

Workers' Protection
National Study for Germany
for the ILO
by
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Introduction

In a population of about 80 millions in March 1998 21.948.00 employees were occupied in the western Länder (states) of the Bundesrepublik Deutschland (Bundesarbeitsblatt 4/1999, p. 57) and 4.982.00 in the new Bundesländer (states)(l.c. p. 58). If you add about 1/10 you get the number of self-employed.

There has been a continuous change in employment from industry to the service sector. There is also a trend of contracting out. The number of part time-workers, of short time-workers and of personnel leasing is continuously increasing. All this has led to new constructions in the field of contracts.

Protection of working people in Germany is granted by statute law, by collective bargaining agreements, works council agreements, employment contracts and judge made law. The legislative field is certainly different in other countries. If no strong trade unions exist as they do in Germany, the most effective way would be statute law in labour law and in social security law.

This national study focuses on the legal aspects of the problem.

I. Employment relationship

(1) Concept and legal or case law elements of the employment relationship or the employment contract and the employer and worker. Distinctive features of the employment contract or employment relationship.

As the protection of employers is granted by labour law and social security law, both systems must be regarded in cumulation.

(a) According to the continental system of law, the starting point for a court when regarding if an employment contract exists is to look if there is a definition in statute law.

(aa) In *labour law* the basic statute is *sec. 611 BGB* (Civil Code). This, however, gives no definition but only describes that it is a duty of an employee to work. A great lack of this *sec. 611 BGB* is that this section and the following are valid as well for employees as for self-employed.

Although we have a lot of statutes in labour law on every single aspect, so far there is no statute on labour contract in general. There have been several proposals, the last one by a group of German labour law professors, which has been accepted by drafts in Saxonia and in Brandenburg, two states in the German Federation. These three proposals contain each a definition of an employee. At the moment, however, there is no sign that the federal government will take up its duty of art. 30 Einigungsvertrag (contract of reunification), to create a statute on labour relationship in general.

(bb) Because of this lack by statute law courts have looked for a specific definition. It can be found in *sec. 84 HGB* (Handelsgesetzbuch, Commercial Code). Sec. 84 para 1 sentence 2 says, „self-employed is, who can in general manage freely his action and his working time.“ Accordingly he who lacks these two criteria is an employee, sec. 84 para 2 HGB.

Although this definition is only valid for salesmen and is not even valid for other types of contracts within the Commercial Code, the BAG (Bundesarbeitsgericht = Federal Labour Court) and part of the scholars think that the definition in sec. 84 HGB contains criteria which are applicable for the difference between employees and self-employed in general.

(cc) In spite of claiming this, the BAG and the prevailing opinion in literature uses a definition, which has only some similarity with sec. 84 HGB but is created free of any legal basis. The standard definition of the BAG is: „An employment relationship differs from a contract of a self-employed by the degree of personal dependency at the performance of the work. An employee is a person who does this work under the command and within in the organisation of his contractual

partner. The degree of dependency is not only to be seen by the fact, that the person employed is under the command of his contractual partner according contents, performance, time, duration and place or other modification of work, but can also arise out of the kind of the contract or of the real performance of the the contract which are very detailed and restrict the freedom for the performance of the work.

A typical criterium is to be found in sec. 84 para 1 sentence 2 HGB.

This section contains - surmounting its original area - a general idea of the legislator ...

The degree of personal dependency is also dominated by the characteristics of the job. There are abstract criteria for this. Some jobs can be performed as well in an employment relationship as in a contract of service or a contract for service, others in general only in a labour relationship. The kind and the organisation of the work may allow the conclusion for a labour relationship ...

In order to find the difference one has in the first line to look at the real facts of the performance of the job but not on the name that the parties give their contract ... The real nature of the contract results from the conditions of the contract together with its real performance.

Conclusions may be drawn from the real performance as to what rights and duties the parties really intended."

This a citation of BAG, November 19th 1997, AP Nr. 90 zu § 611 BGB Abhängigkeit, but has been a standard diction of the BAG for years.

A survey on the jurisdiction of the BAG on this matter is given in *Wank*, Empirische Befunde zur „Scheinselbständigkeit“ - Juristischer Teil - Bonn, Ministry of Labour, 1997, p. 44 ff.

(b) As the protection of employees is granted by labour law as well as by *social security law*, it is important to look at the definition of an employee in social security law, too.

