material point of view. However, the Appellate Court changed the legal basis of the decision by referring to Section 43 of the Contracts of Employment Act. By doing this, the Appellate Court indirectly regarded the player as an employee of the club and thus, declared the contract a contract of employment. However, the Court did this without further argument.

Once again, the player appealed the decision to the Supreme Court of Finland, which allowed the appeal to be heard. In its decision, the Supreme Court upheld the decision of the Appellate Court without substantial changes of argument. For the first time, even though indirectly and without thorough argument, a player was considered an employee of the club by the Finnish supreme courts.

At first sight it seems rather strange that the Supreme Court did not argue the position of the player in the light of the definition of the contract of employment since the question of the legal position of the player was in principle far more important than the interpretation of a particular clause in a player contract. However, since another case regarding the legal position of a player was already under consideration by the Supreme Court and since the case regarded a very specific type of a contract clause, the Court apparently decided to argue the general issue of the classification of the contract in the forthcoming case. However, the indirect application of the Contracts of Employment Act clearly anticipated the outcome of the other case.

1.2.4 An explicit acceptance of a player as an employee

Only two weeks after case KKO 1993:40, the Supreme Court of Finland directly considered a player contract, concluded between another American basketball player and a club, as a contract of employment.³⁰⁰

In KKO 1993:42 an American basketball player, Daryl Thomas, had undertaken to play basketball for the "Tapiolan Honka" basketball club during the 1989-1990 playing season. A written contract was drafted and it was signed by the player, but left unsigned by the club. The player arrived in Finland and was for a short time in the service of the club. However, rather soon after his arrival the player negotiated and signed another player contract with the "Turun NMKY" basketball club and, on the basis of this contract, he played the entire season of 1989-1990. The "Tapiolan Honka" club sued both the player and the "Turun NMKY" club for damages claiming that the player had breached the contract concluded between them and that the "Turun NMKY" club was guilty of contributory negligence for the breach of the contract. The "Tapiolan Honka" club argued that it had concluded a player contract with the player, and this contract was to be regarded as a sui generis contract according to Part 1, Section 1 (2) of

³⁰⁰ Koskinen has briefly commented the case after it was published. His analysis concerns only the issue of termination of the contract during the probation period. No mention is made of the importance of the case in respect of the employee status of sportsmen. See more in detail Koskinen LM 1994 p. 203 to 216.

the Contracts Act.³⁰¹ For their part, the player and the "Turun NMKY" club claimed that in the first place no contract between the player and the "Tapiolan Honka" club had been concluded, and in the second place that if a contract had been concluded, it was a contract of employment with a probation period. This time, in contrast to the previous case KKO 1993:40, the legal classification of the contract had clear material relevance since according to Section 3 of the Contracts of Employment Act, a contract of employment can be cancelled during the probation period by both parties without reference to the general preconditions of the cancellation of the employment contract in Section 43 of the Contracts of Employment Act, while under the general law of contract the cancellation of the contract requires a breach of contract from the other party.

The district court approached the issue in the traditional way by comparing the definition of the contract of employment and its criteria with the facts of the case. It paid particular attention to the fact that according to Section 1 (2) of the Contracts of Employment Act a contract of employment can be concluded for any kind of work and that professional sport had not been expressly excluded from the applicability of the Act. Furthermore, it stated that since the player had concluded a contract for playing and training basketball in exchange for wages with the club and since the management of the club had the right to direct and supervise the performance of the work, the contract was to be classified as a contract of employment. Therefore, and according to Section 3 of the

³⁰¹ "Oikeustoimilaki"

Contracts of Employment Act, the action was dismissed. The player had the right to cancel the contract during the probation period. The approach of the District Court was clearly based on the traditional approach although it did not argue the question about the scope of labour law in any particular detail.

The Court of Appeal of Turku upheld the decision of the District Court adding that there was no evidence submitted to the court which would imply that a professional athlete as an employee would not have the right to cancel the contract of employment during the probation period.

The Tapiolan Honka basketball club appealed to the Supreme Court of Finland. The Supreme Court granted leave to appeal. The Supreme Court reversed the decision of the Court of Appeal of Turku on the basis that, even though the player in principle had the right to cancel the contract during the probation period, the mere fact that he was offered a contract with a higher salary by another club was an inappropriate basis for the cancellation of the contract and was, therefore, contrary to Section 3 of the Contracts of Employment Act. With regard to the legal position of the player, the Supreme Court, however, upheld the ruling of the Court of Appeal. In its argumentation the Supreme Court at first simply stated that the player was a professional basketball player. The Court continued by referring to the terms of the contract, which stipulated in a detailed manner the relationship between the player and the club. According to the Court, the player did not have the freedom to decide upon his performance as a player. Thus, he was under the direction and supervision of the club. Furthermore, the

Court stated that the services were agreed to be rendered in exchange for monetary compensation. Therefore, the contract was to be classified as a contract of employment according to Section 1 of the Contracts of Employment Act.

The argument of the Supreme Court followed, rather straightforwardly, the traditional approach of separating the different criteria of the employment relationship and applying them to the facts of the case. However, what is interesting in the decision is that the Court for some reason started its argumentation by stating that the player was a professional player. This statement cannot be understood in any other way than that the compensation foreign players receive is usually relatively high and, therefore, the approach of the Insurance Court in the "Juntunen" case should not have been adopted. Stating that a high monthly salary would have been granted to support a leisure time activity would have made the decision obviously rather ridiculous. In addition, the Supreme Court did not try to refer to the 'specific nature' of the player contract as the Insurance Court had done in the "Juntunen" case.

Both in terms of the material outcome of the case and the approach taken, the judgement of the Supreme Court was strikingly different from the two decisions taken by the Insurance Court. Although not going into a very thorough analysis of the different components of the employment relationship in the meaning of the basic relationship theory, it is clear that the Court upheld the traditional approach relating to the scope of labour law. However, since the case concerned the position of a foreign player and since according to common belief,

only foreign players were 'professional', the Supreme Court may have underestimated the practical impact of its decision.

1.2.5 The Insurance Court follows the path opened by the Supreme Court

During the proceedings of the two cases in the Supreme Court, another case concerning the position of a Canadian ice-hockey player was pending under the procedural system of the Insurance Court. In the case VAKO 15.9.1994 Dnro 2542:93 the player, Gary Yaremchuck, had concluded a written player contract with "Liiga-Kärpät ry." ice-hockey club for the playing season of 1987-1988. According to the contract, the player agreed to play and train ice hockey in the first team of the club in exchange for monetary compensation, housing benefit and free use of a private car. The monetary compensation amounted to 292 000 FIM³⁰² for the playing season. Otherwise, the terms of the contract were in all essential ways identical to the terms of the player contract in the case concerning the semi-professional football player referred to above.³⁰³ The player was obliged to take part in the training and games of the team, he had to use the equipment provided by the club, he did not have the right to take part into any other sports events without the explicit permission of the club, and he was obliged to take care of his

³⁰² Approx. 50 000 €

³⁰³ VAKO 11.2.1993 Dnro 1400:91 ("Miika Juntunen")

physical condition and to behave in his private life according to what can be expected from a sportsman. If the player was absent from training or a game he was obliged to pay a fine which was deducted from his salary. The player applied for pension rights on the basis of the Occupational Employment Pension Act claiming that he was an employee in the meaning of Section 1 of the Act and Section 1 of the Contracts of Employment Act.

On an identical basis to the other cases³⁰⁴, the Central Pension Security Institute concluded that the player was an employee in the meaning of the aforementioned provisions. As described earlier, the arguments of the CPSI followed basic relationship theory in all details.

The club appealed to the Pension Appeal Board asking it to reverse the decision of the Central Pension Security Institute. Yet again, as in the "Juntunen" case, the Pension Appeal Board, by using very obscure arguments, reversed the decision. The wording being identical to the previous ruling. However, what is essential here is that these decisions were taken before the two decisions of the Supreme Court concerning the position of American basketball players.

The Central Pension Security Institute continued the process and appealed to the Insurance Court. Before the Insurance Court gave its decision, the afore mentioned cases from the Supreme Court had been published. Obviously following the path established by the Supreme Court, but without explicit reference to those rulings, the Insurance Court reversed the decision of

³⁰⁴See above the quotation of the decision of the Central Pension Security Institute.

the Pension Appeal Board and upheld the decision of the Central Pension Security Institute without any further arguments. Thus, the "classical" straightforward application of the criteria of employment relationship was adopted by the Insurance Court by reference to the arguments of the Central Pension Security Institute.

Again, the decision of the Insurance Court is striking if one takes into account the obscurity of its previous decisions on the issue. Its approach changed from almost total obscurity to the acceptance of the arguments of the CPSI, which represented no less than a stereotype of the approach based on basic relationship theory.

After the ruling of the Insurance Court it was clear that a player in team sport can be regarded as an employee, at least if the compensation he receives is substantial. However, what is common to the two decisions of the Supreme Court and the latest decision of the Insurance Court, is that in all of them the player was a foreign player who had been recruited from the "open player market" in order to strengthen the team. Agents represented these players and were openly seeking to earn their living from sport. The monetary compensation the players received was substantial and they were not engaged in any other professional activity.

At least for the Central Pension Security Institute, which is responsible for the administration of the occupational employment pension system in Finland, these rulings seemed to leave the position of (usually Finnish) players insecure

whose income from playing was not as high as the foreign players and who, perhaps, were at the same time engaged in other professional activity.³⁰⁵

1.2.6 A legislative intervention by Parliament

The question on the position of sportsmen in relation to labour and occupational social security law did not come as a great surprise to the public authorities. In fact, the Ministry of Social Affairs had already set up a working party composed of representatives from the Ministry of Labour, Ministry of Education, Central Pension Security Institute, the Association of Accident Insurance Companies³⁰⁶, the main sporting associations³⁰⁷, players' associations³⁰⁸, and the main social partner organisations,³⁰⁹ when the first cases were in the pipeline.³¹⁰

A proposal from the Government on legislation relating to the social security of sportsmen was given to Parliament at the end of 1994. This proposal summarised the difficulties relating to the practical application of occupational social security legislation to sportsmen. According to the proposal the main

³⁰⁵ See also Tapio 1993 p. 34 to 35.

³⁰⁶ Tapaturmavakuutuslaitosten liitto.

³⁰⁷ Suomen Liikunta ja Urheilu ry., Jääkiekon SM-liiga, Jalkapalloliiga, Superpesis Oy/Pesäpalloliitto, Suomen lentopalloliitto.

³⁰⁸ Suomen Liigafutaajat ry., Suomen jääkiekkoilijat ry.

³⁰⁹ Teollisuuden ja Työnantajain Keskusliitto, Suomen Ammattiliittojen Keskusjärjestö.

³¹⁰ See the proposal of the government 1994 vp HE 356 p. 5. The author of this study took part as an invited expert to two meetings of the working party.

reason for proposing the modifications was twofold. First of all, the proposal referred to recent case law. According to the proposal the decision of the Insurance Court in the 'Yaremchuck'-case must be considered as a precedent and, therefore,

"sportsmen must under certain conditions be considered as falling within the scope of the Occupational Pension Act".

However, it was additionally stated that the provisions of the Occupational Pension Act and the Accident Insurance Act cannot be easily applied to sportsmen. Thus, the Government proposed that sportsmen would be excluded from the scope of the Occupational Pension Act, the Pension Act for self-employed, and the Accident Insurance Act. Furthermore, it was proposed that the Wage Guarantee Act be modified in order to make it possible to exclude the application of the Act to certain professions, including professional sportsmen.

The arguments relating to the structural problems in applying certain pieces of legislation to sportsmen were undoubtedly relevant, although one may disagree with the solution to simply exclude sportsmen from the scope of an important part of social security legislation. However, from the point of view of this study it is interesting to see how the analysis in the proposal as regards the scope of labour law was clearly based on the main proposition of basic relationship

theory according to which the scope of different pieces of labour legislation is identical unless a given group of employees is excluded. Some parts of the part of the proposal relating to the notion of the employment relationship are worth citing:

"As performance of work can be regarded any human behaviour which has economic value. From the point of view of the employer, 'direction and supervision' means a right to give orders as regards the details on how to carry out the work, the quality and extent and the time and place of the work. The employee has an obligation to follow these orders while the employer has a right to control that the work is carried out according to his instructions. ... A contract of employment must also contain the right of the employee to be remunerated for the work he carries out." ³¹¹

These phrases could have been, and in reality probably were, taken from a textbook of Finnish labour law which usually start with an analysis of basic relationship theory. However, what is even more important in this context is that the proposal looks at the case law of the different competent courts but does not even imply that the concept and the criteria of an employment

³¹¹ "Työn teoksi katsotaan mikä tahansa inhimillinen suoritus, jolla on taloudellista arvoa. ... Johto ja valvonta merkitsee työnantajan kannalta oikeutta määrätä työn suoritustavasta, laadusta ja laajuudesta sekä työn ajasta ja paikasta. Työntekijällä on velvollisuus noudattaa sovittuja määräyksiä ja työnantajalla on oikeus valvoa, että näin tapahtuu. ... Työsopimukseen tulee sisältyä myös työntekijän oikeus vastikkeeseen tehdystä työstä." See more in detail 1994 vp - HE 356 p. 2.

relationship/contract of employment would be different under different pieces of labour law. Again, clear proof of the omnipotence of basic relationship theory. In fact, the whole structure of the proposal and the detailed proposals made to amend the scope of certain pieces of legislation were governed by the doctrine of the theory. In essence, *such an approach made it possible to preserve the theory and to leave its main propositions intact*. This was to be seen in forthcoming case law of the Supreme Court.

As the proposal to amend some specific statutes already implied, it is interesting to see how the question about applying labour and occupational social security law to sportsmen was difficult only from the point of view of some specific areas of legislation. The core of labour law, the Contracts of Employment Act, did not pose any particular difficulties of application. For instance, the practice of fixed-term player contracts was not in any way threatened by the prospect of considering players as employees. Section 37 of the Contract of Employment Act was by far sufficient to exclude player contracts from the application of the unfair dismissal provisions.³¹² Similarly, working time legislation did not pose any real difficulties as the average working time of players would not exceed the limits set

³¹² At the time of the proposal Section 2 (1) of the Contracts of Employment Act stated that "a contract of employment can be concluded for a fixed-term or for an indefinite period. A fixed-term contract can not be terminated during the contractual period unless otherwise stipulated". According to Section 2 (2) of the Contract of Employment Act, "a fixed-term contract can be concluded if the nature of the work, temporary substitution of another employee, apprenticeship or training or for other similar reason or if the employer has another kind of objective reason to conclude a fixed term contract based on the functioning of the company or the work to be performed. If the fixed-term contract has been concluded under other conditions than mentioned above or if fixed term contracts have continuously been renewed without objective reasons, the contract is to be considered as an open ended contract."

out by the Working Time Act.³¹³ With the exception of some potential problems relating to vicarious liability and the application of the Holidays Act,³¹⁴ the core of the difficulties was the application of occupational social security law.³¹⁵ And indeed, in this respect the prospect of applying the law in professional sports posed some difficult problems. For instance, the application of occupational pension legislation to sportsmen would have given them a retrospective right for occupational pension entitlements for the preceeding 10 years prior to the judgement granting them employee status. Obviously, no contributions would have been made to cover these entitlements and thus, leaving it to the general occupational pension system to take on board a new group of employees. In addition, the sports industry was faced with the prospect of paying the occupational pension contributions, which were estimated at around 15 to 20 % of the gross earnings of the players. Furthermore, the obligatory occupational accident insurance system was not adapted to the career of professional sportsmen taking particular account of their relatively high earnings within a short period of time. Finally, the protection of the employees in the context of the

³¹³ According to the survey carried out during the playing season 1992 - 93, the time spent in training and matches varied between 12 to 25 hours per week. Even if the spent on travelling etc. is added to this, the working time of professional sportsmen hardly can exceed the 40 hours per week/8 hours per day limits as laid down in the Working Time Act.

³¹⁴ The potential difficulties related to the Holidays Act concern the granting and payment of holiday entitlements once the fixed term player contract expires. In respect of vicarious liability, the potential problems relate to situations where a player causes injuries to other players or to the referees or spectators.

³¹⁵ See Rauste 1997 p. 183 to 184.

insolvency of their employer was also problematic as the insolvency of sports clubs had been a relatively common phenomenon.³¹⁶

With the exception of the proposal to exclude the application of the Wage Guarantee Act, the proposal of the Government was adopted by Parliament in March 1995.³¹⁷

1.2.7 A player with modest monthly earnings is also an employee: a classical application of the basic relationship theory

It did not take for very long until the questions, which had been left open after the rulings concerning the position of the foreign professional players were raised. In case KKO 1995:145 the Supreme Court had to answer the question which was left open after the previous rulings. However, as the amendments proposed by the Government on the scope of the Accident Insurance Act, the Occupational Pensions Act and the Insolvency Act had been adopted by Parliament, *the context of the decision was entirely different.*

A Finnish "semi-professional"³¹⁸ ice-hockey player brought an action in the district court of Pietarsaari against two individuals who had acted on behalf of

³¹⁶ Here the problem was essentially financial as the employee status of sportsmen would have guaranteed them the right to receive compensation from the wage guarantee fund.

