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A Comparative Study on the Application of the EU Concept of 'Worker' in the Governmental Policies and Case Law of Germany, the Netherlands, and Austria

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Introduction

The right to freedom of movement has been enshrined into European Union Law through Article 45 of the Treaty on the Functioning of the European Union. It reads amongst other things:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.[1]

However, no common European policy for the application of Article 45 by governmental agencies or national courts has been developed so far. This has led to a substantial difference in the application of EU law in the Member States, a fact that is contrary to Article 20 of the EU Charter of Fundamental Rights, which states that 'Everyone is equal before the law'.[2] This can partly be attributed to the lack of a finite definition of the term 'worker' in the EU treaties and case law by the European Court of Justice, leading to the development of individual national frameworks that are used by governmental agencies and national courts to determine the status of worker for migrants, ergo, determine whether they have a right to freedom of movement.

In this context, 'workers' must be differentiated from 'posted workers', which are "workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services (and) do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion

[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.
[2] EU Charter of Fundamental Rights: Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

of their work".[3] Hence, 'posted workers' do not enjoy the same rights as 'workers' who fall within the context of Article 45. To narrow down the topic, this thesis will not further explore the discussion of posted workers.

Member States could have an interest to define the notion of 'worker' more broadly or narrowly. The decision has political and economic consequences as a broad interpretation of one country could mean that inter alia people from poorer EU countries would migrate since they could more easily receive the status of worker and would be able to receive social security assistance. While this could become a financial burden on national social security systems, increased immigration also often results in increased societal tension and change in the political landscape. As an example, Van Kersbergen & Krouwel have shown that in the Netherlands of 2008, the VDD, centre-right party, had moved towards hard-line and restrictive policies in the area of immigration and multiculturality, partly due to the fear of losing voters to the rising dominance of populist right-wing parties in these policy areas.[4] Their research shows that parties in the Dutch political landscape had to shift their stance on the policy issues described above, which were going to be decisive in the countries national elections. Specifically, while driving such an extreme policy stance, the VDD risked creating a huge inner-party conflict between the libertarian faction, who cherish the values of economic liberalism, personal freedoms and multiculturalism, and the more conservative bloc, who favour inter alia more Eurosceptical and nationalistic policies. Accordingly, having a certain stance on decisive policy areas has a huge influence on core voter base satisfaction, which is why it can be argued, that politicians are incentivised to apply the term 'worker' in a way that would fit their political agenda and would please their voter base.

[3] *Finalarte Sociedade Construçao Civil v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I–7831, 22

[4] Kersbergen and Krouwel 'A Double-Edged Sword! The Dutch Centre-Right and the 'Foreigners Issue'' [2008] Journal of European Public Policy 398

Often, Member States dispute the status of worker if they suspect that that person is engaging in abusive practices and fraudulent behaviour to receive social security contributions. An indicator for such behaviour would be that a person, even before looking for a job, applied for social assistance benefits, and then enters an employment relationship where that person only works the bare minimum to be qualified as a worker. Also, if somebody has not handed in sufficient evidence that supports their claim, e.g. payslips have not been handed in or appear irregular, their worker status would most likely be disputed. Member states, to some extent, also have the discretion to determine what they consider as 'genuine and effective labour'. As will be explained later, the ECJ, in its case law, states that an employment relationship must be genuine and effective, for somebody to qualify for the status of worker. Although some guiding case law by the ECJ on what can be considered genuine and effective is prevalent, Member states still have discretion, which potentially leads to a difference in treatment between Member States.

I intend to analyse the differences in governmental policies and case law regarding the application of the right to freedom of movement for workers in the countries of Germany, Austria and the Netherlands. Concretely, I will provide answers to the following research questions: 1. Under what conditions do the respective governmental agencies consider somebody to have the status of worker? 2. How do the courts differ in their interpretation of the case law by the European Court of Justice when determining the status of worker? The answers to these questions will be provided in a structured way, first shortly mentioning primary legislation, so legislation from the legislative branch, after which secondary legislation in form of administrative ministerial policies will be analyzed, and following that, case law on the subject will be extensively examined for each country, respectively. Consequently, the null hypothesis to be tested in this study is that the Countries of Germany, Austria, and the

Netherlands apply the definition of the term ‘worker’, given by the ECJ in its case law, in a similar way.

Relevancy of the Research

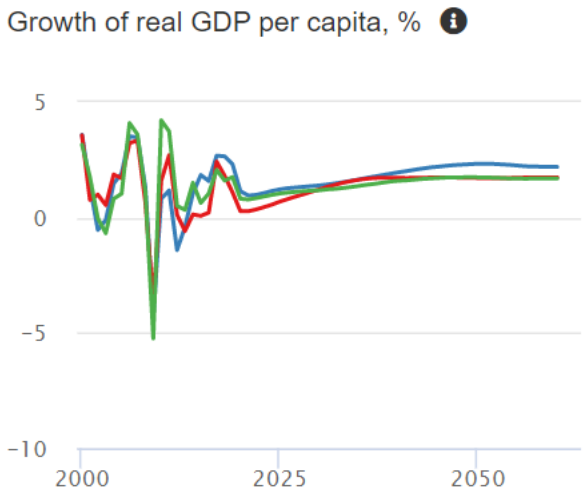
While legal scholars have researched the different models of national interpretation of the term ‘worker’ according to Article 45 (TFEU) extensively, this thesis sets itself apart by analyzing governmental policies and case law on the subject in relation to each other. It will provide insights into what criteria administrative agencies apply, whether they adhere to their own guidelines and also if national courts take an active role in developing the concept further. The research is also of relevancy regarding more practical matters. With increasing intra-European migration, migrants want to know how their rights as EU citizens are implemented in a country and whether administrative agencies and courts provide more or less favourable interpretations of the concept of ‘worker’. By combining administrative policies and courts, a more accurate representation can be depicted of what migrants can expect when moving to one of the three countries discussed in this study. Lastly, the information is inter alia valuable for future longitudinal comparative research since it provides the status quo on the subject matter in three European countries, which will likely change over time.