(aa) For a lot of years, the definition was to be found in *sec. 7 para 1 SGB IV* (Sozialgesetzbuch = Social Security Code IV). It says that a person who is an employee in labour law is in general also an employee in social security law. In spite of this clear legal definition courts in social security law have created a definition of their own which resembles in most parts that of the BAG.

A survey of the jurisdiction of the BSG (Federal Social Court) is given in *Wank*, *Empirische Befunde*, p. 51 ff.

(bb) Since January 1st 1999 the situation has changed by the newly created *sec. 7 para 4 SGB IV*. It contains a definition of an employee for social security law for cases, which are not clear according to *sec. 7 para 1*. Although written only as a presumption, of course *para 4* contains a definition. This definition exists of four criteria. If all four are given, the person is an employee in social security law. If none of these criteria is given, the person must be a self-employed. To make things easier for authorities in social security law, a presumption in *para 4* says, that if two of these four criteria are fulfilled a person is presumed to be an employee, but he may proof (by other criteria) that he is self-employed. This has changed the subject in Germany severely; instead of discussing numerous criteria without any concept of their order and their weight now the discussion is fixed on four criteria, named in the statute law itself.

There have already appeared a lot of articles on this new section:

Bauer/Diller/Lorenzen, NZA 1999, p. 169; *Brand*, DB 1999, p. 1162; *Buchner*, DB 1999, p. 146; *Fischer/Harth*, AuR 1999, p. 126; *Gaul*, DB 1998, p. 2467; *Goretzki/Hohmeister*, BB 1999, p. 635; *Hanau*, ZIP 1999, p. 252; *Hohmeister*, NZA 1999, p. 337; *Kollmer*, NJW 1999, p. 608; *Kunz/Kunz*, DB 1999, p. 846; *Leuchten/Zimmer*, DB 1999, p. 381; *Löwisch*, BB 1999, p. 102; *Reiserer*, BB 1999, p. 366; *Reiserer/Biesinger*, BB 1999, p. 1006; *Richardi*, DB 1999, p. 958; *Weimar/Goebel*, ZIP 1999, p. 217.

(cc) There is a discussion between scholars in Germany, what this definition in social security law means for labour law. Some scholars say, because this is to be found only in social security law it is of no importance for labour law. This attitude is contradictory to the fact, that the same persons have had no objection to refer to sec. 84 HGB which is only a definition for the Commercial Code and to extend it on the whole of labour law. It is contradictory to argue that now when there is a new definition in 1999 the mere fact that it is expressively only a definition for social security law makes it impossible to transfer it to labour law. As the development of this section shows, the idea of the legislator surely was to give a definition applicable for labour law and social security law as well, but that out of political reasons the legislator started with it in social security law. Therefore for my opinion it is evident, that this definition now is also a legal definition for labour law (see *Wank*, RdA (Recht der Arbeit) 5/1999).

(2) *Assumption and other elements facilitating the confirmation of the existence of an employment relationship or contract. Difficulties most frequently encountered in this respect*

(a) As shown sub (1) in *labour law* there is no criterium which definitely proves that a person is an employee or not; according to the prevailing

opinion there is also not a certain number of criteria; furthermore no weight for the used criteria is given. On the contrary, the BAG repeats constantly that everything depends on the facts of the case, which means that there is no concept and no guiding principle at all.

Because of this lack of a methodological procedure there is also no assumption that someone is an employee if certain criteria are given.

In a new decision of BAG of december 15th, 1998, NZA 1999, p. 722, the First Senate of the BAG has declared himself to be unable even to create groups of cases! It says: „As everything depends on the circumstances of the single fact , groups of cases can hardly be named.“

This, of course, proofs that the BAG has in fact no general idea for the problem and even denies to give any help.

As an excuse the BAG says that the „employee“ is not a definition but a „typus“. This excuse, however, cannot be accepted, as even the „typus“ requires a general idea and some main guidelines (see *Wank*, *Empirische Befunde*, p. 13 ff.), which are not regarded by the BAG.

(b) The situation is different in *social security law* since January 1st 1999. The progress is in legislature, that now an assumption exists that a person is an employee if two of four given criteria are fulfilled. As this sec. 7 para 4 SGB IV is quite new, there is so far not much experience regarding the difficulties with sec. 7.