³¹⁷ See more in detail Section 2 of the accident Insurance Act, Section 1(2) of the Occupational Employment Pension Act and Regulation on the pension and accident insurance of sportsmen. It would seem that the reason not to exclude sportsmen from the wage guarantee act is that they are not mentioned in the annex to Council Directive 80/987/EEC.

an unregistered sporting association. He sued for damages on the basis of an unsigned standard player contract containing an annex concerning the compensation to be paid to the player for his services as an ice-hockey player. The other defendant signed this annex. According to the annex to the player contract the player was to receive a monthly salary of 4200 FIM³¹⁹ amounting to a total of 25 200 FIM³²⁰ for the entire playing season of 1992-93. The player had played and trained with the team during the month of October 1992. The club (still at the time an unregistered association) cancelled the contract in the end of October 1992 without further arguments. The defendants claimed in the first place that the agreement constituted only a preliminary agreement, which required the approval of the board of governors of the association and, in the second place, that a player contract cannot be considered a contract of employment.

The District Court regarded the unsigned standard player contract and the signed annex constituted only a preliminary agreement and thus, did not amount to a legally valid contract. Therefore, the Court dismissed the action without the need to further argue the issue of the legal classification of the contract.

³¹⁸The term "semi-professional" is only used here to underline that the case concerned a player whose activity clearly was on the borderline between leisure time and professional activity. He played some games in a team at the level of division 1, which is the second highest level in Finland. However, the player obviously was not really even an average division 1 player since the reason for the action to cancel the contract was that the team did not consider his skills high enough in order to serve the team.

³¹⁹ Approx. 700 €

³²⁰ Approx. 4 200 €

The player appealed to the Court of Appeal of Vaasa. In contrast to the ruling of the District Court, the Court of Appeal considered that the combination of the unsigned player contract, the signed annex to it and the fact that orally it had been agreed that the player will start playing and training immediately with the team, constituted a legally valid contract. Consequently, the Court of Appeal was forced as well to answer the question concerning the legal classification of the contract since this issue had a direct influence on the outcome of the case. At the time the case was pending, the standard player contract of ice-hockey players contained a clause, which stipulated:

"The club and the player declare that the contract is not a contract of employment and, therefore, holiday compensation will not be paid to the player. Consequently the Employment Pension Insurance and the Employment Pension Act are not applicable to this contract".³²¹

The Court of Appeal of Vaasa concluded that the player had undertaken to play and practice ice hockey according to the direction and instructions of the management of the association in exchange for monetary compensation. The essential obligations laid down by the contract and the right to remuneration fulfilled the criteria of the contract of employment in Article 1 of the Contracts of

³²¹The original formulation in Finnish is: "Samalla seura ja pelaaja toteavat, että tämä sopimus ei ole työsopimus, eikä vuosilomakorvauksia suoriteta pelaajalle. Näin ollen TEL-vakuutukset ja -laki eivät myöskään liity tähän sopimukseen."

Employment Act. The declaratory stipulation by the parties of the contract denying the status of a contract of employment was disregarded. Since the defendants had acted on behalf of an unregistered association they were personally responsible to the player for the salary of the month of October 1992. As the contract stipulated that the board of governors had to approve the contract, the Court of Appeal regarded it as a fixed-term contract of employment which the board of governors of the association could terminate by giving notice. The evidence did not suggest that the contract had contained a probationary period.

The defendants appealed to the Supreme Court of Finland and a leave to appeal was granted. In its decision, the Supreme Court first of all stated that the fact that the player had started playing for the club and that the club had acquired the rights for his services from another club by paying a transfer fee, meant that a player contract between the player and the club had been concluded and had come into force regardless of the fact that the standard player contract was left unsigned. Since the defendants had acted on behalf of an unregistered association they were personally responsible for the contract as concluded on the basis of Section 58 of the Act of Associations. After these preliminary observations, the Supreme Court went on to consider the classification of the contract. The Supreme Court of Finland stated:³²²

³²²In Finnish the original ruling is as follows:

"Työsopimuslain 1 §:n 1 momentin mukaan työsopimuksella tarkoitetaan sopimusta, jossa toinen sopimuspuoli, työntekijä, sitoutuu tekemään toiselle, työnantajalle, työtä tämän johdon ja valvonnan alaisena palkkaa tai muuta vastiketta vastaan. Saman pykälän 2 momentin mukaan sopimus voidaan tehdä kaikenlaisesta työstä.

"According to Section 1(1) of the Contracts of Employment Act, a contract of employment means an agreement under which one party, the employee, agrees to perform work for the other party, the employer, under the direction and supervision of the latter in return for wages or other remuneration. According to the subsection 2 of the same provision, the contract can be concluded for any kind of work. [The player] has, on the basis of the negotiations with [the defendants] and, the signed contract, undertaken to play and train ice hockey in the first team of the club. There can be no reason why playing and training could not be regarded as work within the meaning of Article 1 of the Contracts

[Pelaaja] on [vastaajien] kanssa käymiensä neuvottelujen sekä allekirjoittamansa sopimuksen perusteella sitoutunut pelaamaan ja harjoittelemaan jääkiekkoa yhdistyksen edustusjoukkueessa. Ei ole syytä, miksi pelaamista ja harjoittelemista ei voitaisi pitää työsopimuslain 1 §:ssä tarkoitettuna työnä.

Työn tekeminen toisen lukuun edellyttää, että työnteen välitön taloudellinen arvo tulee toisen osapuolen eli työnantajan hyväksi. [Pelaajan] pelaamisen tulokset on tarkoitettu tulemaan yhdistyksen hyväksi.

Vastikkeellisuus merkitsee sitä, että työntekijä tekee työtään palkkaa tai muuta vastiketta vastaan. [Pelaajalla] on sopimuksen mukaan ollut oikeus saada pelaamisestaan 4 200 markan suuruinen kuukausipalkkio.

Työn johdolla ja valvonnalla tarkoitetaan työnantajan oikeutta määrätä muun muassa työn suoritustavasta, laadusta ja laajuudesta sekä sen ajasta ja paikasta. Työntekijän kannalta se merkitsee velvollisuutta noudattaa työnantajan tai tämän sijaisen toimivaltansa rajoissa antamia ohjeita sekä sallia työnteen ja sen tulosten tarkastaminen. [Pelaaja] on edellä sanotuin tavoin sitoutunut pelaamaan ja harjoittelemaan jääkiekkoa yhdistyksen johdon määräysten mukaisesti. Osallistuminen muihin kuin yhdistyksen tai Suomen Jääkiekkoliiton järjestämiin otteluihin on ollut kiellettyä. Lisäksi [pelaajan] mahdollisuus harrastaa muita urheilulajeja kuin jääkiekkoa on pelaajasopimuksen mukaan ollut rajoitettua.

[Pelaajan] solmima pelaajasopimus on siis täyttänyt kaikki työsopimuslain 1 §:n mukaiset työsopimuksen tunnusmerkit. Työsopimuslaki on ehdotonta oikeutta eivätkä osapuolet voi määrätä sen soveltamisesta keskinäisellä sopimuksellaan. Sen vuoksi sillä seikalla, että pelaajasopimus ei siihen sisältyvän ehdon mukaan ole työsopimus, ei ole vaikutusta asiassa.

Näillä perusteilla Korkein oikeus katsoo, että [pelaaja] on ollut työsopimuslain 1 §:n mukaisessa työsopimussuhteessa tuolloin vielä rekisteröimättömään yhdistykseen."

of Employment Act. Performing work to the other party requires that the direct financial value of the performance of work goes to the other party i.e. the employer. The results of the playing of [the player] are intended to come for the benefit of the association/club. Remuneration means that the employee performs the work in exchange for wages or other financial compensation. According to the contract, [the player] has been entitled to a monthly wage of 4200 FIM for playing [ice hockey]. Among other issues, the notion of the direction and supervision of the work signifies the right of the employer to direct and decide upon the way the work is to be performed, the quality and extent of the work, and the time and place of the work. From the point of view of the employee this means an obligation to follow the instructions given to him by the employer or the deputy of the employer within the limits of their competence and, an obligation to allow the supervision and follow-up of the performance and results of the work. As mentioned above, the player has undertaken to play and train ice hockey according to the direction and instructions of the management of the club. The participation to other games except those arranged by the club or the Finnish Ice-Hockey Federation has been prohibited. In addition, according to the player contract, the right to take part into other sporting activities except for ice hockey has been limited. Therefore, the player contract concluded by [the player] has fulfilled all the criteria of a

contract of employment in Section 1 of the Contracts of Employment Act. The Contracts of Employment Act contains peremptory provisions and thus, the parties of the contract may not agree upon its applicability. The fact that the player contract contains a provision which states that the contract is not to be regarded as a contract of employment is, therefore, without meaning in the case. On these grounds, the Supreme Court considers that [the player] has been in an employment relationship with the association which at the time of the coming into force of the contract was still unregistered."

The ruling of the Supreme Court leaves few doubts about the legal position of a player who has agreed to practice sport for a sports club in exchange for consideration, which fulfils the criterion of 'remuneration'. The ruling of the Court is particularly detailed if one compares it to other rulings of the Supreme Court in the context of the scope of labour law.

However, what is more important in this context is that the argumentation of the Court follows precisely the traditional doctrine of the "basic relationship theory" where the components of the employment relationship (contract of employment) are analysed separately and where the conclusion is reached on the basis of whether all the criteria are fulfilled or not. One can hardly imagine a more detailed application of the theory. However, why the Court in this case decided to 'apply the basic relationship theory' in a such a detailed way? If

one compares the decision to some other recent cases on the scope of labour law, the approach represents a pure application of the theory. For instance, in case 1990:29 the Court, although clearly having the components of the employment relationship in mind, concentrated on arguing the case in light of the particular facts of the case and concentrated essentially on one criterion. In fact, case 1995:145 is perhaps the most straightforward, explicit and pure application of basic relationship theory in the history of the Supreme Court. It may be that the Court used these 'stereotype arguments' simply in order to end the controversy on the position of sportsmen vis-à-vis labour law and decided to use the theory in such a purist way in order to leave no doubt to the question. Obviously, as mentioned above³²³, one of the effects of the 'theory' is to give the impression of a "logical conclusion"³²⁴. Thus, the theory is a useful tool for a court if it wishes to deal with a controversial issue without leaving doubts about the application of the law. However, the Supreme Court could have taken a similar position already in case 1993:42, but, although it clearly had the 'criteria' of the employment relationship in mind, it decided to concentrate on the facts of the case. Such an approach is obviously less effective if the Court is seeking to clarify a more general problem. Although cases 1993:42 and 1995:145 are different in the sense that the first case concerned the position of a full-time (foreign) professional player with relatively high earnings from sport while the second case was about a

³²³ One of the effects of the approach of the basic relationship theory is that the arguments seem to leave no doubt as regards the outcome of the case. The conclusion seem to be the only possible and lawful conclusion. See more in detail Sarkko 1980 p. 30 to 33.

semi-professional (Finnish) player whose earnings from sport were relatively modest, one can not avoid to wonder whether the real reason for arguing the case in a different way was the fact that Parliament had removed the main obstacles from declaring sportsmen in team sport as employees. In other words, the new context made it possible for the Supreme Court to make a clear statement on the problem by using the 'authority' of basic relationship theory in a 'purist' fashion. At least if one looks at the open arguments of the Supreme Court, conceptual jurisprudence is alive and well in Finnish labour law.

However, the story was not finished yet. The case did not resolve the position of players who, although playing under a detailed written contract, were not paid a regular salary. From the practical point of view this issue was very important since the number of players playing under a contract, which only covers the costs of playing and grants them, at most, some bonuses in the event of the team being succesful, in addition to some modest payments in kind, such as free meals, was and continues to be considerable.³²⁵

³²⁴ In Finnish: "Ainoa oikea ratkaisu".

³²⁵ According to the survey made, there seems to be a considerable number of such players particularly at the highest level of Finnish basketball. However, the results of the survey are not reliable in this case because in many other team sports and particularly ice-hockey there is a considerable number of players in lower divisions playing under such contracts.

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1.2.8 The Labour Council accepts the (partial) common view of the parties to the contract

Less than a year after the judgement of the Supreme Court, the Labour Council in TN 1327-96 was asked to interpret whether a player contract between player X and FC Porin Jazz was a contract of employment in the meaning of Section 1 of the Holidays Act and Section 1 of the Contracts of Employment Act.

A contract titled "player contract" had been concluded for the season 1994 with an option clause for the season 1995. The basic pay for the 1994 season was 120,000 FIM to which 1000 FIM was to be added for every game won, 500 FIM for every draw and additional bonuses in respect of the Finnish and European Cup. In addition, if the player was unemployed, i.e. without a "civilian job", he was to receive additional pay of 2 500 FIM per month.

Due to alleged breaches of contract, the Club cancelled the contract. The player took the case to court and asked, *inter alia*, for compensation for unused holidays on the basis of the Holidays Act. The club first denied that the contract would be considered a contract of employment but subsequently, after the player's counsel had referred to Supreme Court judgements KKO 1993:42 and 1995:145, it agreed to consider the contract as a contract of employment. However, the club's counsel stated, without referring to any provision, that a contractual relationship between a club and a player contains specific features,

which render some parts of labour law inapplicable to such a contract. It was further stated that,

"it would lead into an unreasonable situation for the clubs and the world of sport in general".

In respect of the scope of the Holidays Act, the club's counsel stated that the application of the Holidays Act requires regular working time and, as player contracts cannot, in all respects, be considered equivalent to contracts of employment, the Act should not be applied.

Although the argumentation of the counsel of the club was clearly very elementary, it contains an interesting reference to the general meaning of the case for the sport industry. A clear, albeit inelegant, teleological argument about the difficulties of application of the relevant material law.

In its decision, the Labour Court simply stated that:

"Taking into account the evidence on the contents of the contractual relationship between X and FC Jazz Pori, the Labour Council has no reason to depart from the joint opinion of the parties according to which the player contract was to be considered a contract of employment. Therefore, the Labour Council concludes that X has had an employment relationship with the club in the meaning of Section 1 of the Contract of

Employment Act and thus, the Holidays Act should be applied to his work.³²⁶

For the purpose of this study it is interesting to see how the Labour Council entirely disregarded the argument of the club which related to the difficulties of application in the context of sport. The club was not entirely of the opinion that a player contract should be regarded as a contract of employment but still the Labour Council referred to the "joint opinion of the parties". A clear example of the very formal way of arguing cases on the scope of labour law. In other respects the ruling was a mere confirmation of the decision of the Supreme Court in Case 1995 : 145.

1.2.9 "Case closed": the Supreme Court concentrates again on one criterion

In KKO 1997:38 a young ice-hockey player, Pasi Volotinen, brought an action before the District court of Joensuu asking for a declaratory judgement against the State of Finland. He asked the Court to declare that the written contract he had concluded with the club Joensuun Kiekko-Pojat ry was a contract

³²⁶ In Finnish: "Kun otetaan huomioon myös X:n ja FC Jazz Pori ry:n välisen pelisopimuksen sisällöstä esitetty selvitys, työneuvostolla ei ole aihetta poiketa osapuolten yhtäpitävästä käsityksestä, jonka mukaan pelisopimusta on pidettävä työsopimuksena. Tästä syystä työneuvosto katsoo, että X on ollut työsopimuslain 1 §:ssä tarkoitetussa työsuhteessa yhdistykseen ja että hänen työhönsä on siten tullut soveltaa vuosilomalakia."

of employment. According to the contract, Mr Volotinen was to play and train ice hockey in a team according to the instructions of the management of the club. In exchange for these services the club undertook to make the following payments:

- “point money” for regular season games - 250 FIM for each point the team gains;
- bonus of 5000 FIM in case the team after the season qualifies for the Finnish championship league;
- 10 litres of petrol for each 100 kilometres according to the playing and training programme for the use of player’s own car;
- one meal per day in a given restaurant during training and playing days;

According to clause 3 of the contract, the player and the club declared that the contract was not to be regarded as a contract of employment.

The club became insolvent during the playing season and, consequently, the player did not receive the agreed payments. On the basis of the insolvency of the club, the player had applied for a guarantee payment according to Section 1 of the Pay Guarantee Act (649/73). According to Section 1 of the Act, a necessary requirement for a guarantee payment is that the applicant has worked under a contract of employment according to section 1 of the Contracts of Employment Act. The State had refused the payment on the basis that the player contract between the player and the club could not be regarded as a contract of

employment. The State considered that the agreed payments could not be regarded as genuine remuneration. Thus, Mr Volotinen's activities as a player were to be regarded as a "hobby" and not as employment. The State agreed that playing ice hockey under a contract may, under certain circumstances, be regarded as employment but that each case had to be considered on the basis of the detailed facts of the case.

The District Court stated that the parties agreed that in principle playing and training ice hockey fulfilled the criteria of "work" in Section 1 of the Contracts of Employment Act. However, the District Court ruled that "taking into account the contribution of the player and the amount and the basis of calculation of the agreed compensation, the agreed fees were not to be considered as remuneration in the meaning of Section 1 of the Contracts of Employment Act"³²⁷. Furthermore, since the parties had not intended to create an employment relationship, the contractual relationship could not be regarded as an employment relationship.