Motivating my Choice

I chose the countries of Germany, Austria and the Netherlands since they are similar from a socio-economic perspective and legal-historical perspective, which makes them suitable to comparison when answering the research questions. Specifically, socio-economic similarities suggest similar migration patterns and, hence, similar governmental policies. Legal-historical similarities, especially in substantive law, imply that the countries’ respective legal systems would treat migrating workers similarly.

When comparing the countries from a socioeconomic perspective, it is helpful to look at the data provided by the Organization for Co-operation and Development (OECD) through its comparison tool, which predicts the following economic scenario:

Graph 1: Economic Indicator OECD, July 2018 (Green: Germany, Red: Austria, Blue: Netherlands) [5]

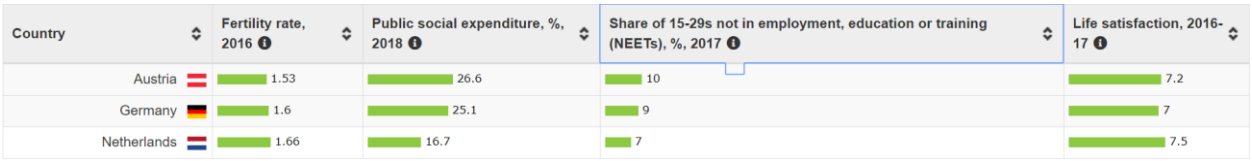


The economic indicator 'real GDP per capita in %' is widely used for the comparison of standard of living between countries. It is the measurement of the total economic output of a country divided by the number of people and adjusted for inflation.[6] As seen in the graph, past performance, as well as predictions of growth of real GDP per capita, are similar across the countries of Germany, Austria, and the Netherlands.

Using the tool by the OECD to compare social indicators, a similar trend can be observed:

[5] OECD 'Compare your country' <https://www1.compareyourcountry.org/long-term-economic-scenarios/en/0/349/default/all/NLD AUT DEU> accessed 9 April 2020
[6] Amadeo, 'What Real GDP per Capita Reveals About Your Lifestyle' (30 January 2020) <https://www.thebalance.com/real-gdp-per-capita-how-to-calculate-data-since-1946-3306028> accessed 9 April 2020

Graph 2: Social Indicators OECD [7]



Country	Fertility rate, 2016	Public social expenditure, %, 2018	Share of 15-29s not in employment, education or training (NEETs), %, 2017	Life satisfaction, 2016-17
Austria	1.53	26.6	10	7.2
Germany	1.6	25.1	9	7
Netherlands	1.66	16.7	7	7.5

The social indicators of Fertility rate, Public social expenditure, Life satisfaction and Share of 15-29s not in employment, education or training are regarded by the OECD as good measures to assess overall quality of life. Looking at the data, it appears that the countries are adequately similar regarding fertility rate, life satisfaction, and share of 15-29s not in employment, education or training. Only when assessing the indicator 'social expenditure' it becomes apparent that the Netherlands spent significantly less of their GDP than Austria and Germany in the year 2018.

The countries also have legal-historical similarities. Legal systems are often grouped together by comparative scholars into different families of Law. By doing so they aim at creating a taxonomy to arrange the vast amount of legal systems in a coherent order. *Zweigert and Kötz* are widely regarded as having succeeded at creating a taxonomy that is comprehensible and adequate to classify a great amount of the legal systems in the world. Accordingly, they came up with the following legal families: (1) Romanistic family; (2) Germanic Family; (3) Nordic Family; (4) Common Law Family.[8]

Germany and Austria can arguably be placed in the Germanic Family of Law. Next to their obvious similarities in language, their history of jurisprudence is also intertwined. The 19th-century movements of the Historical School of Law and the Pandectist School had a great influence on Austrian jurisprudence.[9] Austrian legal scholars were adopting the German

[7] OECD 'Compare your country' <https://www1.compareyourcountry.org/social-indicators/en/2/575 1095 569 571/default/all/DEU AUT NLD> accessed 9 April 2020
[8] Zweigert and Kötz, *Introduction to Comparative Law.* 3rd Rev Ed (Clarendon Press 1998) 72
[9] Ibid. 154

"historical-philosophical method, which consisted in learning to understand the peculiar phenomena of the present by means of a deep and loving study of the past".[10] Hence, the Germanic family is mainly characterised by its similarity in legal theory and doctrine, and not so much by their practical similarities. This becomes apparent when comparing the German civil code or 'Bürgerliches Gesetzbuch/BGB' and the Austrian civil code or 'Allgemeines Bürgerliches Gesetzbuch/ABGB'. Both have a similar structure consisting of a General Part and multiple subparts. However, the BGB is riddled with complex legal terms and is addressed by its writing style to lawyers and legal scholar, while the ABGB is easier to understand for citizens without any legal background.[11]

The Netherlands is mostly neglected by Zweigert and Kötz, apart from mentioning that the Dutch Civil code was greatly influenced by the French civil code, since it was forced upon the Dutch (as it was on many other European Nations), with only little adjustment, in the beginning of the 18th century.[12] However, Zweigert and Kötz, see in the revision of the Dutch civil code of 1992, the same structural elements that the German and Austrian code entail, namely having a general part and multiple subparts.