(3) *Trends concerning disguised employment relationship:(a) Quantitative evolution (increasing, stable, falling) in general and by sectors of activiy;*

(aa) Disguised employment relationship has been a topic in German labour law and social security law only during the last years (see *Wank*, *Der Betrieb* (DB) 1992, p. 90). Most courts and scholars do not even now understand the connection between the problem of defining an employee and the problem of disguised employment relationship. As long as there is no clear concept and clear definition of an employee, it is an invitation for

employers to create disguised employment relationship and it is a great difficulty for a person involved and for authorities to handle these cases. So to diminish disguised employment relationship it is necessary to create a definition which is able to give a boarderline between real employment relationship and disguised employment relationship. With the existing and prevailing definition in labour law this is impossible, because, as shown above, everything depends on the facts of the case.

(bb) To get a survey on the problem of disguised employment relationship, the BMA (Bundesministerium für Arbeit, Ministry of Labour) has ordered an inquiry into the subject, which was done by the IAB (Institut für Arbeitsmarkt und Berufsforschung, Nürnberg), by Hans Dietrich as a sociologist and Rolf Wank as a lawyer. The inquiry was published under the title „Empirische Befunde zur „Scheinselbständigkeit““, ed.

Bundesministerium für Arbeit und Sozialordnung, tome 1, 1996, containing the empirical data, tome 2, 1997, containing the juridical comment. This inquiry is a first nation-wide giving correct figures, after there had been some inquiries before of only regional results or of results only for certain professions. It was difficult to find out the correct method, because questionnaires to find out disguised employment relationship have to deal with two difficulties (see *Wank*, *Empirische Befunde*, p. 12 ff.). First, persons occupied in many cases do not know themselves how their relationship is to be called in law and do not answer a direct question, that they are disguised employees. Secondly, owing to the fact, that there is no clear definition, it was necessary to presuppose, that the BAG and the prevailing opinion in literature should be able to create a definition which can be used for a questionnaire. By strict understanding of the BAG-jurisprudence the inquiry would have been impossible, because on the basis of a judgement of the facts of the case a statistical inquiry is completely impossible. Therefore the authors of the inquiry have presumed that if the BAG - contradictory to the constant jurisprudence - would be asked to give an exact definition, would base this definition on certain main criteria (*Dietrich*, *Empirische Befunde*, p. 3, 40 ff.). The judges of the BAG later have, referring to the study, not found a mistake in this procedure, so that the operationalisation of the jurisprudence of the BAG seems to express if not the words, but the sense of this jurisdiction.

The order for the inquiry was to find out the statistics based on three different definitions of an employee.

(cc) The first definition was the so-called „BAG-Modell“(see question 1 under (a) (cc)), the second was called „Alternativmodell“, the third was called „Verbandsmodell“.

(aaa) The *Alternativmodell* (*alternative definition*) is based on the main criterium „entrepreneur's risk“ (see *Dietrich*, *Empirische Befunde*, p. 59 ff.; *Wank*, *Arbeitnehmer und Selbständige*, 1998, *Wank*, *Die „neue Selbständigkeit“*, *Der Betrieb* 1992, p. 90; *Wank*, *Empirische Befunde*, p. 74 ff.). As legal definitions have to be teleological, they cannot be

created freely as the BAG still thinks which makes a definition free from the legal context, but must refer to the legal consequences of a difference. Therefore a definition referring to the difference between employees and self-employed must take into account the legal consequences if a person is either an employee or a self-employed. A comparison shows that our law regards those people who take their own entrepreneurial risk and have their own entrepreneurial chances, as able to care for themselves so that they do not need state protection in labour law and social security law. On the other hand, as an employee has no own chances to care for himself, state must help him by labour law and by social security law with his risks of working life. From this basis a contract must be regarded with the aim to find out, if it offers entrepreneurial chances or not. The personal dependence, the main criterium of the BAG, may be a useful criterium, but only with respect to entrepreneurial dependence or independence. So this theory also looks to the fact, if a person can choose the place by himself, can choose his own time schedule and can choose the contents of his work by himself (supporters of this theory are named in *Wank*, NZA 1999, p. 225 note 18).

A working definition makes it necessary to give an operationalisation. There must be sub-criteria for entrepreneurial freedom, which can be found out easily by the employed person himself, by the partner or by authorities. Those criteria are especially, if the person has own employees, an own organisation, has own rooms and own capital, and if he is by the contract free in other regards like making prices, buying or selling (see *Dietrich*, *Empirische Befunde*, p. 60 ff.).