The player appealed to the Appellate Court of Eastern Finland. The Appellate Court stated that the parties agreed that the player had performed work in the meaning of Section 1 of the Contracts of Employment Act, that the work was performed for the club and that the representatives of the club had directed and supervised the performance of the work. However, it considered that the parties

³²⁷ In Finnish: "Ottaen huomioon pelaajan työpanos sekä sanotun palkkion määrä ja sen määrätymisen perusteet on katsottava, ettei palkkio ole Työsopimuslain 1 §:ssä tarkoitettua palkkaa."

did not agree whether the performance of the services was rendered in exchange for remuneration in the meaning of the Act.

The Court argued the issue of remuneration in a relatively thorough manner. It concluded that taking into account the provisions of the contract as a whole, it seemed that the value of the payments and other benefits exceeded 12,000 FIM³²⁸ per year, i.e. 1000 FIM³²⁹ per month. Taking into account that the player was still at the very beginning of his career, the payments and other benefits were not so minor that they could not have been regarded as genuine remuneration for the services. Thus, the criteria of remuneration in the meaning of the Contracts of Employment Act were fulfilled. The Court also declared void the clause according to which the parties had agreed that the contract was not to be regarded as a contract of employment on the basis that the Contracts of Employment Act was mandatory law and thus, the parties could not contract out its application.

The State applied for leave to appeal, which was granted. The Supreme Court of Finland firstly stated that the parties agreed that with regard to the criteria of the contract of employment the parties disagreed whether the playing and training of Mr Volotinen had taken place in exchange for remuneration.

First of all, the Supreme Court stated that Section 1.1 of the Contracts of Employment Act does not require that a payment should exceed a certain amount

³²⁸ Approx. 2000 €

³²⁹ Approx. 150 €

in order to qualify as genuine remuneration. However, according to the Supreme Court, the remuneration cannot be so small that it is only symbolic. The Court referred to its previous judgements KKO 1990:29 (voluntary work)³³⁰ and KKO 1995:145, which have been analysed above. The Court stated that:

“Sporting and leisure time activity has in ice-hockey developed towards professional sports. Taking into account the socio-economic situation of players, the fees they receive already at the second highest level of 1. division can not be regarded as meaningless. Even if the fees of players like Mr Volotinen who are at the beginning of their career, may be lower than the fees to more experienced players playing in the same team, participation to matches is a necessary requirement for developing and advancing in the career of a professional sportsman. According to the player contract, Mr Volotinen could expect to receive fees, which were not only ostensible. During the playing season 1993-94 he seems to have received fees and compensation for petrol amounting to over 12 000 FIM. The fees have been inferior to the fees of other players because he has participated to only 15 matches during the season.

³³⁰ In KKO 1990:29 a person had performed laundering work for an association for 20 to 30 hours per week. She was compensated for her work, in addition to some pocket money, in the form of free accommodation, free meals, clothing and health care. Despite of the fact that the compensation undoubtedly contained financial value from a qualitative perspective, the main issue was whether the work was performed for remuneration or not. The Supreme Court of Finland answered in the affirmative.

However, the remuneration must be considered as remuneration from work and not as a subsidy given to support leisure time activity.³³¹

If one compares the arguments of the Supreme Court to case 1995:145, one can hardly avoid recognising a remarkable difference. Obviously, as the question of the position of a player had been decided from a general point of view in case 1995:145, there was no need to 'list' the components of an employment relationship and use the authority of the theory as a justification. Instead, the Court concentrated on the issue of 'remuneration' and, in particular, on the question of what can be considered as sufficient compensation in relation to the activity in question. However, what is perhaps more important, from the point of view of this study, is that the Court made explicit reference to the 'socio-economic factors' of players. This kind of argument is a relatively clear departure from the 'purist' approach in the previous case, although the central proposition of the theory, as regards an identical scope of labour law, is clearly behind the thinking of the Court. Thus, as the difficult question about the position of players in general had been decided, and since the practical difficulties on the application of the law

³³¹ In Finnish: "Urheilu- ja harrastustoiminta on jääkiekossa kehittynyt ammattiurheilun suuntaan ja pelaajien myös toiseksi korkeimmalla sarjatasolla I-divisioonassa ansaitsemilla palkkioilla on heidän taloudellis-sosiaaliseen asemaansa nähden erityistä merkitystä. Vaikka pelaajauran alussa olevien pelaajien, kuten Volotisen, palkkiot saattavat olla alhaisempia kuin samassa joukkueessa kokeneempien pelaajien, osallistuminen kilpailutoimintaan on edellytys kehittyä urheilijana ja edetä ammattiurheilijan uralla. Volotisella on pelaajasopimuksen mukaan ollut odotettavissa mahdollisuus ansaita palkkioita niin paljon, että vastike ei ole ollut vain näennäistä. Hänelle on pelikauden 1993-1994 aikana maksettu palkkiota ja polttoainekorvausta yhteensä ilmeisesti yli 12 000 markkaa. Korvaus on ollut pienempi kuin muilla pelaajilla, koska hän on pelannut yhdistyksen lukuun vain 15 ottelussa. Hänen saamansa vastike on kuitenkin ollut työnteosta maksettua palkkaa eikä ainoastaan harrastustoiminnan tueksi annettua avustusta."

had been removed by Parliament, the Court was able to argue the case more openly.

1.3 An analysis of the case law

Between 1992 and 1997, the supreme courts (The Insurance Court, the Labour Council and the Supreme Court of Finland) gave in all, eight decisions on the legal position of a player in team sport who had undertaken to play and train sport in exchange for monetary compensation. In the first two decisions, the Insurance Court refused to grant employee status to the players by using unconventional and obscure arguments, although in the first instance the Central Pension Security Institute had argued the case in the conventional way, concluding that the player was serving the club on the basis of a contract of employment. Then, when the Supreme Court in two subsequent decisions indicated that the applicants were employees, although not arguing cases in particular detail as regards the scope of labour law, the Insurance Court reversed completely its approach and followed the rulings of the Supreme Court. However, in all of these three cases the appellant was a foreign (American or Canadian) player who had been recruited from the 'open' player market and whose position as 'professionals' was undoubted.³³² The more difficult question with regard to the

³³² At the time of the decisions, the movement of EU/EEA players was very limited due to the fact that the ECJ had not given its judgement on the Bosman case, which radically liberalised the

practical significance of the issue was still open, i.e. the courts had not ruled upon the position of an average Finnish (EU) semi-professional player with regard to the scope of labour law.

Before the Supreme Court were to answer the latter question, Parliament made the task of the Court much easier by excluding explicitly the applicability of Accident Insurance legislation and Occupational Pension legislation to the activities of sportsmen. Thus, it was an easy task for the Supreme Court to end the controversy on the issue by giving another judgement which left no open questions, i.e. a player who was playing under a contract in exchange for monetary compensation was to be regarded as an employee. The arguments of the Court were a 'living statement' of the hegemony and omnipotence of the main proposition of basic relationship theory. Furthermore, the subsequent decision of the Labour Council, in which it entirely disregarded more general arguments about the practical difficulties of application, should also be emphasised.

Except for the very first case, where the income the player received was very low, the cases could not be distinguished on the basis of facts. The standard player contracts in different sports are almost identical without any substantial differences in terms of rights and obligations of the players. The different playing rules of different sports are obviously irrelevant for the legal issue in question. This controversial case law obviously raises several questions of which the

professional sports labour market. It can certainly be assumed that had the cases been pending

central one is, why was the issue so difficult in the first place and why did the Insurance Court so radically change the conventional way of considering and defining the scope of Finnish labour law?

As was indicated above, the outcome of the case had such an important practical meaning that considerations other than a purely formalistic application of the conventional criteria of the employment relationship seemed to have played such a strong role in the decision-making that the Insurance Court tried to hide the issue rather than challenge the established status quo. Granting the status of an employee to a specified group implies the right to protection under labour and occupational social security law which, in turn, imposes high financial and administrative constraints on the assumed employers. The question, which obviously follows is, why did the Supreme Court not hesitate to grant the employee status to a player? The way in which the Supreme Court gradually changed its arguments leading, as it did, to the "statement" in case 1995:145, implies that after certain legislative amendments it was able to openly accept the employee status of a 'player'.

With regard to the almost totally obscure nature of the decision-making of the Insurance Court one must bear in mind that the composition of the Insurance Court differs significantly from that of the Supreme Court. The Insurance Court is founded on a tripartite basis, where the social partners are represented. Therefore, it is possible that the social partners did not want a

generally non-unionised group of "workers" to be covered by labour and occupational social security legislation. This proposition gains important strength through the fact that the Finnish employment pension system grants employment pensions for the preceeding ten years of the professional activity of the person when the "established interpretation of the law" changes. And this would occur without any contributions to the system, i.e. the employment pension system as such would have to take the burden of covering a new, even though a relatively small, group of persons. What is perhaps more important though is that the clubs demanding the services of the players would have had to pay the social security of the players which as such amounts to a considerable percentage of the costs of employment.³³³

Furthermore, it would seem that the outcome of granting employee status to 'players' did not fit well into the traditional idea of the unity of labour law. These obstacles had to be removed before an open acceptance of 'players' as employees could be adopted. Thus, the system of Finnish labour law played a significant role in the cases. However, one does not find a single passage, not even a hint, of this problem if one only reads the arguments of the cases. However, if one reads the case law together with the proposal of the Government on amending certain Acts relating to occupational social security legislation, this argument is irresistible. A comparison of four cases from the Supreme Court,

³³³ As Wedderburn has argued, tripartism is not necessarily a guarantee for a 'labour court' to be successful. Other interests than the interests of the two sides of industry may be relevant to a case or, as the case law in question would seem to imply, the joint interests of the two sides of industry may, in some

KKO 1993: 40 and 42, 1995:145 and 1997:38 indicate that the Supreme Court used the 'legal criteria' of an employment relationship essentially as a justification rather than as the real *ratio decidendi*. Case 1995:145 stands out as a statement of the established doctrine, although the Court could have used the same arguments already in cases 1993 40 and 42. Case 1997:38, on the other hand, is a return to an approach where only one of the criteria receives the requisite attention. However, in all of the cases, the influence of the doctrine is evident.

However, these observations about doctrinal influence and the practical importance of the issue in the argumentation of the courts may not be correct. In order to 'test' these conclusions, a comparative analysis may provide additional elements. Therefore, in the following two chapters the same issue, the granting of employee status to a player, shall be analysed within the context of English law and the law of the European Community.

2 The position of a player under English law

2.1 The rise of professional gate-money sport in England

The professionalisation and commercialisation of sport in England has been studied in relatively great detail. In this thesis it is only possible to give a very superficial picture of this development.³³⁴

The rise of professional gate money sport in England took place in the period between 1875 and the first world war. This period witnessed a rapid development in commercialised spectator sport. There are several factors, all related to the changes in the living conditions of the working class in particular, i.e. "the masses", which explain the rising demand for spectator sport.³³⁵

First of all, the general standard of living rose rapidly during the last decades of the 19th century. The rise of real wages from 1870 to the 1890s has been estimated to be some 60% (in real terms based on 1870 prices). Even if the beginning of the century witnessed a decline in real wages, this decline should not be overestimated since the average real wage between 1900 and 1913 remained above that of the 1890s as a whole. Thus, the spending power of the working class was substantially higher than a few decades earlier. The greater prosperity made it

³³⁴ The most comprehensive presentation of the professionalisation of sports in Britain is made by Wray Vamplew in his outstanding work "Pay up and play the game. Professional sport in Britain 1875-1914." See also Tony Mason "Sport in Britain. A social history".

³³⁵ Vamplew p. 4 to 5.

financially possible for every working man, let alone his family, to attend sports events.³³⁶

Secondly, the late 19th century witnessed a rapid growth in the population. The increased life expectancy widened and deepened the potential market for commercialised spectator sport. But it was not only the growth in the population, which created demand for commercialised sport. It was also essential where this growing population was located and whether it could move from one place to another. According to statistics, the urban population increased by nearly 20% between the 1870s and the beginning of the 20th century, representing 77% of the total in 1901. Rapid urbanisation was the trend. Furthermore, improvements in transportation technology, particularly railways and tramways, made it possible for the increased population to move from one place to another. In short, there were more people living closer to each other, and even for those living in the outskirts of urban areas, it became possible to visit the urban centres without great difficulties with the result that a concentrated market for commercialised sport and recreational entrepreneurs was established.³³⁷

However, sport has an important temporal aspect to its demand. It is not only important that there is time off from work, which can be used, for the consumption of sport, it is also essential that this free time is located in a suitable place in the work-leisure calendar. Thus, the adoption of Saturday afternoon as "free time" was vital for

³³⁶ Vamplew p. 42 to 43 and 51 to 52.

³³⁷ Vamplew p. 53.

the breakthrough of the commercialised spectator sports. One has to bear in mind that in the late 19th century, technology did not yet allow sport events to be organised during evenings. Furthermore, organising sporting events on a Sunday was still prohibited.³³⁸

It did not take very long for the entrepreneurs to realise that the demand for entertainment could become a profitable business. Sports facilities were created and gate money charged. In order to raise the necessary capital for the considerable investments required for sport facilities, many sports clubs were compelled to continue their activities as companies. Furthermore, the need to cover the costs of the investments made it necessary to hold events on a regular basis which, in turn, led to improvements in the organisation of the events.³³⁹

These general developments also led to the professionalisation of sport, although players receiving monetary payments were not a novelty. However, the last quarter of the 19th century brought about the profession of 'sportsman' in an organised fashion. The earnings of professional sportsmen varied from one sport to another and, indeed, between players in the same sport, and even within the same team. For instance, the average earnings of professional cricketers was at around £ 4 to 5 a game at the turn of the century. However, before the introduction of winter pay,

³³⁸ Vamplew p. 48 to 49.

³³⁹ Vamplew p. 54 to 67.

the playing season of cricketers was short. Winter pay (at around £ 2 a week at the beginning of the 20th century) made the career of cricketers a full time profession.³⁴⁰

The earnings of football players were clearly on an upward scale in the 1890s, being at around £ 3 to £ 4 a week while already at the turn of the century the average earnings had risen to between £ 6 to £ 7 a week. This development led to the introduction of a maximum wage in football at the beginning of the 20th century.³⁴¹

Without going into further details, it is safe to say that the earnings of successful professional sportsmen were high in relation to other working-class incomes. However, sportsmen had very little long-term job security and the risk of injuries were ever present. There was strict limitations on player mobility imposed by the clubs and the respective central organisations in different sports. It is no great surprise that sportsmen began to unionise although this development was far from straightforward.³⁴² In the light of what went on before, it was only natural that the legal status of professional sportsmen was challenged in courts.

2.2 Walker v. The Crystal Palace Football Club Limited

The question regarding the legal position of a player had, therefore, to be answered quickly. In *Walker v. The Crystal Palace Football Club Limited [1910]*

³⁴⁰ Vamplew p. 218 to 220.

³⁴¹ Vamplew p. 222 to 226.

³⁴² Vamplew p. 227 to 229.

1 K.B. 87, the Court of Appeal unanimously held that a professional football player was a "workman" under the Workmen's Compensation Act and, thus, was serving the club under a contract of service.³⁴³

The player had entered into a written agreement to serve the respondents for one year, at a weekly wage, by playing football with the respondents' team when required, and to attend training sessions regularly and to observe the training and general instructions of the club. The training regulations required the players to attend the ground every day at 10.30 am and to be under the orders of the trainer for the day. Unfortunately, Walker suffered an accident while playing in a match., and whilst the club paid him his wages to the end of the year, he then claimed compensation for permanent incapacity.

The club contested the position of the player as a workman under the meaning of the Act by referring, first of all, to the definition of the contract of service formulated by Bramwell LJ in *Yewens v. Noakes*³⁴⁴. According to the club, players are engaged to exhibit their skill in playing football and thus, the control of the club only extends to saying whether each man is to play or not. Therefore, according to the club, the manner in which a player plays the game is left to his

³⁴³The definition of a workman was given in section 13 of the Workmen's Compensation Act 1906: "The definition of a workman does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into, or works under, a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

³⁴⁴[1880] Tax Cas. 260. See above Part II chapter 2.2.3.2.

own skill and judgement with the result that the common law definition of contract of service is not fulfilled. Secondly, the club claimed that "the game of football which the applicant was hired to exhibit is a sport or pastime, not work". In other words, since football is generally regarded as a hobby, it cannot become a 'profession' and, thus, a player cannot be viewed as a "workman" under the meaning of the Act.

The player's was stopped by the court at the very beginning implying that the arguments of the club were not convincing. Cozens-Hardy M.R. gave the first opinion. After reviewing the facts, he noted that according to the written regulations and instructions given to the player by the club, the player agreed to devote his whole time, to attend regularly to games and training, and to follow a number of detailed regulations. Then he went on to his conclude:

"I feel myself quite unable to entertain any doubt that this man has entered into a contract of service with the club. I think it was a contract by way of manual labour, but, whether it was so or not, I think it is a contract which plainly comes within those words "or otherwise", and that we should be narrowing the Act most unduly if we were to say this man was not entitled to get compensation as the result of the accident."³⁴⁵

The reasoning of Cozens-Hardy MR was shared by Fletcher Moulton LJ:

³⁴⁵at 92.