Erhard Blankenburg observes, in his "Patterns of legal culture: The Netherlands compared to Neighboring Germany" that the Netherlands also has similarities to the German (& Austrian) legal systems, especially on their substantive law tradition.[13] He notes that Dutch legal scholars continue to orient themselves to German scholarship for what he calls 'dogmatic refinement'. However, there is a noticeable difference between Germany and the Netherlands when comparing styles of their civil codes and or argumentation in judicial opinions. In Dutch legal institutions, legal language is written in much more elementary terms than their German

[10] Unger, *System des Österreichischen allgemeinen Privatrechts I.* 5th edn. (1892) 157
[11] Zweigert and Kötz, *Introduction to Comparative Law.* 3rd Rev Ed (Clarendon Press 1998) 148
[12] Ibid. 102
[13] Blankenburg 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany' [1998] The American Journal of Comparative Law 1 46

counterparts. German courts will provide an elaborate scholarly and thorough answer, while Dutch courts are more pragmatic and use language that can easily be understood.[14] The wording by Dutch legal institutions is, therefore, more reminiscent of the Austrian style. Like Dutch courts, Austrian courts tend to also provide a clear and straightforward answer, but in a slightly more elaborate and not as paper-saving style.

As it was shown, Germany, Austria and the Netherlands all have legal systems that have similarities in their historical jurisprudential background and substantive law tradition. Additionally, all countries are original members of the European Union, with West-Germany and the Netherlands even being founding Members of the European Coal and Steel Community. Due to these similarities, it can be assumed that they will apply the same definition when determining the status of worker under the right to freedom of movement.

Methodology

Regarding the methodology, policy documents, government websites, literature on the subject, and case law by the ECJ and national courts have been analyzed and evaluated. Primary legislation includes, among others, the German Free Movement of Citizens Act & § 7 Social Code Book II, the Dutch Aliens Act 2000, and for Austria, the Federal Act on Establishment and Residence in Austria. Secondary legislation consisted of policy instructions on § 7 Social Code Book II for Germany and the Aliens Act Implementation Guidelines 2000 as well as the policy rule on control policy for migrant employees for the Netherlands. For Austria, a specific policy document was not available, however, the Austrian government guidelines have been derived from their official website 'oesterreich.gv.at'. It is an inter-agency platform on which information on official Austrian policies is published, it is, therefore, equitable to an official policy document.

[14] Ibid. 40

For explanations on the case law of the ECJ on the status of worker, Craig and de Burca's 'EU Law Texts, cases and materials' textbook has been helpful.[15] Case law research from national courts was mainly conducted with the help of case law databases. For German case law, Beck-online database has mainly been used. Search terms included 'Arbeitnehmereigenschaft', 'Unionsbürger', 'Freizuügigkeitsrecht', 'FreizügG/EU', 'tatsächliche und echte Tätigkeit', 'völlig untergeordnet und unwesentlich'. The database is accessible with a university library account. For Dutch case law, the freely accessible database on reechtspaak.nl has been used. Search terms included 'migrerend werknemer' 'migrerend werknemerschap' 'studiefinanciering' 'artikel 45 VWEU'. For Austrian case law research, the freely accessible database from rdb-manz in combination with the public 'Rechtsinformationssystem des Bundes' have been used. Search terms included 'tatsächliche und echte Tätigkeit', 'völlig untergeordnete und unwesentliche Tätigkeit', 'Arbeitnehmer', 'Unionsrecht', 'Freizügigkeit'.

Historical Overview

Already at the establishment of the European Coal and Steel Community through the treaty of Paris, industrial workers were allowed to travel to different European countries for work. This was encouraged by governments, as there was a skilled labour shortage in industry sectors which can be attributed to the demographic effects of the second world war.[16] Already at this time of early (economic) intra-European migration, over 8 million work permits were issued to foreign nationals throughout the EEC Member States. Gradually, more occupations other than of industry were included within the framework of freedom of movement, mainly through the broadening of the term 'worker' by the European Court of Justice.[17]

[15] Craig and De Burca, *Eu law: text, cases and materials* (Oxford: Oxford University Press 2009) 715
[16] Braun and Arsene, 'The demographics of movers and stayers in the European Union' in Recchi and Favells (eds) *Pioneers of European Integration: Citizenship and Mobility in the EU* (Cheltenham: Edward Elgar 2009).
[17] Ibid.

The Treaty on European Union, which was signed in Maastricht in 1992, and the accompanying establishment of the European Union (EU) gave all nationals of the Member States European Citizenship and, thus, the freedom to move and reside in a different member state for the purpose of work. This was further supported by the treaty of Amsterdam, which entered into force in 1999 and allowed most European Citizens to cross intra-European borders without expecting border checks.[18] This arguably made it more attractive for European citizens to move to a different Member State since the omission of border checks meant for a smoother transition. This is supported by statistical data as Biswas and McHardy have concluded that after the Schengen agreement came into effect, "levels of intra-European migration shifted upwards (and) more people made use of their right of free movement after the conclusion of the Schengen Agreement".[19]

Then, Directive 2004/38/EC was introduced, which stated under Article 3 'Beneficiaries', Section 2. (a) that in addition to migrant workers having the right to freely move and reside within the EU, their family members also have a right to accompany them.[20] Although the deadline for implementation of the Directive has passed over 10 years ago, significant implementation obstacles exist, showcasing that even after decades of its introduction, the right to free movement of EU citizens is still an ongoing developing concept.[21]

[18] Ibid.
[19] Biswas and McHardy 'On the intensity and balance of intra-European migration' [2004] International Economic Journal 505
[20] Council Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC [2004] OJ L158/77
[21] European Parliament, *2020* 'Free Movement of Persons: Fact Sheets on the European Union: European Parliament' *Fact Sheets on the European Union*