(bbb) The „*Verbandsmodell*“ had been created by a working group of the associations of the social security authorities (see *Dietrich*, *Empirische Befunde*, p. 76 ff.). Two of the criteria of this model are parallel to the „*Alternativmodell*“, that a person does not employ other employees himself and that he regularly only works for one other person. (These two criteria, common to the *Alternativmodell* and to the *Verbandsmodell*, are now no. 1 and 2 of the section 7 para 4 SGB IV.) What is different is the criterium that the person according to common view fulfills work typical for an employee (now no. 3 of section 7 para 4 SGB IV). On the other hand, this definition does not look into entrepreneur's risks or chances (now in no. 4 of section 7 para 4 SGB IV).

(ccc) There had been a debate among scholars about the right definition of employees years ago (see *Wank*, *Arbeitnehmer und Selbständige*, 1998, p. 27 ff.), but only during the last three years, after suggestions for a legal definition (see *Wank*, *Empirische Befunde*, p. 62 ff.) and drafts containing definitions of the employee, the discussion has started again (see *Boemke*, *ZfA* 1998, p. 285; *Buchner*, *NZA* 1998, p. 44; *Griebeling*, *NZA* 1998, p. 208; *Hanau/ Strick*, *DB Beil.* 14/1998; *Hopt*, *DB* 1998, p. 863; *Horn/ Hensler*, *ZIP* 1998, p. 589; *Hromadka*, *NZA* 1997, p. 569; *Reinecke*, *ZIP* 1998, p. 581; *Rieble*, *ZfA* 1998, p. 327; *Schliemann*, *RdA* 1997, p. 322; *Wank*, *NZA* 1999, p. 225).

(ddd) The inquiry showed, that according to the definition the number of disguised employment relationship also differs. The result was that according to the BAG-Modellthere are:

- disguised employment relationship in Germany, persons with one job	179.000
- disguised employment relationship, persons in their second job	<u>329.000</u>
	498.000

According to the Alternativ-Modell

410.000
901.000
 1.311.000

According to the Verbands-Modell

431.000
1.010.000
 1.441.000

(see *Wank*, Empirische Befunde, p. 95).

The inquiry also got details about the professions in which disguised employment relationship is to be found. Referring to a classification of jobs used in commercial inquiries, the inquiry showed the following result (see *Dietrich*, Empirische Befunde, p. 102):

Disguised employment relationship, by professions, in percent

farmers	1,4	production	8,4	technical profession	5,1	merchants
19,4	traffic	8,4	office	15,2	security	1,4
science	10,4	hotellery	4,8	cleaning	2,8	no answer
					8,8	

The inquiry also showed, how much the number of disguised employment relationship depends on the size of the enterprises. Most disguised employment relationships were to be found in enterprises with 10 - 49 employees (see *Dietrich*, Empirische Befunde, p. 113):

Disguised employment relationship, main profession, in percent

private household	8,7	1 - 9 members of staff	18,9	10 - 49
24,4	50 - 499	18,1	500 and more	16,3
				no answer
				13,6

The inquiry also showed, how many hours a week disguised employees work; mainly they work 35 hours and more (see *Dietrich*, Empirische Befunde, p. 115.):

Disguised employment relationship, main job, in percent

work per week	up to 15 hours	24,1	15 - 35
26,9	35 hours and more	43,9	no answer
			5,5

The contracts were working mostly for four years and more (see *Dietrich*, Empirische Befunde, p. 119).

(b) *Qualitative evolution: main characteristics. New forms of wage employments. Civil or commercial arrangements which most frequently involved a disguised employment relationship or contract.*

The inquiry has shown, that disguised employment relationship can be found in all kinds of professions. Besides, there seems to be a preference for disguised employment relationship in those sectors dealing with distribution of goods and services. Typical are new forms of wage

employment in the driving sector. The kind of contract is that of a so-called transport contract, with one person, one vehicle, delivering goods according to the commands of a producer but being regarded by the contract as a self-employed.

(4) *Machinery available to the worker or the labour inspectorate to ensure the application of labour legislation in the event of disguised employment relationships. Degree of use and practical effectiveness of such machinery.*

In Germany, the control of working conditions is done by labour inspectorate only regarding health and safety law (see *Wank/ Börgmann*, Deutsches und europäisches Arbeitsschutzrecht, 1992, p. 64 ff.) and triangular relationships (see Erfurter Kommentar- *Wank*, AÜG, sec. 1). When regarding working methods of control you must differ between labour law and social security law first.