"I cannot see any reasonable room to doubt that a professional football player employed as this man was is within the terms of the Act. Here is a company that carries on the game of football as a trade, getting up and taking part in football matches. In order to share in the proceeds of those matches they must, of course, have a team, which they can send to represent them in the games. This they obtain by entering into contracts of service with definite persons who are called professional football players, and who, in the language of the Master of the Rolls, give up their time for the purpose. Now I ask myself why is such a contract, which is in its form a contract of service, not to be regarded by us as such? I can see no reason."³⁴⁶

In similar terms, Farwell LJ had no doubts about the legal position of the player. However, instead of analysing the position of a player in general, he gave his opinion on the two arguments raised by the counsel of the club. The first argument claimed that the requirements of the control test are not fulfilled in the case of a football player. Farwell LJ did not agree:

"They first of all say there is no contract of service with an employer because the football player is at liberty to exercise his own initiative in

³⁴⁶at 92-93.

playing the game. That appears to me to be no answer. There is many employment in which the workman exercises initiative, but he may or may not be bound to obey the directions of his employer when given to him. If he has no duty to obey them, it may very well be that there is no service, but here not only is the agreement by the player that he will serve, but he also agrees to obey the training and general instructions of the club. I cannot doubt that he is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game - that is to say, any direction that is within the terms of his employment as a football player."³⁴⁷

He then went on to the second argument concerning the nature of football as "work". He was not convinced of this argument either:

"It appears to me that it is impossible for the Court to consider the practical utility of the service or work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is, therefore, necessarily

³⁴⁷ at 93.

excluded from the definition of workman within the meaning of the Act."³⁴⁸

For the purpose of this study, it is not only interesting that the Court of Appeal unanimously held that the applicant football player was serving under a contract of service, but that the case was decided during a time when the narrow interpretation of the control test was dominant. Nevertheless, the Court of Appeal had no doubts about the legal position of the player. It is difficult to think of another case where the opinions of the judges could have been more unambiguous. The arguments of the club were simply destroyed. A professional football player was a 'servant' and the club was his 'master'. Taking into account the class-orientated nature of the 'contract of service' at the time of the judgement, it is interesting to note how footballers were assimilated as 'blue collar workers' in the eyes of the law at the beginning of the 20th century. In other words, despite of the narrow scope of the definition, the players were clearly considered to be falling within that scope.

Walker v. Crystal Palace Football Club Ltd. is the only case, which directly concerned the legal nature of a player's contract. Thus, the gradual changes in the definition of the contract of employment did not raise the issue again. This is natural because, as explained earlier, changes to the definition have, from a general point of view, only widened the scope of the contract of

³⁴⁸at 93-94.

employment. However, for the purposes of this study it is necessary to try and trace whether any indirect changes may have taken place.

2.3 Other cases

There are several other cases which highlight the position of the player and his contract with the club from the time of the *Walker* decision up to the present day. Until the 1950s these cases arose in the context of taxation. However, in the modern cases the issue has changed to concern problems about restraint of trade. The two sports involved in the case law have without exceptions been football and cricket.

The first of these cases, *Seymour v. Reed (Inspector of Taxes) [1927] A.C. 554*³⁴⁹, regarded a situation where a professional cricketer was, on the basis of the rules of the club, granted a so called 'benefit match'. The money paid for admission by spectators at the match was, in accordance with the club's regulations, held by the club for the player until, in 1923, it was used to purchase a farm for him. The problem, which arose, was whether the money from the benefit match was taxable income under Schedule E.

The House of Lords (Lord Atkinson dissenting) held that the money was not taxable on the basis that it was a personal gift from the public to the player and not a profit arising from his employment within Sch. E. However, what is more

³⁴⁹See also the decision of the Court of Appeal [1927] 1 K.B. 90 and the decision of the King's Bench Division of the High Court [1926] 1 K.B. 588 in the same case.

interesting in this context is that the case provides detailed information on the position of the player in general. Even though the case was decided in the context of taxation, where being taxed under Schedule E (generally for employees) instead of Schedule D (generally for self-employed) does not automatically mean that the person is employed under a contract of service, it is clear from the wording used by the lawlords that the contract between the player and the club was one of service.³⁵⁰

An analogous situation took place in *Davis v. Harrison* [1927] All ER 743. A professional footballer was, according to the agreement between the parties and the rules of the Football Association and the Football League, granted, as a benefit payment after five continuous seasons, part of a transfer fee payable by his new club to his old. The case was distinguished from *Seymour v. Reed* and it was held that the payment was additional remuneration arising from employment and taxable under Sch. E. Again, there are no doubts that the player was engaged under a contract of service.

The situation was similar in the joint case of *Corbett v. Duff* (*Inspector of Taxes*), *Dale v. Duff* (*Inspector of Taxes*) and *Feeberg v. Abbott* (*Inspector of Taxes*) [1941] 1 K.B. 730. Football players had received benefit payments from the clubs employing them in accordance with the rules of the Football League. It was held that all the payments in question were made in respect of, and as

³⁵⁰None of the lawlords even took up the question whether the possible liability for taxation could instead of Schedule E be under Schedule D. In addition the unambiguous use of the words 'serving'.

remuneration for, the players' employment as footballers and that they were, therefore, taxable. The players were undoubtedly serving under a contract of service.

The last of the taxation cases, *Moorhouse (Inspector of Taxes) v. Dooland* [1955] 1 All ER 93 concerned a situation where a cricket player was entitled, on the basis of the contract between him and the club, and in accordance with the rules of the cricket league, to have a collection made whenever he had a particularly meritorious performance in batting or bowling for the club. The Court of Appeal held that the collections were taxable under Sch. E because they arose in the ordinary course of the taxpayer's employment. The contract between the player and the club was explicitly regarded as a contract of employment even though it did not have direct relevance for the case.

The modern cases arose in the context the restraint of trade doctrine. In *Eastham v. Newcastle United Football Club, Ltd. and Others* [1963] 3 All ER 139, a player challenged the so called retain and transfer system³⁵¹ in force in professional football. This time the legal status of the contract had direct relevance since the doctrine of restraint of trade makes a distinction between

'employment', 'employer' etc. do not leave any doubts about the legal nature of the initial contract. See e.g. Lord Atkinson at 564.

³⁵¹Without going into more details of the system, the effect of the combination of retention system and transfer system was that a retained player after termination of employment by a club could not obtain employment as a player except with a club willing to pay the transfer fee, subject to the management committee's power to reduce the fee required by the club, and could not escape outside the league. Of the history of the system see Katz 1994 pp. 371 to 420. Of the economic aspects of the system see Sloane 1969 pp. 181 to 199. To be accurate, it has to be noted that this was not the first time the retain and transfer system was challenged in courts. In *Kingaby v. Aston Villa Football Club* (Unreported), the system was challenged on the basis of tort law. See "The Times" March 28, 1912.

contracts entered into by vendors and purchasers of business, where the parties are of equal strength, and contracts between master and servant, when often they are not.³⁵² Without any reference to the case law or doctrine, Wilberforce J argued the case on the basis that the contract between the player and the club was a contract of service/employment.³⁵³ There was simply no reason to question a self-evident fact, i.e. the system as existing at the date of the writ was considered as being an unreasonable restraint of trade.

Practically the same question arose 15 years later in cricket with the same outcome. In the joint case *Greig and Others v. Insole and Others, World Series Cricket Pty. Ltd. v. Greig and Others* [1978] 1 W.L.R., the Chancery Division of the High Court regarded a similar system of rules denying the freedom to change a club as being an unreasonable restraint of trade. Again, the contracts between the players and the clubs were considered as contracts of employment without further arguments.³⁵⁴

³⁵²See Wilberforce J at 146.

³⁵³A very detailed description of the labour market in professional football is provided at 142 to 150.

³⁵⁴Slade J e.g. at 326.

2.4 The present legal status of a professional footballer in England: A brief analysis

The legal status of professional sportsmen in team sport is not controversial in England. Professional players who have entered into a contract with a club are employees in the fullest sense of the concept. It is sufficient to look at the rules of the Football Association³⁵⁵. Paragraphs 18 to 22 contain the rules relating to players. Paragraph 18 (c) is headed "Contract of Employment" and states:

"All contracts of employment or letters of employment exchanged between a Club and any Official, Player, Manager, Coach, Trainer or any other employee of the Club, shall specify that all emoluments due to the individual shall be paid to the individual concerned and not to any company or agency acting on behalf of the employee, and all such contracts shall specify that the individual is directly under the disciplinary control of the Club and of The Association."

In a similar way, The Football League Regulations under Section 6, Regulations 44 to 78, lay down the rules concerning "Players' registrations,

³⁵⁵ The Football Association Handbook, season 1995-96.

transfers, and *contracts of service*³⁵⁶. For instance, Regulation 63 (2) first paragraph states that:

"All *Contracts of Service* between Clubs and Players must be on the official form supplied by The Football Association and approved by The League and may be for any period expiring on the thirtieth day of June in any year except for monthly contracts. The contracts must be signed on behalf of the Club by either the Chairman alone or the Manager or Secretary or duly appointed signatory together with one Director. Clubs shall be free at any time except between the fourth Thursday in March and the end of that Season to re-negotiate or amend the *Contracts of Service* with its own Players on such terms as shall be mutually acceptable except that any contract re-negotiated or amended during a Season shall be dated to expire at least one year later than the existing contract between the Club and the Player."

The standard players contract of the F.A. Premier League and Football League Contract contains detailed provisions on the rights and obligations of the contracting parties (see Annex II).

The status of professional football players in England is absolutely clear, they are employees under a written contract of service and have been so

³⁵⁶ The Football League Handbook, Season 1995-96.

throughout the century. As prime testimony to this situation is the "Report of a Committee of Investigation into a Difference Regarding the Terms and Conditions of Association Football Players" of 1952 appointed by the Minister of Labour and National Service. Under paragraph 38 of the Report the Committee concludes:

"Association football, a sport and a recreation to a vast body of spectators throughout the country, is to the professional footballer his industry in which he seeks his livelihood. Employment by a Football League club is a hallmark of his professional ability and we cannot doubt that his industry's success is inextricably bound up with the success of the Football League."³⁵⁷

Throughout the Report it is absolutely clear that a player is engaged under a contract of employment.

³⁵⁷ The Committee was appointed to investigate the practice of the retain and transfer system in force in the football industry under the Football Association's rules.

3 Sport and sportsmen in the case law of the European Court of Justice

3.1 Introduction

Sport has been the subject of three preliminary rulings of the Court of Justice under Article 234 (ex-Article 177) of the Treaty, namely Case 36/74 Walrave and Koch v AUCI³⁵⁸, Case 13/76 Dona v Mantero³⁵⁹ and the recent "Bosman" case (Case C-415/93).³⁶⁰ The Dona and Bosman cases both concerned football and, particularly the latter case, is of importance in this context since it takes a clear position on the applicability of Article 39 in the case of a professional sportsman in team sports. In this chapter the case law shall be analysed in detail in the following by paying specific attention to the argumentation of the Court. The observations of the respective Advocates General are also of vital importance.

In legal literature the scope of the relevant provisions has not received particular attention. In the context of the general analysis of Articles 39 to 42 (ex. Articles 48 to 51) sport and sportsmen are not usually mentioned as a specific category.³⁶¹

³⁵⁸ See chapter Part II chapter 3.3.2.

³⁵⁹ Case 13/76 Gaetano Donà v Mario Mantero [1976] ECR 1333.

³⁶⁰ Case C-415/93 Union Royale Belge des Sociétés de Football Association ASBL and Others v Jean-Marc Bosman and Others [1995] ECR 4921.

³⁶¹ The work of Schroeder is an exception to the general rule. He distinguishes between amateur and professional levels and between different sports. The work is, however, slightly out-of-date since several rulings of the Court have been given since the publication of this book. See for more detail Schroeder 1989 p. 92-120. Another positive exception is the brief remark by Picard: "Some cases are on the

3.2. The case law

3.2.1 The earlier cases: "Walrave" and "Dona"

In the two earlier cases the Court ruled on the general applicability of Community law to sport. As mentioned above, the Walrave case concerned two Dutch nationals who acted professionally as pacemakers in cycle races ('motor-paced bicycle races'). In that sport, each participant cyclist has a pacemaker on a motor cycle in whose the wake of which he rides. The races the applicants, Mr Walrave and Mr Koch, took part in included the world championships. The international association for cycling sport (Union Cycliste Internationale) had drawn up rules for the championships under which the pacemaker and the stayer had to be of the same nationality. The applicants considered those rules to be contrary to Community law and brought an action in the Arrondissementsrechtbank (District Court) Utrecht, which asked the Court of Justice, *inter alia*, whether Community law can be applicable to sporting activities.

The *Walrave* case concerned directly the scope of Articles 39 to 42 and/or Articles 49 to 55 (ex-Articles 48 to 51 or 59 to 66) of the Treaty. Its impact to the evolution of the key concepts has already been analysed above.³⁶² Leaving

borderline between two kinds of activities, such as sport, which may be practised as part of a contract of employment or by self-employed people". See Picard 1992 p. 659. An example of uncritical remarks is that by Catala and Bonnet, who conclude that sports professionals are workers by simply referring to the Walrave case even though in the case it was clearly stated that it concerns Articles 48 to 66 (new Articles 39 to 55) of the Treaty and not only Articles 48 to 51 (new Articles 39 to 42). See Catala and Bonnet p. 73.

³⁶² See above Part II chapter 3.3.2.

aside the general considerations regarding the interpretation of Article 39 of the Treaty aside, the Walrave case clearly established that the practice of sport is subject to Community law. However, according to the Court, certain preconditions must be fulfilled. First of all, it is essential that the practice of sport constitutes an economic activity within the meaning of Article 2 of the Treaty. These activities may be pursued either in the form of gainful employment or remunerated service, i.e. contract of employment or self-employment. As the prohibition of discrimination based on nationality applies equally to "gainful employment" and "remunerated service", the distinction between these forms of work was not considered essential within the context of the case. However, the Court stated that the prohibition of discrimination based on nationality does not affect the particular composition of sport teams, in particular national teams, the formation of which, according to the Court, is a question of purely sporting interest and, as such, has nothing to do with economic activity.

As mentioned, the Court was not willing to take a position on whether the contractual relationship between the stayer and the pacemaker was a contract of employment or a contract for services as it considered this question irrelevant to the case. However, it is worth mentioning in this context that Advocate General Warner considered the activities as falling within the scope of Article 49 (ex-Article 59) of the Treaty, i.e. as provided under a contract for services.³⁶³ On the

³⁶³ See more in detail the Opinion of Mr Warner at p.1425.

other hand, the Commission, in its observations, considered that the relationship in question was to be regarded as a contract of employment.³⁶⁴ However, as the Court did not consider this question relevant for the case, it is not worth arguing the question in more detail in this context.

In *Dona v Mantero* the ECJ was asked to deliver a preliminary ruling in the context of an action between two Italian nationals over the compatibility of Articles 39 and 49 of the Treaty with certain provisions for the rules of the Italian Football Federation, under which only players who are affiliated to that federation could take part in matches as professional or semi-professional players, whilst affiliation in that capacity was, in principle, only open to players of Italian nationality.³⁶⁵

The ECJ first of all confirmed its ruling in the *Walrave* case by stating that "the practice of sports is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty"³⁶⁶. However, the Court went on to apply this test in the context of football players. It stated that:

³⁶⁴ See more in detail at p. 1409.

³⁶⁵ For general commentary of the case see e.g. Forlati Picchio Laura, *Rivista di Diritto Internazionale* 1976 p. 745 to 760; Trabucchi Alberto, *Giurisprudenza Italiana* 1976 I sez. I Col. 1649 to 1654; Barile Paolo, *Giurisprudenza Italiana* 1977 I sez. I Col. 1409-1414.

³⁶⁶ Paragraph 12 of the Judgement

"This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service. Where such players are nationals of a Member State they benefit in all the other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services."³⁶⁷

Thus, professional and semi-professional players were to be regarded as falling within the scope of Articles 39 to 42 or 49 to 55 of the Treaty. Again, as was the case in *Walrave*, the Court did not take a position on whether a sportsman, in this case a professional or semi-professional football player, should fall within the scope of Article 39 or 49 of the Treaty. As the question related solely on matters of discrimination based on nationality, it seems that the Court did not consider the precise legal basis of its ruling as having material relevance.

It is, however, interesting to note that Advocate General Trabucchi stated in his Opinion that:

"the fact remains, however, that the players have a professional or semi-professional status, which, in fact, put them in the position of employees as against the club which runs the team."³⁶⁸

³⁶⁷ Paragraphs 12 and 13 of the judgement.

³⁶⁸ Opinion of Advocate General Trabucchi delivered on 6 July 1976. ECR [1976] 1343.

With regard to the boundary between economic activity and activities with a purely sporting interest, the Court slightly redefined its position by stating that Articles 39 to 42 and 49 to 55 do not prevent

"the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries."