Important ECJ Cases

During the course of its existence, the ECJ has, through its case law, substantially contributed to the development, scope of application and definition of the right to free movement of which a few distinguished cases will be mentioned. With every mentioned judgement on the issue, the ECJ further defined the scope of application in a linear fashion. Accordingly, the influential judgement of the *Lawrie-Blum* case must be recognised.[22] Ms. Lawrie Blum, a British national, was undergoing training to become a teacher in Freiburg, Germany. After being blocked to go to the second stage of training due to the facts that teachers are not regarded as workers but as civil servants in Germany, she eventually appealed to the ECJ, on grounds that she should be regarded as a worker in accordance with the TFEU. The ECJ confirmed her worker status and said that the term 'worker' should be given a common European definition. Hence, the court defined that for somebody to fall under the term 'worker' in accordance to the TFEU, the person must be performing services of economic value for and under the direction of another person in return for which he or she receives remuneration. The three elements to determine whether somebody falls under the concept of 'worker' are, therefore, the provision of labour (performing services), remuneration, and subordination. Additionally, the provided labour must be 'genuine and effective', as opposed to 'ancillary and marginal'. In this context, it does not matter whether the performed work was only restricted to a low amount of hours or whether the remuneration was low, as long as the performed activity can be regarded as genuine and effective, which must be determined on a case-by-case basis.[23] Following the *Lawrie-Blum* judgement, in *Kempf* the ECJ noted that the term 'worker' should be interpreted broadly instead of restrictively.[24]

[22] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121
[23] Ibid.
[24] Case C-139/85 *R. H. Kempf v Staatssecretaris van Justitie* [1986] ECR 1741

Only two years later, In *Steymann*, the ECJ pushed the boundaries on the definition of remuneration when it decided that remuneration could also be non-monetary, as the plaintiff had received material goods in return for the work he provided.[25] The next influential development was in *Ninni-Orasche*, where the court held that it does not matter for what purpose somebody moved to a different Member State and took up work there, as long as the work is effective and genuine, and in the same context, that it does not matter if the person is employed for a short period of time, as this was the situation of the claimant, who had only worked for two and a half month under a fixed-term contract.[26] Lastly, the 2009 judgement in *Genc* must be mentioned.[27] In *Genc*, the ECJ held that 5,5 hours per week amounting to a monthly income of 175€ can be sufficient. It argued that in consideration of all the circumstances, including the duration of the previous employment relationship, amounts of hours worked, amount of remuneration, participation in a collective labour agreement, and the contractually stipulated continued payment of wages in case of sickness, it can be concluded, that the work is not merely marginal and ancillary and granted the status of worker.[28] This was groundbreaking as the court confirmed genuine and effective work with a very low amount of hours worked and low income, while, at the same time, redefining the criteria of how it should be assessed whether a performed activity is marginal and ancillary.

In conclusion, the ECJ considers somebody to be a worker under Article 45 (TFEU) if that person performs services of economic value for and under the direction of another person for which he receives remuneration. The performed service must be regarded as 'genuine and effective', and not 'ancillary and marginal'. The assessment must be made on a case-by-case basis and all the circumstances must be taken into account including, but non-exhaustively,

[25] Case C-196/87 *Udo Steymann v Staatssecretaris van Justitie* [1988] ECR 6159
[26] Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187
[27] Case C-14/09, *Hava Genc v Land Berlin* [2010] ECR I-931
[28] Ibid.

duration of the (previous) employment relationship, amounts of hours worked, amount of remuneration (monetary and non-monetary), participation in a collective labour agreement, and the continued payment of wages in case of sickness. It is reasonable to assume that, in the future, the ECJ will continue to provide preliminary rulings for national courts, which will further narrow down the application of the term 'worker' in the context of freedom of movement according to Article 45 (TFEU). In subsequent, the country specific analysis of primary legislation, secondary legislation and case law will be provided.

Germany

Primary Legislation

Directive 2004/38/EC was transposed into German law through the implementation of the 'Freizügigkeitsgesetz/EU' (Free Movement of Citizens Act). The entitlement of benefits can be derived from 'Sozialgesetzbuch II – Leistungsberechtigte' (§ 7 Social Code Book II – Beneficiaries). The definition of 'worker' in German Law can be found at §611a 'Bürgerliches Gesetzbuch' (German civil code). Accordingly, worker is who, based on a private law contract, does paid services for a third party in personal dependence. Personal dependency means being bound by instructions with regard to working hours, the place of work and the content of work.

Secondary Legislation

From primary legislation alone, the institutional policy of who can be considered a 'worker' and thus, has the right to freedom of movement, cannot be comprehensively inferred. Governmental agencies, therefore, are provided with policy guidelines that give their employees the framework conditions on how they determine whether somebody is entitled to the status of worker.