(a) In *labour law* control is done by employees themselves, if they sue their employer. This is not much effective in cases where the employee wants to continue his employment relationship, but only in cases where the relationship has already finished or when the person works in public service. There is support to those claims by trade unions.

Secondly in some cases a works council also sues the employer to find out if persons employed are employees or self-employed, for this is important for elections for the works council (LAG Köln, LAGE § 611 BGB Arbeitnehmerbegriff Nr. 29) or for the right of information of the works council (BAG, NZA 1999, p. 722).

It must be admitted, however, that these ways of control have not been very effective in the past. Therefore the idea was, to create an operational definition which can be easily handled by authorities in social security law. As social security authorities depend on contributions, they have an own interest to find out if somebody is in reality an employee. In the past their chances were vague because of a lack of a clear and operational definition.

(b) As *social security law* has been changed on January 1st 1999 and as there is now a clear and workable definition for social security authorities, there has been a large and effective inquiry to working relationships all over Germany following this new statute law.

The example shows, that two things are necessary if one really wants to diminish disguised employment relationships:

At first it is necessary to have a clear and operational definition. With definitions like that of our BAG an effective control is impossible, because no one can know in advance what would be the results of a claim. As the BAG constantly repeats that it does not know itself what is the correct definition but that it depends on the facts of the case, it proofs, that even the judges of the BAG cannot tell in advance what would be the result of a claim.

Secondly it proofs not to be very effective to leave the risk of a claim to employees and works councils. Labour inspectorates also do not seem to be very effective, because their

number is too small and they have no own financial interest. Social security authorities with own financial interest, however, seem to be an effective subject of control.

(5) *Practical repercussions of disguised employment relationships on the formal or affective protection of workers as regards:*

(a) conditions of employment and remuneration

As in cases of disguised employment relationship the employee is formally regarded as self-employed, all statutes of labour law and social security law seem to be not applicable. In detail that means that there is no claim for sickness benefits, for vacations, for maternal protection, for protection with dismissals etc.

The employed person in a disguised employment relationship is paid as a self-employed, that means either monthly or according to the result. He has to pay income tax and VAT himself and has to look for private insurance companies for his social risks.

Employers often deceive applicants telling them how much they can earn in the enterprise being occupied as self-employed. They do not offer a comparison between the net income of a self-employed and that of an employee with the same job (see *BGH (Federal Law Court) BGHZ 140, p. 11 = NJW 1999, p. 218*). A self-employed has to care for his own social security by paying private assurance contributions, while the employee only needs to pay half of the contributions, while the employer pays the other half. By transferring all the other risks mentioned (sickness, vacations etc.) on the employed person, another high amount of costs arises with the so-called self-employed. Some courts like the LSG Berlin (Landesozialgericht Berlin, District Social Court Berlin) and the BGH (Bundesgerichtshof = Federal Civil Court) have given examples of how little is left to so called self-employed when you regard all the costs und deductions.

(b) Occupational safety and health conditions

For employees there is a quite a lot of health and safety law, based on EC law. We have a new Arbeitsschutzgesetz (ArbSchG = Statute on Health and Safety at Work), Arbeitssicherheitsgesetz (ASiG = Statute on Safety at Work) and numerous regulations (see *Wank, Technischer Arbeitsschutz 1999*). For self-employed there is only sec. 618 BGB, a general clause with almost no effect. As the self-employed is regarded as master of his own work, health and safety law only deals with situations where the employing person gives detailed command. As these contracts are usually in a manner that all risks are transferred to the employed person, he has to care for his health and safety himself and only as he works under the command of the partner, sec. 618 BGB is valid. All detailed legislation, however, on health and safety as mentioned above, is only valid for employees.

(c) Social security

Social security law referring to - sickness- old age care- old age pensions- work accidents- unemployment only refers to employees and - with little exemptions - not to self-employed. So when the employing person succeeds in making a self-employed an employee, no contributions to all these social security systems have to be paid by the employer, whereas in works accident security he has to pay the whole contribution and in the other branches half of the contribution if he occupies an employee. In consequence in cases of disguised employment relationship the employed person will not get any support by social security.