Although it is difficult to provide evidence, this ruling left doubts as to whether the Court intentionally avoided being more precise in its judgement. It took almost 20 years before the questions left open would be answered in detail.

3.2.2 "Bosman"

Most of the open questions relating to professional team sport in the context of the free movement of persons were answered in the recent judgement of the Court in the *Bosman* case. This ruling, which without any doubts has received more publicity than any other case in the history of the ECJ, is very

interesting from the point of view of Community law in general. However, in this context it is necessary to concentrate only on the question of the scope of the provisions of the relevant Treaty provisions.

Before going into the actual ruling of the Court, it is necessary to summarise the facts of the case before the national court.³⁶⁹

Mr Jean-Marc Bosman, a professional footballer of Belgian nationality, was employed from 1988 by RC Liège, a Belgian first division club, under a contract expiring in June 1990, which assured him an average monthly salary of BFR 120,000, including bonuses. In April 1990, RC Liège offered Mr Bosman a new contract for one season, reducing his pay to BFR 30,000, the minimum permitted by the Belgian Football Federation's rules. He refused to sign and was put on the so-called transfer list. The transfer fee was set, in accordance with the Federation's rules, at BFR 11,743,000. Since no club showed an interest in a compulsory transfer, Mr Bosman made contact with US Dunkerque, a club in the French second division, which led to his being engaged for a monthly salary of approx. BFR 100,000 plus a signing-on bonus of some BFR 900,000. In July 1990, a contract was also concluded between RC Liège and US Dunkerque for the temporary transfer of Mr Bosman for one year, against payment by US Dunkerque to Liège of a compensation fee of BFR 1,200,000 payable on receipt by the French Football Federation of the transfer certificate issued by the Belgian

³⁶⁹ The facts of the case are particularly extensive as the litigation involved several different phases. During the litigation, three preliminary rulings were referred to the Court of Justice. The

federation. The contract also gave US Dunkerque an irrevocable option for full transfer of the player for BFR 4,800,000. Both contracts, between US Dunkerque and RC Liège, and between US Dunkerque and Mr Bosman, were, however subject to the suspensive condition that the transfer certificate must be sent by the Belgian Federation to the French Federation in time for the first match of the season, which was to be held in August 1990. RC Liège, which had doubts as to US Dunkerque's solvency, asked the Belgian Federation not to send the said certificate to the French Federation. As a result, neither contract took effect. On 31 July 1990, RC Liège also suspended Mr Bosman, thereby preventing him from playing for the entire season. On 8 August 1990, Mr Bosman brought an action against RC Liège before the Court of First Instance of Liège, applying among other issues that a question be referred to the ECJ for a preliminary ruling. The Court of First Instance of Liège found in favour of Mr Bosman and referred to the ECJ a preliminary ruling on the interpretation of Article 48 of the Treaty in relation to the rules governing transfers of professional players. In the meantime Mr Bosman was looking for further offers from France and Belgium but faced considerable difficulties in finding new employment as a professional footballer. According to the national court, there was strong circumstantial evidence to support the view that, notwithstanding a 'free status' conferred upon him by an interlocutory order, Mr Bosman was boycotted by all European clubs which might

first and the second reference were respectively removed from the register of the Court following a new reference.

have engaged him. In the meantime the parties to the litigation elaborated their arguments following voluntary interventions by French and Dutch professional footballers' unions to support the claims of Mr Bosman. The court of First Instance of Liège held that it had jurisdiction to entertain the main actions. The Belgian Federation, RC Liège and UEFA, which had become involved in the proceedings following a writ by Mr Bosman, appealed against the decision of the decision of the court of First Instance. The Court of Appeal of Liège referred a preliminary ruling to the ECJ concerning the interpretation on Article 39, 81 and 82 of the Treaty, which removed from the register of the Court the previous references for a preliminary ruling. The question put to the ECJ by the national court was as follows:

"Are Articles [39, 81 and 82]³⁷⁰ of the Treaty of Rome of 25 March 1957 to be interpreted as:

- (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;
- (ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of

³⁷⁰ Articles 48, 85 and 86 at the time of the judgement.

foreign players from the European Community to the competitions which they organise?"³⁷¹

The Court of Justice answered in the affirmative to both questions in respect of Article 39 of the Treaty but considered that ruling on the interpretation of Articles 81 and 82 of the Treaty was unnecessary as the rules to which the national court's question refer are contrary to Article 39.

The case has been the subject of extensive commentary.³⁷² However, no particular attention has been paid to an aspect which is of primary importance to this study³⁷³: The Court, without any hesitations applied Article 39 of the Treaty in the case, even though in the *Walrave* and *Dona* judgements the Court explicitly referred to Articles 39 and 49 of the Treaty and thus, avoided taking position as to

³⁷¹ The first reference for a preliminary ruling by the court of first instance of Liège (Case C-340/90) asked the Court of Justice to interpret Article 39 in the context of the transfer rules. In the course of new pleadings Mr Bosman had developed his case by taking on board aspects relating to Community competition law (Articles 81 and 82 of the Treaty). Thus, the two subsequent requests for a preliminary ruling asked for the Court of Justice to interpret Articles 39, 81 and 82 of the Treaty. As Community competition law does not, at least in principle, give any formal or substantial significance for the classification of a given legal relationship in a similar way as is the case between Articles 39 and 49 of the Treaty, Articles 81 and 82 can be set aside in this context. This is even more so as the Court itself in the judgement refused to interpret Articles 81 and 82 on the basis that it considered the transfer rules and nationality clauses contrary to Article 39.

³⁷² See e.g. O'Keeffe David - Osborne Paul, *The International Journal of Comparative Labour Law and Industrial Relations* 1996 p. 111 to 130; Van Miert K, *Revue du Marché Unique Européen* 1996 no 1 p. 5 to 9; Demaret Paul, *Revue du Marché Unique Européen* 1996 no 1 p. 11 to 15; O'Keeffe David - Osborne David, *Revue du Marché Unique Européen* 1996 no 1 p. 17 to 44; Campogrande G, *Revue du Marché Unique Européen* 1996 no 1 p. 45 to 56; Pappalardo A - Parisi N, *Revue du Marché Unique Européen* 1996 no 1 p. 57 to 64; Dupont Jean-Louis, *Revue du Marché Unique Européen* 1996 no 1 p. 65 to 77; Késenne Stephan, *Revue du Marché Unique Européen* 1996 no 1 p.79 to 87; Thill Marc, *Revue du Marché Unique Européen* 1996 no 1 p. 89 to 117; Nyssen L, *Revue du Marché Unique Européen* 1996 no 1 p.119 to 133; Parisi Nicolas - Fernández Salas Mariano, *Revue du Marché Unique Européen* 1996 no 1 p.135 to 153; Fernández Salas Mariano, *Revue du Marché Unique Européen* 1996 no 1 p.155 to 170; Pollet Kris, *European Business Law Review* 1996 p. 141 to 145;

³⁷³ See, however, a brief analysis by Thill in (1996) *Revue du Marché Unique européen* p. 89 to 117 at 102 to 103.

whether a cyclist or a football player was to be regarded as a worker or a self-employed. This question shall now be analysed in detail.

The starting point is obviously the formulation of the question that was put to the ECJ in the first place by the national court. Or, perhaps, it is more correct to say courts, because in the course of the proceedings three references for a preliminary ruling were addressed to the Court of Justice.³⁷⁴

However, what is essential in this context is that at no time during the course of proceedings was Article 42 or 49 of the Treaty invoked even though in both *Walrave* and *Dona* the Court of Justice had always interpreted Article 39 or 49 of the Treaty in parallel.

In light of the *Walrave* and *Dona* cases, it is very interesting that the national court did not ask the ECJ to interpret Article 49 of the Treaty. The only possible explanation would seem to be that the national court (or courts)

³⁷⁴ The first reference for a preliminary ruling was made by the court of first instance of Liège (Case C-340/90 in the ECJ's register). The national court asked the ECJ to interpret Article 39 of the Treaty in relation to the rules governing transfers of professional players. This case was removed from the register of the Court of Justice by order of 19 June 1991 after the Court of Appeals of Liège revoked the interlocutory decision of the court of first instance of Liège in so far as it referred a question to the Court of Justice for a preliminary ruling.

Following new pleadings lodged in April 1992, the court of first instance of Liège referred a question to the Court of Justice for a preliminary ruling. As Mr Bosman had developed his case the question put to the ECJ asked for the interpretation of Articles 39, 81 and 82 of the Treaty in the context of the transfer rules and the nationality clauses in the context of professional football. This case was registered as Case C-269/92.

The defendants in the first instance, The Belgian Football Federation, RC Liège and the European Football Federation UEFA appealed against the decision of the court of first instance of Liège. Since the appeals had suspensive effect, the procedure before the Court of Justice was suspended. By order of 8 December 1993, Case C-269/92 was removed from the register of the Court of Justice following the judgement of the Court of Appeals of Liège which itself referred the two questions described above to the Court of Justice. As mentioned above, the Court of Appeals of Liège asked for the interpretation of Articles 39, 81 and 82 of the Treaty.

considered that it was absolutely clear that a footballer was to be regarded as a 'worker' in the meaning of Article 39 of the Treaty and not as a 'provider of services' (self-employed). As this was not the case either in *Walrave* or in *Dona*, it raises the question as to whether the context was somehow different. Clearly, one can immediately see that the reference for a preliminary ruling in *Walrave* was made by a Dutch court, while in the case of *Dona* it was an Italian court. However, could the answer be as simple as that? Most likely not since during the approx. 15-20 years, which had passed before the Bosman case, the legal status of professional sportsmen had been clarified in a significant way. In fact, during the 70s' the question of the legal status of professional sportsmen and particularly football players in the context of labour law and social security law was controversial in many Member States.³⁷⁵ Thus, it may well be that these developments are behind the fact that in the Bosman case Article 49 of the Treaty was never invoked although in principle the provisions of the Treaty as regards free movement, on the one hand, and the application of national labour and social security legislation, on the other, are two separate issues. Obviously, another important aspect in this respect is the development of the case law relating to the concept of 'worker', as described above.³⁷⁶

³⁷⁵ See e.g. Karaquillo 1987 p. 65 to 105 and Karaquillo 1989 p. 53 to 56; Gitter and Schwartz 1982 p. 37 to 60; Barile 1976 p. 1412 to 1413. In Italy and Belgium this controversy led to the adoption of a specific law for professional sportsmen who were considered employees. See more in detail Legge 91/81 in Italy and Loi de 24 février 1978 relative au contrat de travail du sportif rémunéré. For an overall view in a number of European countries see Chabaud – Dudognon – Primault "Le sportif et la Communauté européenne".

³⁷⁶ See above Part II paragraph 3.3.2.

However, it goes without saying that from the point of view of this study the differences in the formulation of the references for a preliminary ruling are very interesting, particularly as Advocate General Trabucchi in the *Dona* case had come to the conclusion that professional football players fall within Article 49 of the Treaty, while the Court, on that occasion, refused to pronounce itself on the matter. However, in this context it is more important to look at how the Court of Justice interpreted Article 39 in the *Bosman* ruling.

The fact that the national court did not ask the Court of Justice to interpret Article 49 of the Treaty opened up the possibility for the applicants in the national court to argue that a professional football player does not fall within the scope of Article 39 of the Treaty. However, at no time were such arguments put forward. Instead, arguments such as "only major European clubs may be regarded as undertakings", "similarity between sport and culture" (Article 151 of the Treaty), "the principle of freedom of association as enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" and the principle of subsidiarity were referred to as arguments against the application of Article 39.³⁷⁷ There was absolutely no dispute that in respect of *scope rationae personae* a professional football player fell within the scope of Article 39 of the Treaty. Two paragraphs are worth citing here:

³⁷⁷ See more in detail paragraphs 78 to 81 of the Judgement.

"It is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is *the existence of, or the intention to create, an employment relationship*."³⁷⁸

"Article [39] of the Treaty applies to rules laid down by sporting associations such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in *gainful employment*"³⁷⁹

There is still another aspect of the case, which is of particular interest for this study. Among other UEFA argued that,

"the Community authorities have always respected the autonomy of sport, that it is extremely difficult to distinguish between the economic and the sporting aspects of football and that the decision of the Court concerning the situation of professional players might call in question the organisation of football as a whole".

³⁷⁸ Paragraph 74 of the judgement.

³⁷⁹ Paragraph 87 of the judgement.

In other words, UEFA openly put forward a "political" argument against the application of Article 39 of the Treaty. The answer of the Court is worth citing:

"With regard to the possible consequences of this judgement on the organisation of football as a whole, it [the Court] has consistently held that, *although the practical consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application on the ground of possible repercussions of a judicial decision*. At the very most, such repercussions might be taken into consideration when determining whether exceptionally to limit the temporal effect of a judgement."³⁸⁰

Finally, as the Court itself considered the question of the scope *rationae personae* of Article 39 of the Treaty clear in the context of professional football, it is worth looking at how Advocate General Lenz argued the issue. In this context it must be remembered that in *Donà*, Advocate General Trabucchi considered football players as falling within Article 49 of the Treaty.³⁸¹

The Opinion of Mr Lenz is particularly thorough. In all it consists some 287 paragraphs plus footnotes. The Opinion contains one paragraph on the

³⁸⁰ Paragraph 77 of the judgement. See also Case C-163/90 *Administration des Douanes v Legros and Others* [1992] ECR I-4625.

³⁸¹ See also O'Keeffe – Osborne, (1996) *the International Journal of Comparative Labour Law and Industrial Relations* p. 114.

question of the legal nature of football players in the context of free movement of persons. This paragraph is worth citing:

"The Court left it open in its *Donà* judgement whether the provisions of Article [39] on workers or the provision on services (Article [49] et seq.) apply to the activities of professional footballers. The questions submitted relate to Article [39] only. It appears indeed correct that the professional footballers active in a football club are to be regarded as workers within the meaning of that provision. The following observations will, therefore, deal with that provision only. However, the result would be no different if the examination had to be done with reference to Article [49] et seq."³⁸²

Although Mr Lenz does not give any substantial arguments as to why he considered it correct that football players are 'workers' rather than 'providers of services', the point is very clearly made. It is true, as Mr Lenz states that in most respects the practical application of either Article 39 or 49 would not result in a different outcome. However, in a later stage he takes a slightly different point of view. In paragraphs 200 to 201 he states:

³⁸² Paragraph 134 of the Opinion.

"I am in any event of the opinion that in examining the compatibility of national provisions with the provisions of Community law on the fundamental freedoms, it is not so important which specific fundamental freedom a particular factual situation is to be measured against. What should be decisive is rather whether the provisions in question hinder trans-frontier economic activity and - if that is the case - whether those restrictions are justified. That does not exclude the possibility that distinctions are to be made with respect to justification according to whether the hindrance is of a discriminatory nature. The circumstance of a permanent or only a temporary activity in another Member State being concerned may also justify distinctions in that respect, as is already accepted in the case-law. *That is by no means a purely academic point.* The Court's case-law shows that there is often considerable difficulty in distinguishing between factual situations which come under one and those which come under another of the fundamental freedoms. The present case is a good example. *As a rule it is no doubt correct - as I have already explained - to classify football players as workers within the meaning of Article [39].* Under the third paragraph of Article [50], the essential criterion for distinguishing between Article [39] and Article [49] is that the latter only covers activities, which are 'temporarily' pursued in another Member State. What does that mean, for example, with respect to a contract by which a club engages a player for a few matches? It is

debatable whether in such a case it would not be better to speak of a provision of services. ... The Court has, therefore, quite rightly left it open in a number of cases whether Article [39] or Article [49], for example, was applicable in the particular case. It did that in the *Walrave* and *Donà* cases, which are of special interest in the present case. The Court thereby clearly indicated that those two provisions employ comparable criteria and that their application led to the same result in the specific case."

Although Mr Lenz seems to disregard the fact that the Court in a number of cases has interpreted Article 39 by laying down a relatively extensive set of criteria for distinguishing between Article 39 and 49, the cited paragraphs of the Opinion clearly indicate that the question over the correct Article of the Treaty was considered at length. Still, as Mr Lenz himself stated: "As a rule it is no doubt correct to classify football players as workers within the meaning of Article [39]".

Finally, Mr Lenz also clearly distinguished between the applicability of Community law and the consequences of the Court's decision in the context of arguments laid down by UEFA. Under paragraph 128 of his Opinion, Mr Lenz states that:

"That argument relates to the *consequences* of the Court's decision, not the question of the *applicability* of Community law, and thus cannot be

an obstacle to that applicability. The possible consequences of the Court's decision will, however, have to be taken into account in answering the questions submitted for a preliminary ruling."

In other words, in the context of legal decision-making under Community law, arguments relating to the consequences of the ruling are relevant, but in the context of *applicability* of law they are not permitted. Mr Lenz's opinion is particularly rich from the point of view of legal argumentation in the Community law context. As Mr Lenz considered it to be clear that Article 39 is applicable to football players, but did not give any substantial arguments for this conclusion, it is worth looking at the question from a more general point of view by analysing the position of football players in the light of the case law of the ECJ on the criteria of 'worker'. However, it is worth mentioning in this context that in the pending case C- 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basket-ball and Ligue Belge-Belgische Liga*, Advocate General Alber confirmed the view taken in 'Bosman' by considering Mr Lehtonen, as a professional basketball player, a 'worker' within the meaning of Article 39 of the Treaty.³⁸³

³⁸³ Opinion of Advocate General Alber of 22 June 1999 in Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basket-ball and Ligue Belge-Belgische Liga*.