Hence, the German institutional policy can be deducted inter alia from 'Fachliche Weisungen zu § 7 Sozialgesetzbuch II - Leistungsberechtigte' (Policy Instructions on § 7 Social Code Book II - Beneficiaries).[29] This policy document from the 'Bundesagentur für Arbeit' (Federal Employment Agency) is particularly relevant for the employment agencies to determine the status of worker, as it is, in most instances, a necessary condition for EU migrants to receive benefits. The governmental agencies, therefore, carefully scrutinize each application before granting benefits. Accordingly, the document lists conditions that should be regarded as favourable and unfavourable circumstances for the applicant when determining whether an employment relationship is genuine and effective. Favourable circumstances are the granting of vacation and continued payment of wages in the event of sickness, participation in a collective labour agreement, obligation to have social security insurance, and the long-term existence of an employment relationship. Unfavourable circumstances include purely occasional or courtesy work (sporadically carried out services), short working hours, especially less than eight hours per week, and whether taxes and social security contributions are not paid properly.[30]

Case Law

German national courts frequently deal with cases, where one of the parties is of the opinion that the status of worker of an EU citizen has been or has not been established wrongfully. In *Unionsbürger - Arbeitnehmertätigkeit Nr. 8*, the court overturned the decision of the administrative agency.[31] The person had worked in a Café for 4,5 hours per week from July 2016 until March 2017, then increased it to 10 hours per week, which amounted to a monthly income of 450€. The person also started working in a supermarket for 6,5 hours per

[29] Bundesagentur für Arbeit, *Fachliche Weisungen § 7 SGB II* (BA Zentrale GR 11, 2020) 5
[30] Ibid.
[31] [2017] EZAR NF 11 (G)

week from the end of February 2017 onwards, which amounted to an additional monthly income of 230€. The court also took into consideration when determining the status of worker for the whole period in question, that it was the persons first employment relationship since entering the labour market and that the attending of daily language courses and the caretaking of underage children did not allow for an increase in working hours in the period before March 2017.[32] Due to these circumstances, the work cannot be considered merely 'marginal and ancillary' and the court granted the status of worker for the full period in question.

In *Unionsbürger - Arbeitnehmertätigkeit Nr. 6*, the administrative agency had argued that the EU citizen should not be regarded as 'worker', since he is only working five hours (later six hours) per week in a Bistro on five (later six) different days (one hour per day), resulting in a monthly income of 180€ (later 240€), and that he is getting a substantial amount in social assistance to health insurance.[33] The court denied that receiving social security contributions can have an impact on the assessment and granted the status of worker. The work was not merely marginal and ancillary since it was of considerable importance to the functioning of the restaurant, as the person is the only cleaner. Additionally, the person was part of a collective labour agreement, which also granted her vacation days and continued payment in the event of sickness, circumstances that are favourable towards the establishment of the status of worker.[34] In *LSG Sachsen-Anhalt (4. Senat)*[35]and *Beschluss vom 24.06.2016, LSG Bayern (11. Senat)*[36], the respective courts granted the status of worker, even though the number of hours worked per month only amounted to 22 and 21 hours, resulting in an income of 192,60€ and 186,90€ respectively. No other circumstances were considered in the courts' assessments.

[32] Ibid.
[33] [2012] EZAR NF 11 (G)
[34] Ibid.
[35] [2016] L 4 AS 193/16 B ER (G)
[36] [2017] L 11 AS 887/16 B ER (G)

To summarize, German administrative agencies consider less than 8 hours of work per week to be a strong indicator that the performed work is purely marginal and ancillary and deny the status of worker. National courts do an individual assessment of all the circumstances of an individual to arrive at their conclusion whether a person has the status of worker, which, in many instances, overturns the previous decision by the administrative agency.

The Netherlands

Primary Legislation

In the Netherlands, Directive 2004/38/EC is transposed by multiple legislative acts and amendments, including the 'Vreemdelingenwet 2000' (Aliens Act 2000), the 'Participatiewet' (Participation Act) and the 'Wet studiefinanciering 2000' (Student Finance Act 2000). However, no comprehensive definition of 'worker' is given in Dutch law, hence, primary legislation does not define what can be considered as 'genuine and effective' labour and what is to be considered 'marginal and ancillary' labour. Therefore, secondary legislation must be assessed.

Secondary Legislation

The institutional policy of when a person has to be considered a 'worker' in the Netherlands can be deducted inter alia from the willingness of the 'Dienst Uitvoering Onderwijs' (Education Executive Agency), short DUO, to grant study finance aid to EU Migrants studying in the Netherlands. DUO is generally responsible for executing legislative acts and regulations that are concerned with education. To grant an EU-student study aid, DUO assesses whether that student is economically active, ergo, if they have the status of worker, in which case they are eligible. Their guidelines provide that somebody must be considered economically active, if they work on average 56 hours or more per month, as explained in the

'Beleidsregel controlebeleid migrerend werknemerschap' (Policy rule on control policy for migrant workers).[37] This is a substantial increase compared to 32 hours, which used to be the criterion of how 'genuine and effective' work was established by DUO prior to 2014. The document makes reference to the ECJ's framework on how to determine the status of worker.[38] In the explanation of what can be considered 'genuine and effective work' reference is made to the 'Vreemdelingencirculaire 2000 (B)' (Aliens Act Implementation Guidelines 2000 (B)).[39] Hence, both policy documents state that in general the standard of 'genuine and effective work' is guaranteed, if the person works at least 40% of the usual full working time, ergo, amounting to at least 56 hours per month, taking holidays and sick days into account, or, if the income exceeds 50% of the applicable standard of social assistance for that individual. It is further stated, that if these targets are not met, DUO can further investigate individual circumstances, as all the circumstances of the employment relationship must be taken into account.