(d) Freedom of association

Freedom of association in German law is given according to art. 9 para 3 Grundgesetz (GG, Fundamental Law, Constitution) and following sec. 12 a Tarifvertragsgesetz (TVG, Statute on Collective Bargaining) only to employees and "employee-likes" (see IV, self-employed in economic dependence), not to self-employed. So as long as the disguised self-employed regard themselves as self-employed, they cannot unite in a trade union and there cannot be collective bargainings for them.

(e) Collective bargaining

As collective bargaining follows the freedom of association, it is impossible for real self-employed. As in labour law and social security law the important aspect is the practical fulfilling of a contract and not the words of the contract, disguised employees could be part of collective bargaining.

(f) Access to justice (competent jurisdiction, applicable procedure)

If a person is self-employed, he has access to civil courts, as an employee or an „employee-like“ access to labour courts, which are regarded as more competent in dealing with matters of labour law. The applicable procedure also is different, with the Zivilprozeßordnung (ZPO, Statute on Civil Process) ruling the civil jurisdiction and the Arbeitsgerichtsgesetz (ArbGG, Statute on Labour Courts) ruling the labour jurisdiction. Following the words of the contract, a disguised employee only has access to civil courts; therefore to claim his rights he first has to claim that in reality he is no self-employed but an employee and therefore has access to the labour courts. So in these cases this is the first question courts have to decide. As labour courts are opened not only for employees but also for „employee-likes“, the court need not decide whether a claimant is an employee, as long as he can be either employee or „employee-like“.

Accordingly, in two remarkable cases of the latest past, BAG and BGH had to decide, whether „Eismann“-drivers (homeservice with frozen goods) are employees („employee-likes“) or self-employed. As both employees and „employee-likes“ have access to labour courts, both

courts decided that „Eismann“-drivers are no self-employed and that therefore in any case the labour courts are competent for the claims (BAG AP Nr. 103 zu § 611 BGB Abhängigkeit = NZA 1999, p. 374; BGH, NJW 1999, p. 218 = RdA 1999, p. 268 (*Wank*)).

(6) *Possible solutions for dealing with new forms of wage employment and the problem of disguised employment relationships and, in general, inadequate protection*

As shown above, the solution has as well a material aspect as a procedural aspect.

The most important thing is to create, either by jurisdiction or by statute law, a definition which is correct and which is operational. As experience in German law (and as well in the law of other countries) shows, courts seem not to be the right institution to create such a definition. As nobody involved can know in advance how his case will be decided, there is little protection. The best thing is a definition by statute law, which is based on few criteria that are easily to be proven. Although sec. 7 para 4 SGB IV in our German law is certainly not the best solution, the way our law has gone certainly is the most preferable one.

There ought to be one definition primarily in labour law. Social security law and tax law should accept this same definition, although they may make modifications for certain groups of persons for their purposes.

In a procedural aspect to leave the decision who is a disguised employee to employed persons or to labour inspectorates or to works councils or to trade unions does not seem to be an effective solution. Instead to give competence to social security authorities seems to be most effective, because these institutions have an own financial interest.

In Germany the newly created sec. 7 para 4 SGB IV has led to the fact that the social security authorities have at once gone into questioning employers as to the legal status of their staff and have developed a questionnaire. This is a result of a new idea of a change of burden of proof.

II. Triangular relationships

1. *Traditionally, the most common „triangular relationships“ are probably those that may exist between a person who places an order for a piece of work or a service, a person who independently undertakes to carry out the work or provide the service, and the latter's workers. What name is give to these relations and what legal system is applicable to them?*

In German law, the triangular character of these situations is mostly neglected and comes only into sight in comparison with personnel leasing. The reason is that what is regarded is the contract between the employing person and the person who makes the contract.

Mainly we have two kinds of contracts for self-employed,
- the „contract of service“, sec. 611 BGB- the „contract for service“, sec. 631 BGB.

These are the two most prominent types, while in reality quite a number of different types exist.

For the worker in case of a contract of service or a contract for service it does in general not make a difference, if he works for his master or for a third person. All rights he has are only given to his master and not to the third person, his duties are duties against his master and not against the third person.

Typical for this situation is that in the relationships of sec. 611 BGB or sec. 631 BGB only civil law and commercial law is applicable, while in the relationship between master and worker only labour law is applicable.