3.3 Going beyond the Court: An analysis of the position of a sportsman in team sport in the light of the case law regarding the concept of “worker” under Article 39 of the Treaty

3.3.1 Introduction

As described above, the ECJ has not analysed in detail the position of sportsmen in the light of its own case law on the concept of ‘worker’ under Article 39 of the Treaty. In *Bosman*, the Court took it for granted that a football player falls within the scope of that concept. As was also mentioned, Advocate General Lenz briefly concluded that it is correct to consider a football player as a worker within the meaning of Article 39. In order to be convinced that it is somewhat self-evident that a sportsman can qualify as a ‘worker’ in this context, the position of a sportsman shall be analysed by taking into account the case law of the ECJ on the general concept of ‘worker’ in the meaning of Article 39 of the Treaty. In a sense, the following exercise attempts to put into words what presumably was behind the thinking of the Court and Advocate General Lenz in the *Bosman* case.

The cases concerning the interpretation of the concept of ‘worker’ can be divided into two categories according to whether the problem has been the scope of articles 39 to 55 of the Treaty in general or the boundary between an employment relationship and self-employment. In deciding these border-line cases the different criteria of an employment relationship laid down by the Court clearly have a different weight in different situations. These criteria, and their role

in decision-making, shall be analysed more closely in the following text. Firstly, the criteria, which seem to be decisive in establishing the boundary between the scope of provisions 39 to 55 of the Treaty and 'other nationals' shall be discussed.

3.3.2 The applicability of Community law to Sport ("Sport as effective and genuine economic activity")

In order to come under Articles 39 to 49 of the Treaty, the services performed have to fulfil certain preconditions. First of all, the services have to be 'effective and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'. This quantitative precondition is fulfilled if the person in question has completed a sufficient number of hours in order to familiarise himself with the work. Since the requirements of different occupations vary greatly, a uniform limit cannot be construed. However, the following have been considered sufficient:

- continuous work as a chambermaid in an hotel for 20 hours per week;³⁸⁴
- 12 hours of music teaching per week for over eight months;³⁸⁵

³⁸⁴ Levin v Staatssecretaris van Justitie, op. cit.

³⁸⁵ R.H. Kempf v Staatssecretaris van Justitie, op. cit.

- approximately 11 hours per week as an apprentice teacher (intended to last for two years)³⁸⁶; and
- carrying out some domestic tasks and helping in the running of commercial activities of a religious community for several months³⁸⁷.

Sport at the top level is a very demanding activity both physically and psychologically. It also demands a considerable investment of time from the sportsman. For instance, the average time given to sporting activities in five different team sports at the highest competitive level in Finland varied from 24 to 32 hours per week.³⁸⁸

There can be no doubt that competitive sport in general is an 'effective and genuine activity'. In fact, this has been indirectly confirmed by the Court itself in *Walrave*³⁸⁹ and *Dona*,³⁹⁰ where it was concluded that the practice of sport can be subject to the provisions concerning the free movement of employed and self-employed persons. Neither can there be doubt as to whether a sportsman at a high competitive level is familiar with the activities he is supposed to perform.

³⁸⁶ Lawrie-Blum, op. cit.

³⁸⁷ Steymann v Staatssecretaris van Justitie, op. cit.

³⁸⁸ Football 24 h/week, Basketball 25 h/week, Finnish baseball 28 h/week, Volleyball 31 h/week, Ice hockey 32 h/week. The figures are based on a survey carried out in Finland during the 1992-93 playing season. The players were asked to add up the weekly time they use for playing in matches, practising, warming up and travelling to matches.

³⁸⁹ Walrave and Koch v AUCI op. cit.

³⁹⁰ Case 13/76 Gaetano Dona v Mario Mantero [1976] ECR 1333.

Secondly, the performance of services has to be economic in nature. This 'qualitative' precondition requires that the services be performed for remuneration. Additionally, a certain minimum balance between the performance and the financial compensation paid has to prevail.³⁹¹ Since time and effort and the ordinary pay in different occupations may vary remarkably, a common limit cannot be construed.

Furthermore, the services performed should not serve only 'social' aims in order to be economic in nature. Whether this kind of activity is in question can, however, only be confirmed by using objective criteria, i.e. the openly expressed aims of a certain special employment programme.

It is clear that top-level sports do not serve any 'social' aims for the sportsmen themselves. Therefore, as decisive for the drawing of the boundary of the "lower limit" of an employment relationship in the case of sport is *the relation between the amount of compensation a sportsman receives for the services he pursues for the benefit of sporting organisations (clubs, federations) and other undertakings (organisers of sporting events, sponsors etc.) and the effort top-level sport requires from sportsmen.*

In order to be economic in nature, sport, like any other activity, has to be engaged in for remuneration.³⁹² In *Dona v Mantero*³⁹³ the Court stated that 'semi-

³⁹¹ By using a rough example, a monthly pay of one € for a full-time work does not fulfil the requirement of balance between "work and pay".

³⁹² Walrave and Koch v AUCI op. cit.

³⁹³ Donà v Mantero op. cit.

professional or professional sports' fulfil the requirement of economic activity. Therefore, the "lower limit" of an employment relationship in the case of sport is defined by using the concept of 'semi-professional'. However, it was concluded that certain sporting events may involve elements, which are of only sporting interest, excluding them from the sphere of economic activity. As an example of this the Court mentioned matches between national teams.

To make the distinction between economic and non-economic sporting activities (i.e. "amateur" and semi-professional sports), one has to use analogies from the cases concerning other occupations.

As a general observation it can be said that the boundary between non-economic and economic activity has not been set high. With the exception of *Steymann*, all cases concerned the exercise of a conventional profession on a part time basis. Since the employment has been part time, the salary has not reached the average level of that profession. However, if calculated on an hourly basis, the pay has not been exceptionally low. Therefore, a *reasonable balance* has prevailed between work and pay.

The *Steymann* case, however, concerned an activity, which cannot be deemed conventional. Even though the tasks performed were not themselves original (involving domestic work and assisting in commercial activities) an essential element of performing the work was the membership of a religious community. However, since it was not Steymann's obligation as a member of the community to perform the tasks in question, he had in fact two separate roles in

relation to the Bhagwan community, a member and an employee. The compensation Mr Steymann received for the services performed was modest, even though the value of free accommodation should not be underestimated.

Like religious communities, sport is often organised under the freedom of association in the form of sporting clubs and federations. The vast majority of the members of the clubs take part in the activity without any financial compensation. However, as mentioned above, top level competitive sport has become a part of commercial life and the entertainment business, and as an essential part of the business many sportsmen earn their living, or at least part of it, by practising sports. Therefore, the position of a sportsman may, as in Steymann, go beyond the membership of the organisation he represents.

By taking into account that, on the one hand, sportsmen are often reimbursed for their expenses and that the 'reimbursement' of expenses may often exceed the amount of factual expenses and, on the other, the rulings in *Levin*, *Kempf* and *Steymann*, the requirements of the criteria 'economic sporting activity' ('semi-professional') in the meaning of the provisions concerning free movement of persons would seem to be fulfilled when a person receives as a compensation for exercising his skills as a sportsman, *earned income on a regular basis exceeding the amount of expenses which result from the practice of sports*. In practice this means that a sportsman who does not receive any regular salary from the club or any other organisation he represents does not pursue an economic activity in the meaning of the Treaty, and, therefore, belongs to the

category of an "amateur". This is the case even if he were entitled to bonus payments in the case of a successful playing season. In the case that the individual salary structure is calculated on a bonus basis, where it is very likely that the results, which entitle the sportsman to the payments, occur on a regular basis, the sportsman is, however, pursuing an economic activity.

In some individual sports, such as tennis and golf, the main source of income is prize money from competitions and pay for taking part in competitions. In these situations, since there is a risk of not winning any prize money, it is sufficient that a person take part in competitions *in order to gain earned income exceeding the amount of expenses, which result from the practice of sport*. This conclusion can be reached on the basis that those sportsmen who take part in competitions involving prize money have to possess a level of skills which almost necessarily result in gaining prize money often enough as to regard the activities as economic in nature.

3.3.3 The Boundary between Article 39 and 42 / 49 of the Treaty

In most situations the boundary between employed and self-employed persons is not, from the material point of view, relevant under provisions concerning the free movement of persons, since the rights conferred to both of these categories are similar.³⁹⁴ Therefore, the need to distinguish between these

³⁹⁴ See e.g. Nielsen and Szyszczak 1997 p. 65 to 66.

categories has arisen only in exceptional situations. Only once has the Court been directly challenged with the problem in question³⁹⁵. However, as was described above, despite this lack of material relevance, the Court has considered it important to repeat the general test for making this distinction in a number of cases.

In *Lawrie-Blum* the Court distinguished between three essential criteria of the employment relationship, performance of services, remuneration and subordination. Since the first two are essential criteria for both categories in question and define the scope of Articles 39 to 55 in general, they can be set aside in this context. In other words, when it comes to distinguishing between employed and self-employed persons it is taken for granted that the two former criteria are fulfilled. Therefore, one is left with the components of the subordination test in *Lawrie-Blum* and the additional criteria used in the ex. p. *Agregate* case. Only the criterion 'the freedom to choose one's own working hours' was used expressly in both of these cases.

By combining the rulings of the two cases mentioned above, one should have a sufficient set of criteria to make a distinction between employed and self-employed persons in 'semi-professional and professional' sports. It has to be stressed, however, that the list of criteria is not exhaustive. Nevertheless, whether all, or the vast majority of, the factors listed are or are not fulfilled, there should be no need for additional criteria. Only in the case of several competing criteria may

³⁹⁵ The Queen v Ministry of Agriculture, Fisheries and Food, ex parte *Agregate Ltd.* op. cit.

further arguments be needed. As a whole, all of the factors expressed by the Court aim at evaluating the freedom a person have in relation to the person for whom the services are performed. The question about how the difference in the level of 'freedom' in sport coincides with the differences in the level of 'freedom' relevant to the division between employees and self-employed shall be discussed next.

A professional or semi-professional sportsman in team sport usually pursues his activities in a contractual relationship with a club. For instance, clause 2 of the standard player's contract of the Finnish Football League expressly places the player under the orders of the management of the club:

"The player agrees to play and practise football under the orders of the management of the club in the team the management decides."

The task of the player is, therefore, to play and practise football according to the orders of the club management and coaching staff. A successful performance of the team requires each individual player to know his tasks on the field in order to play the role the team management has given to him. It is, therefore, essential that all members of the team practise at the same time under the instructions and orders of the coaches.³⁹⁶ Only in some limited individual

³⁹⁶ It is self-evident that the performance of the team requires that all the players be present in a game.

practices can more freedom be given, as regards the time and place of the practice.

As a whole it is clear that a professional or semi-professional player in team sport fulfils the requirements of the 'direction-subordination test' adopted in the Lawrie-Blum case. The player has to play the role the coach assigns to him according to the instructions of the coach. The freedom to choose one's own working hours is extremely limited and the rules of the team are very strict. In most cases there are specifically defined sanctions for being late for a match or a practice or, for instance, drinking alcohol within a certain period of time before a match. Whether the player's "preliminary" status as an employee can be questioned on the grounds of the criteria laid down in the ex.p. *Agegate* case shall be discussed next.

The vast majority of sportsmen in team sport do not share any part whatsoever of the commercial risks of the clubs. Usually they do not own any shares in the club if it is run in the form of a company. Neither can a player as such be responsible for the obligations of the club, e.g. the debts the club has taken in order to finance its functioning.³⁹⁷

The performance of a sportsman can naturally only involve the personal effort of an individual. Freedom to engage a personal assistant is, therefore, out of the question. Additionally, it is solely a matter for the team management to recruit

³⁹⁷ In some cases, retired players have, however, become involved with a club for instance as a partial owner.

new players, coaches, trainers and all the other personnel the team may need for its proper functioning. Therefore, an individual player does not possess any kind of freedom to engage 'assistants' or any other personnel of the club.

A 'professional or semi-professional' sportsman, by definition, receives financial compensation for the services he performs for the club. The pay he receives may be calculated on various bases. However, in the vast majority of the cases, it seems that at least a part of the pay is based on time, even though a bonus salary based on either the success of the team or the performances of the player, or a combination of the two, may often form part of the basis on which the total salary of a player is calculated.³⁹⁸ As a whole, the salary structure of a sportsman in team sport is very individual and is based on the individual contract of the player. It is extremely rare, if not non-existent, for a player to receive pay calculated on a collective basis. Even in these rare cases the collectively calculated amount will only add up to a part of the whole salary.

There can be no doubt about the status of a 'professional or semi-professional' sportsman in team sport, with regard to the division between employed and self-employed in the provisions concerning the free movement of persons of the Treaty and the secondary legislation. *The criteria for belonging to the category of 'worker/employed person' are clearly fulfilled.* Only in the rare

³⁹⁸ In five different team sports the basis for calculating the total salary of a player was the following (percentage of players):

cases where a player shares a major part of the commercial risks of a club he represents as a player, could this conclusion be questioned.³⁹⁹

3.4 Observations for the purposes of the study

This analysis on the different criteria of 'worker' under Article 39 of the Treaty in the context of sport confirms why the Court of Justice had no difficulties in classifying a professional football player as falling within that concept. None of the criteria of 'worker' could put this conclusion into question, although one has always to be cautious about using criteria employed in the context of different factual situations. However, for the purposes of this study it is by far sufficient that sportsmen in team sport are 'workers' within the meaning of Article 39 of the Treaty. This conclusion can be reached without any controversy as was so done by the ECJ in the *Bosman* case.

For the purposes of this study it is striking to see how easily the Court of Justice used Article 39 in *Bosman*. The fact that the question as to whether Article 39 or 42/49 is the correct provision of the Treaty in a case involving potential obstacles for the free movement of persons does not usually lead to differing conclusions and does not change the fact that sportsmen in team sport are

³⁹⁹ Burrows, Weatherill and Catala - Bonnet are of the same opinion without, however, any substantial arguments. See Burrows 1987 p. 122, Weatherill 1989 p. 59, Catala and Bonnet 1991 p. 73. The European Parliament also shares this conclusion. Resolution on the freedom of movement of professional football players in the Community, preamble B: "whereas professional football players are employees who have formed officially recognised trade unions...." OJ 1989 No C 120/33.

beyond doubt 'workers' for the ECJ. Taking into account the similarity of the concepts of 'employee' under Finnish labour law and 'worker' under Article 39 of the Treaty, the difference between the argumentation of the Finnish courts and the ECJ is striking.

PART IV: CONCLUSION

1. An analysis of the hypothesis

The starting point of this study was the hypothesis put forward by Prof. *Kaarlo Sarkko* who claimed that the way in which the Finnish courts and tribunals openly argue cases in the context of the scope of labour and occupational social security law does not reflect the true decision-making process. Prof. *Sarkko* assumed that in difficult cases the courts first reach the conclusion and only afterwards fit their decision into the statutory definition and the "legal" criteria of the employment relationship derived from that definition by doctrine. It was also claimed that the decision-making process has been strongly influenced by jurisprudential considerations, which themselves are not necessarily up-to-date, in the context of a modern welfare state. Second, it was assumed that the practical consequences of the issue in the context of the relatively recently professionalised sports industry played an important role in the decision-making of the courts, although such considerations were entirely hidden.

Part II of the study was devoted to a detailed analysis of the Finnish system in its historical context followed by an analysis of the comparable notions under English law and European Community law. It was concluded that the formulation of the relevant concepts is relatively similar and certainly comparable for the purposes of this study. The three concepts also perform the same task in

their respective jurisdictions, i.e. they define those individuals who are working under a subordinate position vis-à-vis their employer. Therefore, a distinctively different treatment of an identical factual situation would raise serious questions in respect of the reasons for the differing conclusions.

Part III of the study concentrated on the relevant case law in respect to the legal status of professional sportsmen in team sports vis-à-vis the scope of labour law. While the English system had no difficulties in covering sportsmen already under the narrow and class-orientated "control test" and while the Community legal order had no difficulties in classifying a sportsman in team sport as a "worker" for the purposes of the free movement of persons, the Finnish courts were having serious difficulties with what was essentially the same question.

In the first two cases the Insurance Court considered that a player could not fall within the scope of the relevant statutory legislation. In addition, it used obscure and unconventional arguments in reaching its decisions although the first instance had come to the opposite conclusion by using the conventional approach as laid down by the 'basic relationship theory'. Following two judgements by the Supreme Court, where the legal position of a foreign full-time professional athlete was, at least indirectly, declared an employee, the Insurance Court reversed its opinion by granting employee status to another foreign professional athlete. What is particularly striking is the way it changed its arguments. From total obscurity of argumentation the Insurance Court jumped to a

stereotypical application of the different components of the basic relationship theory.