Case Law

In recent years, DUO's assessment practice to determine the eligibility for study finance for migrant students, which amounts to an assessment whether that person qualifies as a (migrant) 'worker' in accordance with Article 45 (TFEU), has been challenged in front of Dutch courts. Herein, the judgement of the Centrale Raad van Beroep's (Administrative High Court) judgement of 21.10.11 has been vastly influential.[40] In its judgement, the court confirmed the legitimacy of the 32 hours (56 hours respectively) rule by stating that it is in accordance with Article 45 (TFEU), and also specified how it should be applied. A Polish national was ordered to pay back his public transport debt from the study aid package since he

[37] Ministerie van Onderwijs, Cultuur en Wetenschap, *Beleidsregel controlebeleid migrerend werknemerschap* (HO&S/463528, 2014)
[38] Ibid.
[39] Ministerie van Justitie en Veiligheid Overheid, *Vreemdelingencirculaire 2000 (B)* (2020)
[40] [2011] 10-6296 WSF (NL)

did not comply with the provisions of the Policy rule on the control policy of migrant employees. Accordingly, the status of worker is undoubtedly granted to the migrant student, if that person worked on average 32 hours per month (56 hours respectively) during the year that study aid is claimed for. Moreover, if a student has not worked at all in one month due to vacation time or sickness, this month will be disregarded, and the number of hours will be averaged over the remaining months. Finally, if the student has not worked at all for more than one month, there is no entitlement to study aid over the months where less than 32 hours (56 hours respectively) have been worked.[41] Since this judgement was delivered by the Administrative High Court, lower courts reference it when they are asked to assess whether a student (un)rightfully received study aid.[42]

In another case, DUO had given notice that the study-aid had to be paid back, as, after assessment, it was concluded that the person did not meet the 56 hours hurdle.[43] The court reversed that decision stating that the hours worked are reasonably close to the required amount and that it should be taken into account that the period in question, February until December 2014, was just after the standard to determine eligibility was increased from 32 hours to 56 hours. It is noteworthy, that DUO incorrectly applied the procedure laid out by the Centrale Raad van Beroep, since in all the contested months the applicant had worked less than 56 hours, e.g. in February with 30,75 hours and May with 54,75 hours. However, in no month did the applicant work zero hours which is the indicator, that there is no entitlement to study aid for the remaining months where the applicant did not meet the 32 hours hurdle (56 hours respectively).[44]

In yet another case, the court granted the status of worker where it was previously denied by DUO, based on the rule that a person qualifies as a worker if that person earns 50%

[41] Ibid.
[42] See: [2014] Awb 13/2473 (NL), and also: [2015] AWB - 15 _ 919 (NL)
[43] [2015] 15_4703 WSFBS (NL)
[44] Ibid.

or more of the applicable social assistance standard.[45] However, the court only confirmed the status for four out of nine months that the applicant was in the employment relationship since he earned less than 50% of the applicable social assistance standard in the remaining months.

To sum up, Dutch administrative agencies consider an employment relationship for less than 56 hours per month, or an income below 50% of the applicable standard of social assistance, to be marginal and ancillary. Dutch national courts apply the same criteria to determine the marginal and ancillary threshold and only rarely deviate from it under extraordinary circumstances.

Austria

Primary Legislation

In Austria, Directive 2004/38/EC is mainly transposed into national law by the 'Bundesgesetz über Niederlassung und Aufenthalt in Österreich' (Federal Act on Establishment and Residence in Austria). After the initial implementation, the ECJ decided in its preliminary ruling in the *Sahin* case, that Austria had not transposed the Directive properly.[46] The act does not provide clarity as to what work should be regarded as 'marginal and ancillary' and what 'genuine effective', nor is the term 'worker' clearly defined in Austrian legislation.

Secondary Legislation

While there is no specific policy document available, the Austrian institutional policy can be derived from the official website from the Austrian government. The information on the website is provided by the Federal Ministry for Digital and Economic Affairs and is approved by the Federal Ministry of Labor, Family and Youth and the Federal Ministry for Social Affairs,

[45] [2017] AWB - 16 _ 8058 (NL)
[46] Şahin v. Turkey App no 44774/98 (ECtHR, 29 June 2004)

Health, Nursing and Consumer Protection.[47] Accordingly, an employment relationship cannot be considered merely marginal and ancillary, when the income derived from said relationship exceeds the de minimis limit ('Geringfügigkeitsgrenze'), which is set by the government each year and increases due to adjustment for inflation.[48] De minimis, as used in policy and legal tradition, describes the threshold under which something is considered to be so small or low that it lacks significance. The de minimis limit set by the Austrian government for the year 2020 amounts to 460,66€ per month. In the year 2019 it was set at 446,81€, in 2018 to 438,05€, and in 2017 to 425,70€.[49] Henceforth, if somebody would earn more than the set amount in the respective year, their employment relationship has to be regarded as genuine and effective, which results in the status of worker, in the meaning of Article 45 (TFEU). It is further stated by the 'Österreichische Gesundheitskasse' (Austrian Health Insurance Fund), that it is of significance, how long the employment relationship was agreed upon and when it was started and ended, however, no explanation is provided in which specific circumstances this would have an effect on whether an employment relationship should be considered genuine and effective.[50]

Case Law

Generally, just like German and Dutch courts, the definition by the ECJ is included in Austrian court judgements, which states that all the circumstances have to be taken into account when an assessment is made whether an employment relationship is not merely marginal and ancillary. In one case, the applicant had been working for 9 hours per week for resulting in an