2. *Other significant types of „triangular relationships“ (supply of staff, lending oder hiring of labour, etc.)*

The forms of triangular relationships named above must be seen in contrast to „personnel leasing“. There is a special statute on personnel leasing, *Arbeitnehmerüberlassungsgesetz*, AÜG. The main difference between contract of service, contract for service on the one hand and personnel leasing on the other hand is, that the *Arbeitnehmerüberlassungsgesetz* refers to the triangular relationship and gives the employee special rights in this case. All three types of contract have in common that the worker is the employee of the partner of the contract.

Practically in German law the difference between these two kinds is important, because a lender (see *Erfurter Kommentar-Wank*, sec. 1 AÜG) in German law needs a special concession, which is not needed for a person who is working on the basis of a contract of service or a contract for service. If somebody deals with personnel leasing without this concession (and also in some other cases) the *Arbeitnehmerüberlassungsgesetz* rules that the worker is not a worker of the lender but of the borrower (sec. 10 AÜG). This shows, that it is very important to differ between a worker employed on the basis of a contract of service or a contract for service and a person occupied by a lender. In jurisdiction and literature there is quite a number of theories, how the difference can be described (see *Erfurter Kommentar-Wank*, AÜG sec. 1, note 26 ff.). Almost all of these attempts lack a teleological basis. The question is, why the legal consequences are those of the AÜG in one case and of not applying the AÜG in other cases. This leads to the question, why such an *Arbeitnehmerüberlassungsgesetz* is necessary. The reason is, that a person who has no enterprise and organisation for himself but only sends workers to the enterprises to work for him, may not

be a serious employer regarding labour law, social security law and tax law. Therefore this kind of occupying workers needs special rules and special control. Only by this teleological point of view it is possible to make the right difference between these two cases of occupying workers which are sent into other enterprises (see *Erfurter Kommentar-Wank* sec. 1 AÜG, notes 29 ff.). The Bundesarbeitsgericht has found the right differentiation. According to the BAG it is important, whether the employee - is integrated in the enterprise of the third person and- must follow the commands of the third person.

(BAG 10.2.1997 AP Nr. 9 zu § 103 BetrVG 1972).

In this case the relationship is regarded as disguised personnel leasing, with the consequence that this kind of contract is illegal and that the worker becomes by law a worker of the borrower.

In literature the most common theory is that the difference only depends on a „Personalhoheit“ i.e. who has the command over the workforce.

In practical cases there is often the question which kind of contract is applicable if an enterprise does normal production or service for third persons on one hand and personnel leasing as well on the other hand, being a „Mischbetrieb“ (mixed enterprise). BAG and literature agree that in these cases the AÜG is also applicable, because otherwise the enterprise could use this way to avoid the application of the AÜG (BAG 8.11.1978 AP Nr. 2 zu § 1 AÜG; *Erfurter Kommentar-Wank*, sec. 1 AÜG, note 40).

There are also some other kinds of contract, called-
Geschäftsbesorgungsvertrag (contract of agency)-

Dienstverschaffungsvertrag (contract for the procurement of service) which belong into this field.

3. *Most frequent situations of simulation or fraud, of apparent „triangular relationships“, designed to circumvent labour obligations by the person really benefiting from a worker's services*

As shown above, an employer on whom the AÜG is not applicable, is free of the controls of this statute. Therefore in many cases employers try to prove that they are working on a contract for service. In practice the authorities have developed a number of criteria to find out if this is true or if it is only a disguised personnel leasing (see „Durchführungsanordnung des Präsidenten der Bundesanstalt für Arbeit“, Dienstblatt-Runderlaß 72/86 vom 5.5.1988 i.d.F. v. 31.1.1995).

4. *Trends: (a) quantitative evolution (increase, stability, reduction) in general and by sectors of activity*

As contract of service and contract for service don't make problems for labour law, the development in this kind of triangular relationship is not observed. What is observed is the number of legal personnel leasing as well as the number of illegal personnel leasing. The number of personnel leasings has constantly increased during the last years. One reason is, that in former times there have been more restrictions by the state regarding these enterprises.

As legal personnel leasing is under control of the state and is only admitted by special concessions, the statistic figures for legal

personnel leasing are reliable. They show a steadily increasing number of workers in this branch.

Figures for illegal personnel leasing, of course, are far less reliable as you can only tell how many illegal practices have been discovered without knowing how much more have escaped discovery.