However, it was only after Parliament amended the relevant legislation that the question was essentially resolved. From the point of view of the sports industry these amendments were necessary for granting employee status to the major bulk of Finnish league players who are earning their living from practising sports. Consequently, the Supreme Court in case 1995:145 affirmed, in general terms, that players serving under a player contract were to be considered as employees. The arguments of the Supreme Court reflected in all essential aspects the criteria of the employment relationship as laid down by Prof. Arvo Sipilä in the 1930s. It was as though nothing had happened in 65 years. The conclusion was presented as a logical deduction comparing the facts of the case with the "legal criteria" in Section 1 of the Contracts of Employment Act. The impression given was that, on the basis of the 'legal criteria', no other conclusion could have been reached. The basic relationship theory with all of its 'power' in the mind of the legal profession in Finland (the legal mentalité)⁴⁰⁰ was used to end the controversy on the issue.

It is more than likely that neither the 'obscure' nor the 'basic relationship theory' approach represented the real thinking of the judges. Due to the practical importance of the issue, there was considerable pressure on the courts and, in particular, the Insurance Court, to reach a certain conclusion but

⁴⁰⁰ See e.g. Legrand 1995p. 272 to 273 and Part I chapter 2.2. above.

the established criteria pointed in the opposite direction. Thus, on the one hand, there were important policy (and 'political') considerations which favoured a different conclusion to that which the legal criteria were indicating and, on the other, the legal criteria themselves did not seem to genuinely reflect the decision-making process of any of the Courts.

It would seem to be fair to say that the hypothesis put forward by Prof. Sarkko is supportable. The description of the employment relationship/contract of employment, and its "legal" criteria as derived by the doctrine from Section 1 of the contracts of Employment Act are not very useful in a difficult case. It would certainly also seem to be the case that the different criteria of this concept do not reflect the decision-making process of the Courts. The decision-making of the Insurance Court is a remarkable testimony to this fact. And it is certainly true that the open arguments of the Courts are strongly influenced by doctrinal considerations. One needs only to compare the arguments of the Supreme Court in case 1995:145 and the arguments of the Insurance Court in the "Yaremchuck" case in light of any text book of Finnish labour law over the past decades. The cases are testimony to the dominance of the basic relationship theory with its conceptual particularities, although courts avoid making open this link with doctrine.

Before one takes a position on whether the status quo is desirable or not, one needs to take another look at this controversial case law and ask the

following question: was the position of players really a difficult case from the point of view of judicial interpretation?

The answer to this question would seem to be clearly no. The ease in which the English courts and the European Court of Justice dealt with the issue is already a strong indication of the fact that the case was not really difficult from a formal legal point of view. However, what is even more convincing is the way in which the Insurance Court in the Yaremchuck case, and the Supreme Court in case 1995:145 argued. None of the criteria of the employment relationship were really put into question. The application of the statutory definition was straightforward. In fact, from the 'conceptual' point of view the case seemed to be very easy for the Courts. Thus, the reasons for the difficulties had to be elsewhere. The real reasons were partially related to some structural problems around applying occupational social security legislation in the context of the particularities of the career of sportsmen. However, the reasons were primarily economic. The cost effect of applying the relevant legislation to sportsmen was too high for the sports industry, on the one hand, and for the social security system, on the other. Whether the players were in need of protection was not, paradoxically, given much weight. The courts took these political considerations into account and, in the first cases, they were considered decisive by the Insurance Court, in particular. The question was not resolved by means of legal argumentation, what mattered being the outcome of the cases. With the cautious

help of the Supreme Court, Parliament, following a proposal from the Government, removed the obstacles to open acceptance of sportsmen as employees.

There is no doubt that these were the real issues behind the controversial case law in terms of the difficulties of granting employee status to sportsmen. However, the formal deductive method of arguing the cases by Finnish courts and the strong influence of the basic relationship theory was not suited to the taking of such arguments openly into account. In other words, the courts hid the real reasons behind either obscurity or doctrinal formality. In respect of the argumentation of the Insurance Court, the 'jump' from total obscurity to doctrinal purity is of particular significance. It is difficult to avoid wondering whether the tripartite structure of the Insurance Court influenced this radical change, although it is, of course, impossible to provide clear evidence for the assertion.

This case law would certainly seem to suggest that a theory, such as the 'basic relationship theory' in Finland, which, on the one hand, insists on the unity of the scope of labour law and, on the other hand, defines this scope by referring to conceptual particularities which have often little to do with the real decision-making process, would not seem appropriate in the context of a modern welfare state where the decision about the legal status of a given group is of considerable importance. However, due to the strong dominance of the theory within the legal profession in Finland, it is difficult to imagine any change without legislative intervention in the form of amending Section 1 of the Contracts of Employment Act, although the formulation of the provision itself would allow a

different and more open interpretation. Despite its merits in establishing the discipline of labour law in Finland, the basic relationship theory concerning the unified scope of labour law, cannot anymore be regarded as adequate. However, whether such a 'radical' change is possible is obviously first and foremost a matter for political considerations, not least by the two sides of industry.

This is hopefully something to think about for the Committee on Contracts of Employment which reflects upon the revision of the Contracts of Employment Act.⁴⁰¹

2 Some general thoughts on labour law

How does all this relate to more general discussions on labour law? The traditional notion of 'subordination' as the essential criterion for distinguishing between employees and self-employed has been subject to extensive discussion over the past couple of years.⁴⁰² It has been stated that the traditional model of the contract of employment defined as a bond of subordination between the employee and the party to whom the services are delivered corresponds to the so called "Fordist model" i.e.,

⁴⁰¹ The Government has appointed a tripartite committee to revise the essential provisions of the Contracts of Employment Act.

⁴⁰² See e.g. "Transformation of labour and the future of labour law in Europe" p. 5 to 8; Simitis 1996 p. 17 to 19; Javillier 1999 p. 40 to 56; Weiss 1999 p. 57 to 73; Kauppinen and Kairinen 1999 p. 74 to 101; Montoya Melgar p. 102 to 119; Santoro Passarelli 1999 p. 123 to 142.

"a large industrial business engaging in mass production based on the narrow specialisation of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture). ...[T]he core feature of the model, present everywhere to same extent, is the crucial importance of the standardised full-time non-temporary wage contracts (particularly to adult men), centred on the trade off between high levels of subordination and disciplinary control from the part of the employer and high levels of stability and welfare/insurance compensations and guarantees to the employee."⁴⁰³

It has been further pointed out that the standard patterns of social and economic regulation of employment are rapidly losing ground and that,

"a single pattern of labour relations cannot be expected to emerge because of the many different kinds of environment existing today".⁴⁰⁴

To put it succinctly, the unified model of applying all or nothing of the protective legislation depending on whether one falls within the personal scope of the legislation, i.e. whether one is considered an employee or not, does not

⁴⁰³ "Transformation of labour and future of labour law in Europe" p. 2.

⁴⁰⁴ Idem.

necessarily reflect the changing nature of work. Thus, we have witnessed the emergence of the so-called non-standard forms of work, such as false self-employment, fixed-term and part-time work, temporary agency work and so on.

In the light of this study, the question about the difficulties of applying all or nothing of labour and occupational social security law, certainly sounds very familiar, although the argument about the changes in the organisation of work seem somewhat alien in the context of professional sport. As described above, the essential problem that the Finnish courts faced in relation to sportsmen was not really over whether the criteria of the employment relationship were present or not but rather the practical consequences of the decision under the presumption of the unity of the scope of labour and occupational social security law. The contractual relationship between the player and the club has not, from the factual point of view, changed over time. Obviously, sport has become an industry even in Finland even though the essential nature of the work, and its organisational structure, have not changed in the same way as is claimed in the rest of society. Sportsmen have always been 'workers' with special skills and the rules of the different games have essentially remained intact. It is the context of the welfare state that made the decision difficult. One needs only to compare the way in which the relevant case was argued in 1910 in England to the situation in Finland. The stakes were not as high as they were in the context of a developed Finnish welfare state in the 1990s although one should not underestimate the importance of granting workmen's compensation to a new group of workers in England at the

beginning of the century taking into account, in particular, the then class-orientated definition of the contract of service. Professional players in England were assimilated in blue collar workers and neither the subsequent widening of the notion of the contract of employment, nor the changes incurred in the social status of professional sportsmen forced the issue up again. In other words, as the system of labour law grew up with professional players already within its scope, the 'juridification'⁴⁰⁵ of the sports industry was a more natural phenomenon than the equivalent process in the Finnish context where, on the one hand, the sports industry had to swallow a new regulatory framework and, on the other, the system of labour law had to swallow a new group of workers within its scope. In England, sport and labour law grew up hand-in-hand while in Finland they were forced to meet through intense litigation.

This observation would seem to suggest that, at least in the area of labour law, the process of juridification has an important temporal aspect to it. The intensity of a conflict between labour law and a given social sphere depends, at least partially, on the timing of the development of the law itself, on the one hand, and the level of development of the social sphere which enters the juridification process, on the other. If the given social sphere, such as professional sport in this context, enters the sphere of law at a relatively early stage, the conflict is likely to be less intense than if the institutions of law and the social sphere have for long

⁴⁰⁵ Of the concept see more in detail e.g. Clark and Wedderburn 1987 p. 165 and the Introductory Part above.

developed separately. In a sense, the development of Community law confirms this rule. Although the question about being a 'worker' was beyond doubt in the Bosman-case described above, the political pressure placed on both Mr Bosman and the European Court of Justice, was very intense. The ruling of the ECJ changed professional sport in the EU in, even a more radical way, if that were possible, than in Finland through granting employee status to players. Professional sport became a genuine part of the EU internal market for workers, which it had not been until the Bosman ruling. The fact that a professional player was engaged in 'gainful economic activity' was simply too obvious to be disregarded by the ECJ. Equally, it is beyond doubt that the conflict between the sports industry and the Community law system was very intense.

From the point of view of labour law it would seem safe to say that the traditional way of looking at the employment relationship is challenged from two essentially different angles. On the one hand, there is the general trend towards the rising level of employee skills and qualifications and the consequent increase of the professional autonomy of the workers, particularly in the service sector and within the 'information society' (e.g. the increase of telework). On the other hand, there is the commercialisation of activities which, in terms of the performance of the work itself and the organisational structure under which the work is performed, have not essentially changed, but enter the sphere of the market necessitating their classification within the framework of the basic established legal categories.

The commercialisation of sport is a prime example of the latter.⁴⁰⁶ The difficulty with such a process is that if the stakes are too high and, the division between those within the scope of legislation and those outside is too great, there is a stronger likelihood that groups not clearly falling within either category 'float around' under uncertain conditions.⁴⁰⁷ Attempts to change the true nature of the relationships increase, legal certainty is undermined and the use of non-standard forms of work increase.

On the basis of the analysis undertaken in this study, the latest developments in a number of countries to introduce a new category between employees and self-employed, and the application of parts of labour law to such 'parasubordinate workers', would seem to be a welcome initiative. However, at the same time it must be borne in mind that where legal categories are established, there will always be new boundaries to be drawn. At the end of the day, the importance of these boundaries depends on the substantial rights and obligations linked with belonging to a given legal category. Therefore, just the simple adding of a new category without reflecting upon the functioning of labour law in general is not, as such, a miracle solution to any suggested shortcomings of the existing systems. However, more discussion is needed to identify whether and where changes are needed and how they should be carried out. A simple distinction between the 'Fordist-Taylorist' model and the 'new forms of work' is not sufficient.

⁴⁰⁶ See also Barbagelata 1982 p. 39.

These questions have their implications not only in respect of the individual rights and obligations linked to the employment relationship but also in respect of the collective side of labour law. It is unlikely that the introduction of a new category could easily be carried out without clarifying the links of such workers with, for instance, the established collective bargaining structures. However, that discussion is beyond the scope of this study.

⁴⁰⁷ Already prior to the recent developments in the UK, Collins and Freedland advocated a new approach to the contract of employment as the 'test' failed to target the group in need of legislative protection. See Collins 1990 p. 376 to 380 and Freedland 1995 p. 23 to 24.

ABBREVIATIONS

CPSI	Central Pension Security Institute (Eläketurvakeskus)
ECJ	European Court of Justice
ECR	European Court Reports
FIM	Finnish Markka
HE	Hallituksen esitys (Proposal of the Government)
KHO	Korkein Hallinto Oikeus (The Supreme Administrative Court)
KKO	Korkein Oikeus (The Supreme Court)
KM	Komiteanmietintö (Report of a Committee)
LVK	Lainvalmistelukunta (Law drafting committee)
TN	Työneuvosto (Labour Council)
TSL	Työsopimuslaki (Contracts of Employment Act)
VAKO	Vakuutusoiikeus (Insurance Court)

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ANNEX I

**STANDARD PLAYER CONTRACT OF THE FINNISH ICE-
HOCKEY LEAGUE**



S O P I M U S

jäljempänä seura, sekä
jäljempänä pelaaja, ovat

tanaan sopineet seuraavaa:

1. Pelaaja sitoutuu pelaamaan ja harjoittelemaan jääkiekkoa seuran valmennusjonkon määräysten mukaisesti siinä joukkueessa, jonka seuran johto osoittaa.
2. Sopimusaika on 01.05.19 - 30.04.19 , jolloin sopimus päättyy ilman eri irtisanomista. Kauden ____-____ osalta sopimus on molemminpuolin irtisanottavissa __/__/19 mennessä. Irtisanominen on toimitettava kirjallisesti.
3. Seura suorittaa pelaajalle urheilijapalkkioita. Palkkiosta peritään lain mukainen ennakonpidätys. Tämä on EPL 6§:n mukainen suoritus ja sille ei suoriteta sosiaaliturvamaksua. Samalla seura ja pelaaja toteavat, että tämä sopimus ei ole työsopimus eikä vuosilomakorvauksia suoriteta pelaajalle. Näin ollen TEL-vakuutukset ja -laki eivät myöskään liity tähän sopimukseen.
4. Seura vakuuttaa pelaajan sopimuskauden aikana sopimuksen tarkoittamissa tilaisuuksissa mahdollisesti sattuvan tapaturman varalta seuraavasti:
 - D) Vamman hoitokulut siltä osin kuin niitä ei korvata jonkin lain nojalla 10.000 mk
 - B) Kertakorvaus pysyvästä, täydellisestä invaliditeetistä 150.000 mk
 - A) Kertakaikkinen kuolemantapauskorvaus vakuutetun omaisille 100.000 mkPelaajalla on mahdollisuus parantaa vakuutusturvaansa omalla kustannuksellaan.
5. Pelaajan on pelattava seuran johdon määräämällä mailalla ja käytettävä seuran johdon määräämiä varusteita.

6. Mikäli pelaaja loukkaantuu seuran ottelussa, harjoituksissa, ottelu- ja harjoitusmatkojen aikana tai jäljempänä kohdassa 13 tarkoitettulla tavalla huolehtiessaan omakoh-
taisesti peruskunnostaan ja hänet seuran nimeämän lääkärin
toimesta todetaan pelikyvyttömäksi, suoritetaan pelaajalle
kuluva kauden korvaukset.
7. Mikäli pelaaja loukkaantuu tai sairastuu jääkiekosta
johtumattomista syistä, maksaa seura palkkiokertymän
kaikilta osin, kuin pöytäkirjapelaajalle, kuukauden
eteenpäin sairastumisesta. Mikäli sairausajan päättymisestä ja pelaajan kyvystä jatkaa pelaamista sairausajan
jälkeen syntyy erimielisyyksiä, ratkaistaan ne jäljempänä
mainitulla välimiesmenettelyllä.
8. Mikäli seuran lääkäri julistaa pelaajan pelikykyiseksi
ja pelaaja tästä huolimatta kieltäytyy pelaamasta, hän
sitoutuu suostumaan ulkopuolisen erikoislääkärin
tutkittavaksi ja osapuolet sitoutuvat tyytymään tämän
päätökseen. Jos pelaaja edelleen kieltäytyy pelaamasta,
lakkautetaan häneltä välittömästi oikeus korvausten
saamiseen.
9. Mikäli pelaaja jää kiinni doping-testistä, lakkautetaan
hänelle maksettavat korvaukset heti.
10. Pelaaja ei ole oikeutettu harrastamaan muita urheilu-
lajeja kuin jääkiekkoa ilman seuran lupaa, jota ei
kuitenkaan tarvita tavanomaiseen harrastamiseen, mikäli
kun katsotaan kysymyksessä olevan pelaajan suorituskyvyn
parantaminen jääkiekkoilussa.
Osallistuminen muihin kuin seuran, SM-liigan, Suomen
Jääkiekkoliiton tai pelaajayhdistyksen järjestämiin
jääkiekko-otteluihin on pelaajalta kielletty. Jos
pelaaja ilman seuran lupaa osallistuu muuhun jääkiekko-
otteluun tai jonkun muun urheilulajin viralliseen

tilaisuuteen ja siellä tapahtuneen loukkaantumisen takia on pelikyvytön, seura lopettaa korvausten suorittamisen kunnes pelaaja mahtuu pelaavaan kokoonpanoon.