[47] Bundesministerium Digitalisierung und Wirtschaftstandort 'Geringfügig Beschäftigte' (17 February 2020) <https://www.help.gv.at/Portal.Node/hlpd/public/content/207/Seite.2070006.html> accessed 30 May 2020
[48] Ibid.
[49] Ibid.
[50] Österreichische Gesundheitskasse 'Geringfügigkeit' (1 Januar 2020) <https://www.gesundheitskasse.at/cdscontent/?contentid=10007.821071&viewmode=content> accessed 30 May 2020

income of 438€ per month. As this case was from 2011, her income exceeded the de minimis limit for that year, as it was set at 374,02€.[51] However, courts also consider the length and nature of an employment relationship to be of considerable importance. In a decision of the state 'Lanesverwaltungsgericht Wien' (Administrative Court of Vienna) from the year 2017, an employment relationship was regarded as not merely marginal and ancillary where the person only received an income of 234€ per month on average. He was employed as an assistant at the magistrate of the city of Vienna, but the court considered to be the deciding factor that the employment relationship had existed for longer than one year.[52] On another instance, the court decided that an employment relationship for 10 hours per month, which resulted in 84,50€ per month, was enough to be considered not marginal and ancillary. The court justified this decision by saying that the applicant, who as a delivery driver, had been continuously working for more than three years in a de minimis employment relationship and, as such, had been registered with the Austrian Public Health Fund, which is why it cannot be considered merely marginal and ancillary.[53] In multiple other cases, the courts decided that employment relationships cannot be considered marginal and ancillary, when they existed for a substantive amount of time, even though the monthly wages were under the de minimis limit set for that year.[54]

In summary, Austrian administrative agencies assess whether an employment relationship is marginal and ancillary, by comparing whether the income is below the de minimis level that the government has set for that year. Courts follow this practice but often decide that an employment relationship cannot be marginal and ancillary if it has already existed for a substantial amount of type, typically for at least longer than one year.

[51] [2014] W129 2008740-1/2E (A)
[52] [2017] VGW-242/002/RP12/4804/2017 (A)
[53] [2018] VGW-151/016/3846/2018 (A)
[54] See for insance: [2010] VwGH 2010/22/0011 (A) or [2010] VwGH 2010/09/0234 (A)

Interpretation of the Findings

It can be inferred from the findings that Germany, the Netherlands, and Austria apply different criteria to determine whether somebody can be considered a worker in accordance with Article 45 of the Treaty of the Functioning of the European Union. German administrative agencies consider less than 8 hours of work per week to be a strong indicator that the performed work is purely marginal and ancillary, which, would mean that the status of worker, as described in Article 45 (TFEU), cannot be granted. German institutional policy states that if a person works less than 8 hours per week or less than 34,4 hours per month, an individual assessment of all the facts must be made to determine whether the performed work is not purely 'marginal and ancillary', but 'genuine and effective', which would result in the status of worker. Dutch administrative agencies are stricter in their 'worker' policy, as they require an individual assessment when a person works less than 56 hours per month or earns an income that exceeds 50% of the applicable standard of social assistance. Austria, unlike Germany and the Netherlands, in its institutional policy, does not focus on the number of hours that an individual works, but purely pays attention to whether a person earns more than the de minimis limit. The limit is set each year by the Austrian Government to determine which work is genuine and effective, and which is marginal and ancillary. In 2020 is was set at 460,66€.

While Germany and the Netherlands administrative agencies state that an individual assessment has to be made when certain criteria are not met, Austrian administrative agencies do not seem to make an individual assessment of all the circumstances, as the de minimis limit clearly defines what kind of employment relationship should be considered marginal and ancillary. While it is possible that the decision to not introduce an hourly criterion was just based on continuing the existing administrative praxis of how marginal employment is decided upon, it has far-reaching consequences. Accordingly, higher-income groups of society need to work considerably fewer hours than people with lower income, in order to have their

employment relationship recognized as genuine and effective. In addition, workers in long-term employment relationships are heavily favored over workers in short-term employment relationships.Hence, the current praxis favours high-income groups over low-income groups and also favors people with employment relationships that have existed for a considerable amount of time.

When looking at case law from the countries where the status of worker was in question, it becomes apparent, that administrative agencies of the Netherlands and Germany also purely focus on whether a certain margin is reached. On many instances, the case law has shown, that the administrative agencies have denied the status of worker in cases where applicants only minimally missed the hours- or monetary criteria. Additionally, the analysis of case law of the respective countries has shown that there are differences in how the national courts assess whether somebody should be considered a 'worker', in accordance with Article 45 (TFEU). Evidently, German national courts are the most lenient since they define the term 'worker' the most broadly. Accordingly, for instance, it was taken positively into account when determining the status of worker, that an individual, as a cleaner, was of considerable importance to the functioning of a business. Also, having to take care of underage children and going to language courses are valid reasons that a person can only work a very limited number of hours. Special significance is given to the precedents by the ECJ. Some German courts grant the status of worker in instances where an individual only worked a low amount of hours, with the sole reason that the ECJ in *Genc* has confirmed the status of worker of a person who only worked 5,5 hours per week.[55]

Austrian courts were more restrictive in their case law on the issue, which can be attributed to the fact that the de minimis policy leaves little room for interpretation. However, the analysis of Austrian case law has shown, that the courts consider the length of an

[55] Case C-14/09, *Hava Genc v Land Berlin* [2010] ECR I-931

employment relationship to be a positively contributing factor. On many occasions, the status of worker was granted based on the fact that the employment relationship has already existed for several years. Dutch courts were the most restrictive and narrow in their interpretation of the term 'worker'. In almost all cases that dealt with the subject, the courts rejected the appeals by individuals, citing a judgment of the Administrative High Court from the year 2011, which confirmed the current policy of the Dutch administrative agencies. Since the policy that the administrative agencies and the courts apply is based on the Aliens Act 2000, it can be argued that the administrative agencies are strictly compliant with the national legal framework of primary law, which is why the courts do not have to interfere so often. However, only in secondary law, in the 'Policy rule on control policy for migrant workers, the 56 hours test is specified.[56] This indicates that administrative agencies, as well as courts, enforce a rule by the legislator that is contrary to the interpretation by the European Court of Justice.