11. Pelaajan on käytettävä harjoittelu- ja pelikautena siten, että hänen elintapansa eivät vaaranna pelikuntoa ja -vireyttä, eivätkä aiheuta seuralle tai lajille negatiivista julkisuutta.
12. Jos pelaaja on pakottavissa tapauksissa estynyt osallistumasta seuran harjoituksiin tai otteluihin, on siitä sovittava seuran valmennusjohdon kanssa 24 tuntia ennen seuran ilmoittamaa harjoitusta tai ottelua. Äkillisestä sairastumisesta tai vastaavista pakottavista syistä on ilmoitettava heti sen tapahduttua valmennusjohdolle.
13. Pelaajan on omakohtaisella harjoittelullaan huolehdittava peruskunnostaan sinä aikana, jolloin seuralle ei ole järjestetty yhteisharjoittelua.
14. Tällä sopimuksella pelaaja sitoutuu ilman seuralta tulevaa eri korvausta pelaamaan kaikissa Pelaajayhdistyksen tai SM-liigan järjestämissä otteluissa sekä osallistumaan liigan järjestämiin testeihin, joiden kustannuksista vastaa SM-liiga. Korvaukset otteluista ja edustustehtävistä maksaa a.o. järjestäjä.
15. Seuralle on yksinoikeus pelaajan seuran peliasussa otettuun valokuvaan. Pelaajalla on myös oikeus käyttää ko. valokuvaa sopimalla siitä erikseen seuran kanssa. Pelaaja sitoutuu esiintymään seuran PR- tai kaupallisissa tilaisuuksissa.
16. Mikäli pelaaja ei täytä sopimuksen ehtoja, seuralle on oikeus lopettaa sopimusten mukaisten maksujen suorittaminen. Sopimuksen rikkomisesta pelaajalle langetettavan vahingonkorvauksen suuruudesta päättää valimiesoikeus.

Mikäli seura ei täytä sopimuksen ehtoja, pelaaja on oikeutettu saamaan täysimääräisinä kaikki sopimuksen mukaiset korvaukset sopimuskauden loppuun asti. Suoritettaville määrille lasketaan 16%:n vuotuinen korko eräpäivästä lukien. Sopimuksen rikkomisesta seuralle langetettavan vahingonkorvauksen suuruudesta päättää välimiesoikeus. Muilta osin noudatetaan Jääkiekon SM-liigan ja Suomen Jääkiekkoliiton kilpailusääntöjä.

17. Vuodeksi kerrallaan valittava kolmijäseninen välimiesoikeus ratkaisee sopimuksesta aiheutuvat erimielisyydet välimiesmenettelystä 04.02.1928 annetun lain mukaisesti. Välimiesoikeus on valittava kunkin vuoden heinäkuun 31. päivään mennessä siten, että Jääkiekon SM-liiga nimeää yhden jäsenen ja Jääkiekkoilijat ry yhden jäsenen sekä nämä jäsenet yhdessä valitsevat välimiesoikeuden puheenjohtajan.
18. Pelaajan mahdollisesti siirtyessä toiseen seuraan hänen siirtokorvauksensa määräytyy SM-liigan ja SJL:n voimassa olevien kilpailusääntöjen perusteella.
19. Sitoudumme noudattamaan tarkoin tämän sopimuksen ehtoja muuttamatta sopimuksen tekstiä. Sopimusta on laadittu kolme samansanaista kappaletta yksi seuralle ja yksi pelaajalle. Yksi kappale tulee toimittaa SM-liigalle huolellisesti täytettynä, pelaajan nimen selvennöksiin ja osoitetiedoin varustettuna, virallista luettelointia varten.

----- /----- 199-----

seura

pelaaja

nimen selvennös
sos.turva (-)
osoite:

ANNEX II

F.A. PREMIER LEAGUE AND FOOTBALL LEAGUE CONTRACT

F.A. PREMIER LEAGUE AND FOOTBALL LEAGUE CONTRACT

League Copy	
Club Copy	
Player Copy	

AN AGREEMENT made the..... day of..... 19

between (name).....

of (address).....

acting pursuant to Resolution and Authority for and on behalf of

..... Football Club Limited (hereinafter referred to as "the Club") of the one part and

(name)

of (address).....

a Football Player (hereinafter referred to as "the Player") of the other part.

WHEREBY it is agreed as follows:-

1. This Agreement shall remain in force until the 30th day of June 19..... unless it shall have previously been terminated by substitution of a revised agreement or as hereinafter provided.
2. The Player agrees to play to the best of his ability in all football matches in which he is selected to play for the Club and to attend at any reasonable place for the purpose of training in accordance with instructions given by any duly authorised official of the Club.
3. The Player agrees to attend all matches in which the Club is engaged when directed by any duly authorised official of the Club.
4. The Player shall play football solely for the Club or as authorised by the Club or as required under the Rules of The Football Association and either the Rules of The F.A. Premier League or the Regulations of The Football League* dependent on the League in which the Club is in membership. The Player undertakes to adhere to the Laws of the Game of Association Football in all matches in which he participates.
5. The Player agrees to observe the Rules of the Club at all times. The Club and the Player shall observe and be subject to the Rules of The Football Association and either the Rules of The F.A. Premier League or the Regulations of The Football League* as appropriate. In the case of conflict such Rules and Regulations shall take precedence over this Agreement and over Rules of the Club.
6. The Club undertakes to provide the Player at the earliest opportunity with copies of all relevant Football Association Rules and F.A. Premier League Rules or Football League* Regulations as appropriate, the Club Rules for players and any relevant insurance policy applicable to the Player and to provide him with any subsequent amendments to all the above.
7.
 - (a) The Player shall not without the written consent of the Club participate professionally in any other sporting or athletic activity. The Player shall at all times have due regard for the necessity of his maintaining a high standard of physical fitness and agrees not to indulge in any sport, activity or practice that might endanger such fitness. The Player shall not infringe any provision in this regard in any policy of insurance taken out for his benefit or for the benefit of the Club.
 - (b) The Player agrees to make himself available for community and public relations involvement as requested by the Club management, at reasonable times during the period of the contract (e.g. 2/3 hours per week).
8. Any incapacity or sickness shall be reported by the Player to the Club immediately and the Club shall keep a record of any incapacity. The Player shall submit promptly to such medical and dental examinations as the Club may reasonably require and shall undergo, at no expense to himself, such treatment as may be prescribed by the medical or dental advisers of the Club in order to restore the Player to fitness. The Club shall arrange promptly such prescribed treatment and shall ensure that such treatment is undertaken and completed without expense to the Player notwithstanding that this Agreement expires after such treatment has been prescribed.

9. Subject to the provisions of clause 10, in the event that the Player shall become incapacitated by reason of sickness or injury the Club shall, unless provision for the continuation of bonus payments be set out in the Schedule to this Agreement during the period of incapacity, pay to the Player for the first twenty-eight weeks of incapacity his basic wage as specified in the Schedule plus a sum equivalent to the amount of sickness benefit which the Club is able to recoup. After twenty-eight weeks of incapacity the Club shall, unless provision for the continuation of bonus payments be set out in the Schedule to this Agreement, pay to the Player his basic wage as specified in the Schedule without reduction for any state sickness or injury benefit that he may receive. The provisions of this Clause apply only to the playing season.
- The Player agrees to notify the Club of any sickness benefit received after the end of the playing season in order for the Club to deduct the amount from the Player's gross wage.
10. In the event that the Player shall suffer permanent incapacity the Club shall be entitled to serve a notice upon the Player terminating the Agreement. The Player's minimum entitlement shall be to receive 6 month's notice where the Agreement has not more than 3 years to run with an extra month's notice for each year or part year in excess of the said 3 years, provided that the parties shall be able to negotiate a longer period of notice if they so wish. The notice may be served at any time after:-
- (a) the date on which the Player is declared permanently totally disabled in a case where the Player suffers incapacity within the terms of the Football League and/or F.A. Premier League Personal Accident Insurance Scheme; or
 - (b) in any other case, the date on which the incapacity is established by independent medical examination.
- Where the player is declared permanently totally disabled under the terms of The Football League and/or F.A. Premier League Personal Accident Insurance Scheme he will be entitled to receive a lump sum disability benefit in accordance with the terms of the relevant policy.
11. (a) The Player shall not reside at any place which the Club deems unsuitable for the performance of his duties under this Agreement.
- (b) The Player shall not without the previous consent of the Club be engaged either directly or indirectly in any trade, business or occupation other than his employment hereunder.
12. The Player shall be given every opportunity compatible with his obligations under this Agreement to follow courses of further education or vocational training if he so desires. The Club agrees to give the Footballers' Further Education and Vocational Training Society particulars of any such courses undertaken by the Player.
13. The Player shall permit the Club to photograph him as a member of the squad of players and staff of the Club provided that such photographs are for use only as the official photographs of the Club. The Player may, save as otherwise mutually agreed and subject to the overriding obligation contained in the Rules of The Football Association not to bring the game of Association Football into disrepute, contribute to the public media in a responsible manner. The Player shall, whenever circumstances permit, give to the Club reasonable notice of his intention to make such contributions to the public media in order to allow representations to be made to him on behalf of the Club if it so desires.
14. (a) The Player shall not induce or attempt to induce any other Player employed by or registered by the Club, or by any other Club, to leave that employment or cease to be so registered for any reason whatsoever.
- (b) The Club and the Player shall arrange all contracts of service and transfers of registration to any other Football Club between themselves and shall make no payment to any other person or agent in this respect.
15. No payment shall be made or received by either the Player or the Club to or from any person or organisation whatsoever as an inducement to win, lose or draw a match except for such payments to be made by the Club to the Player as are specifically provided for in the Schedule to this Agreement.
16. If the Player shall be guilty of serious or persistent misconduct or serious or persistent breach of the Rules of the Club or of the terms and conditions of this Agreement the Club may on giving fourteen days' written notice to the Player terminate this Agreement in accordance with the Rules of The Football Association and either the Rules of The F.A. Premier League or the Regulations of The Football League* as appropriate and the Club shall notify the Player in writing of the full reasons for the action taken. Such action shall be subject to the Player's right of appeal (exercisable within seven days of the receipt by the Player of such notice and notification of reasons from the Club) as follows:-
- (a) he may appeal to the Board of either The F.A. Premier League or The Football League, dependent on the League in which the Club is in membership, who shall hear the appeal within fourteen days of receipt of the notice of appeal.
 - (b) either the Club or the Player may appeal against the decision of the Board to The Football League* Appeals Committee and such further appeal shall be made within seven days of the receipt of the Board's decision and shall be heard within fourteen days of receipt of the notice of the further appeal.
- Any such termination shall be subject to the rights of the parties provided for in the Rules of The F.A. Premier League or the Regulations of The Football League* as appropriate. The Club may at its discretion waive its rights under this Clause and take action under the provisions of Clause 18.

17. If the Club is guilty of serious or persistent breach of the terms and conditions of this Agreement the Player may on giving fourteen days' written notice to the Club terminate this agreement. The Player shall forward a copy of such notice to The Football Association and either The F.A. Premier League or The Football League* dependent on the League in which the Club is in membership. The Club shall have a right of appeal as set out in Clause 16(a) *mutatis mutandis* (exercisable within seven days of the receipt by the Club of such notice from the Player) and the Club or the Player as the case may be shall have a further right of appeal as set out in Clause 16(b).
18. If the Player is guilty of misconduct or a breach of any of the training or disciplinary rules or lawful instructions of the Club or any of the provisions of this Agreement the Club may either impose a fine not exceeding two weeks' basic wages or order the Player not to attend at the Club for a period not exceeding fourteen days. The Club shall inform the Player in writing of the action taken and the full reasons for it and this information shall be recorded in a register held at the Club. The Player shall have a right of appeal as set out in Clause 16(a) (exercisable within seven days of the receipt by the Player of such written notification from the Club) and the Club or the Player as the case may be shall have a further right of appeal as set out in Clause 16(b) of this Agreement. Any penalty imposed by the Club upon the Player shall not become operative until the appeals procedures have been exhausted.
19. In the event of any grievance in connection with his employment under this Agreement the following procedures shall be available to the Player in the order set out:-
- (a) the grievance shall be brought informally to the notice of the Manager of the Club in the first instance;
 - (b) formal notice of the grievance may be given in writing to the Manager of the Club;
 - (c) if the grievance is not settled to the Player's satisfaction within fourteen days thereafter formal notice of the grievance may be given in writing to the Secretary of the Club so that it may be considered by the Board of Directors or Committee of the Club or by any duly authorised committee or sub-committee thereof. The matter shall thereupon be dealt with by the Board or Committee at its next convenient meeting and in any event within four weeks of receipt of the notice;
 - (d) if the grievance is not settled by the Club to the Player's satisfaction the Player shall have a right of appeal as set out in Clause 16(a) (exercisable within seven days of the Club notifying the Player of the decision of the Board or Committee) and the Club or the Player as the case may be shall have a further right of appeal as set out in Clause 16(b) of this Agreement.
20. The Player may if he so desires be represented at any personal hearing of an appeal under this Agreement by an official or member of the Professional Footballers' Association.
21. Upon the execution of this Agreement the Club shall effect the Registration of the Player with The Football Association and The F.A. Premier League or The Football League* as appropriate in accordance with their Rules and Regulations. Such Registration may be transferred by mutual consent of the Club and the Player during the currency of this Agreement and this Agreement will be deemed to be terminated (but not so as to affect accrued rights) on the Registration by the The Football Association and by The F.A. Premier League or The Football League* as appropriate of such transfer.
22. The Rules and Regulations of The F.A. Premier League and The Football League* as to the re-engagement and transfer of a registration shall apply to the Club and Player both during the currency and after the expiration of this Agreement.
23. The remuneration of the Player shall be set out in a Schedule attached to this Agreement and signed by the parties. The Schedule shall include all remuneration to which the Player is or may be entitled. In the event of any dispute the remuneration set out in the Schedule shall be conclusively deemed to be the full entitlement of the Player.
24. The Player shall be entitled to a minimum of four weeks' paid holiday per year, such holiday to be taken at a time which the Club shall determine. The Player shall not participate in professional football during his holiday.
25. Reference herein to Rules, Regulations or Bye-laws of The Football Association; The F.A. Premier League, The Football League*, the Club and any other body shall be treated as a reference to those Rules, Regulations and Bye-laws as from time to time amended.
26. If by the expiry of this Contract the Club has not made the Player an offer of re-engagement or the Player has been granted a Free Transfer under the provisions of The F.A. Premier League Rules or The Football League* Regulations then he shall continue to receive from his Club as severance payment his weekly basic wage for a period of one month from the expiry date of this Contract or until he signs for another Club whichever period is the shorter provided that where the Player signs for a Club within the month at a reduced basic wage then his old Club shall make up the shortfall in basic wage for the remainder of the month.
27. The terms and conditions of this Contract shall continue to apply in the event of the Club losing Football League status to join The Football Conference except that the references to "Football League*" in Clauses 4, 5, 6, 16, 17, 21, 25 and 26 shall be deemed to read "The Football Conference" and in Clause 22 the words "The Regulations of The Football League" shall be altered to read "The Rules of The Football Association".
28. All previous agreements between the Club and Player are hereby cancelled.

. SCHEDULE

- (a) The Player's employment with the Club began on the 19.....
- (b) No employment with a previous employer shall count as part of the Player's continuous period of employment hereunder.
- (c) The Player shall become or continue to be and during the continuance of his employment hereunder shall remain a member of the Football League Players' Benefit Scheme (and a member of the Pension Scheme) and as such (in the latter case shall be liable to make such contribution and in each case) shall be entitled to such benefits and subject to such conditions as are set out in the definitive Trust Deed or Rules of the Scheme.
- (d) A contracting out certificate is not in force in respect of the Player's employment under this Agreement.
- (e) Basic Wage.
- £ per week from to
- £ per week from to
- £ per week from to
- £ per week from to
- (f) Any other provisions:-

Signed by the said (Player)

and

in the presence of (Club Signatory)

(Signature).....

(Occupation).....

(Address).....

.....

.....

.....

.....

..... (Position)

.....

relation to the Bhagwan community, a member and an employee. The compensation Mr Steymann received for the services performed was modest, even though the value of free accommodation should not be underestimated.

Like religious communities, sport is often organised under the freedom of association in the form of sporting clubs and federations. The vast majority of the members of the clubs take part in the activity without any financial compensation. However, as mentioned above, top level competitive sport has become a part of commercial life and the entertainment business, and as an essential part of the business many sportsmen earn their living, or at least part of it, by practising sports. Therefore, the position of a sportsman may, as in Steymann, go beyond the membership of the organisation he represents.

By taking into account that, on the one hand, sportsmen are often reimbursed for their expenses and that the 'reimbursement' of expenses may often exceed the amount of factual expenses and, on the other, the rulings in *Levin*, *Kempf* and *Steymann*, the requirements of the criteria 'economic sporting activity' ('semi-professional') in the meaning of the provisions concerning free movement of persons would seem to be fulfilled when a person receives as a compensation for exercising his skills as a sportsman, *earned income on a regular basis exceeding the amount of expenses which result from the practice of sports*. In practice this means that a sportsman who does not receive any regular salary from the club or any other organisation he represents does not pursue an economic activity in the meaning of the Treaty, and, therefore, belongs to the

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