The ECJ has repeatedly emphasized that the term 'worker' should be interpreted broadly instead of restrictively. While Austrian and especially Dutch courts severely limit the interpretation of the term 'worker', it was shown that German courts fully adopted the definition that the ECJ had provided and further developed it as a legal concept. Based on these findings, the null hypothesis must be rejected, since the Countries of Germany, the Netherlands, and Austria do not apply the definition of the term 'worker', given by the ECJ in its case law, in a similar way.

Discussion

Already in 1994, Slaughter introduced the term of transjudicial communication.[57] National courts and their judges are increasingly interested in how courts and judges from

[56] Ministerie van Onderwijs, Cultuur en Wetenschap, *Beleidsregel controlebeleid migrerend werknemerschap* (HO&S/463528, 2014)
[57] Slaughter, 'A Typology of Transjudicial Communication' [1994] University of Richmond Law Review 103

national jurisdictions, other than their own, practice law and, thus, engage in communication across borders, often by attending international conferences where they share expertise and exchange knowledge about national jurisprudence. Especially on the Subject of EU Law, transjudicial communication is of importance and can lead to further legal integration across the European Union. Slaughter identifies three different modes of transjudicial communication: (1) horizontal (2) vertical, and (3) mixed.[58] Horizontal transjudicial communication takes places between different national or regional courts that are of the same status, for example between courts of first instance, constitutional courts, or even between supranational courts. Communication is described as vertical if it happens between national and supranational courts. In mixed vertical-horizontal communication, exchange of information happens on both the horizontal and vertical level. A legal maxim could first be circulated among regional courts, then be communicated to a supranational entity, after which different national courts might be informed about it.[59]

Arguably, the communication and acknowledgements between the European Court of Justice and the national courts of Germany, Austria and the Netherlands can be classified as vertical transjudicial communication, since a supranational-to-national relationship exists. Communication between the national courts of Germany, Austria, and the Netherlands would be classified as horizontal transjudicial communication. These courts possess the same status among the international legal hierarchy, and are aware of each other's decisions, and, on rare occasion, even refer to each other in their case law, as was the case in the judgment of *soc. Granital v. Ministero di Finanze*. Herein, the Italian constitutional court, in its argumentation, cited how EU community regulations are applied by courts in other Member States, especially how courts of Luxembourg apply EU regulations.[60]

[58] Ibid.
[59] Ibid. 111
[60] [1984] 109 I Foro It. 2062 (I)

While horizontal communication does happen between national constitutional courts in the EU, lower national courts are still lacking a consistent approach. No horizontal transjudicial communication has become apparent from examining case law from three different countries who all apply the same EU legal principle in different ways. Further research should, therefore, be conducted, whether the application of EU law is as diverging on other issues as it is on the application of the ECJ definition of the term 'worker'.

The findings have shown that the administrative agencies from Germany and the Netherlands also only focus on whether a certain margin is reached. The hypothesis can be made, that an individual assessment of all the circumstances is much time and resource consuming for the administrative agencies. It can be assumed, that most individuals would refrain from going to court over the agencies decision, resulting, in many instances, in the deprivation of their rights as EU-citizens. However, this hypothesis should be further tested in additional research.

Going forward, concepts should be developed that explore how to achieve a consistent application of EU-Law across Member States. European Law is a developing concept that has vast implications for people across the European Union, hence, development should not be rushed if the consequences cannot be visualized yet. However, the current state of legal integration across the Union, unfortunately, leaves EU-law halfway between the unwillingness of (some) national courts to adopt it, and the unwillingness of the ECJ to further define its application, which would force the Member States to adapt on their own.

Limitations

Since this study only focuses, in addition to research on ECJ judgements, on literary research on governmental policies and case law of three different Member States, it is limited in application as its findings cannot be generalized to other Member States of the European

Union. In addition, limitations exist as not all judgements of national courts or all-encompassing information on policies of administrative agencies may be published publicly, which could lead to a distortion of the findings. This shall be attempted to be mitigated by doing extensive research on the issue to, at least, not miss any publicly available information. Furthermore, it is to be noted, that for the Dutch governmental policy and case law, material regarding student workers was used, as 'studiefinanciering' (study aid) was the area of law where extensive case law on the subject of 'worker' was available. There is no reason to believe that student workers should be distinguished from other workers, since the courts refer to legislation that is applicable to all workers.

In subsequent, a historical overview of the right to free movement will be given after which I will motivate my choice regarding which countries I chose to compare.

Conclusion

This thesis has shown that a consistent application of EU Law is still lacking on the right to freedom of movement across Member States. Germany, Austria and the Netherlands have different administrative policies on the issue and the national courts interpret the case law by the ECJ on the subject with varying degrees of restrictive- or openness. The analysis has revealed that German courts are the most liberal in their interpretation of the ECJ's judgements regarding the definition of the term 'worker', in the light of Article 45 (TFFEU). Austrian courts are more restrictive than German courts but still allow for less strict criteria than Dutch courts, who barely divert from the set institutional policy. Administrative agencies from all countries fail to take into account that the ECJ's case law has specified that an individual case by case analysis should be conducted. In doing so, all the circumstances should be taken into account when an assessment is made whether the status of worker should be granted. The findings of this thesis call for a greater effort of national courts to engage in transjudicial

communication. It can be argued, that legal integration through transjudicial communication across the European Union is of vital importance to its survival as a Union of shared social, political, and legal values since the EU institutions still lack comprehensive legal competences in many policy areas and the ECJ often refrains from providing finite definitions on concepts from the EU-treaties. EU Law has to be developed further and implemented more consistently across the Member States. This process will require national courts, national governments and their administrative agencies, EU officials and their respective agencies, and the ECJ, to work together and engage more actively on transjudicial and transadministrative communication to continue to build the European Union that is based on equity and the rule of law so that Europe can prosper in the future.

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