(b) Qualitative evolution: main characteristics

There is a direct connection between the standard of labour law and the increase of personnel leasing. When it becomes too difficult for enterprises to occupy their workers on special tasks or at special times or to dismiss them at will they will increasingly prefer to engage enterprises for personnel leasing.

Besides the increase of enterprises for personnel leasing is due to a new economical attitude. While in the past enterprises tried to do as much work with their own workcraft as possible, this attitude has changed. Today enterprises look at what is necessarily done by own workers and which work can be done by other enterprises, so called outsourcing or contracting out. So if a certain task only comes up at certain times and is not continually to be done, it is not necessary to keep own personal but employ personnel leasing. Therefore the increase of personnel leasing is not a temporary phenomenon but will be characteristic for the future.

5. *Concept in law and jurisprudence of the intermediary and the contractor. Difference between the two*

In German law, as shown above, it is impossible to look only at one situation of triangular relationship, but it is necessary to differ

between the two basic types, working with own personal either on the basis of a contract for service or a contract of service or sending one's staff to another enterprise in the form of personnel leasing. For ILO purposes, too, it seems necessary to differ between these two types of triangular relationship. Otherwise, it seems, that the real problems of workers will not be found out, which are the problems of personnel leasing and not of the other basic types.

6. *Worker's protection and main problems of inadequate protection (formal or affective) as regards:(a) conditions of employment and remuneration*

According to the two basic types in the following text there will be a comparison between contract for service and personnel leasing as the two basic different kinds of contract.

In case of a contract for service, the employee is paid only by his own employer. In general he gets a fixed salary, disregarding if he is a worker or an employee. If he is working on an accord basis, all questions of remuneration are also only dealt between his employer and himself.

In cases of personnel leasing by law the situation is, as it seems, parallel. The employer of an enterprise for personnel leasing gets a salary which is fixed by month or by salary per hour.

As far as the conditions of employment are concerned, the worker in cases of personnel leasing is more integrated in the third party's enterprise, although legal personnel leasing requires that the integration must not be too intensive.

(b) Conditions of occupational safety and health

In case of a contract for service the employer is liable for health and safety of his staff.

In personnel leasing as the worker is employed by the lender, the lender is liable for obeying the conditions of occupational safety and health (see sec. 12 para 2 sentence 3 Arbeitsschutzgesetz). On the other hand, the employee works on the premises of other enterprises, where the lender has no influence on the working conditions. Therefore the borrower has as an employer own duties regarding health and safety, although the hired workers are not his own workers. As an example sec. 12 para 1 of the Arbeitsschutzgesetz obliges the employer generally to instruct his employees about the health and safety conditions of their work. Para 2 sentences 1 und 2 rule that in cases of personnel leasing this duty is one of the borrower.

(c) Social security

In cases of a contract for service all the law of social security is applicable on the employee.

In cases of personnel leasing this is generally the same. The worker is employed by the lender and therefore social security relationships exist between social security authorities and the worker and the lender. What is different is that in the branch of personnel leasing it may more often happen that the lender as an employer does not come up to his duties to social security authorities. Therefore sec. 3 para 1 no. 1 AÜG says that the lender will get no concession, if he is not reliable with regard to social security law.

(d) Freedom of association

As workers of a partner of a contract for service as well as workers of a contract of personnel leasing are workers in the sense of Art. 9 para 3 GG, they have the freedom of association.

(e) Collective bargaining

The freedom of association is worth only if collective bargaining exists. As the trade unions have right from the start opposed to personnel leasing, they do not engage into collective bargaining for workers in the field of personnel leasing. There has once been one collective bargaining in this area, but at the moment there is no permanent collective bargaining, only a peremptory tariff for the staff of the exposition 2000 in Hannover.

This seems to be contradictory. If the trade unions really intend the protection of workers, they should also engage for the protection of workers in personnel leasing. But as sociological theories show, trade unions normally are interested in their normal clientel of regular workers and not in atypical workers.

(f) Access to justice (competent jurisdiction, applicable procedure)

Workers of an employer on a basis of a contract for service as well as workers in cases of personnel leasing have access to labour jurisdiction.

7. *Possible solutions (normative or administrative) to the problem of the possible weakening of responsibilities and the use of disguised*

employment relationships through „triangular arrangements“ and, in general, inadequate protection in such cases

In cases of a contract for service there are not many problems. One seems to be important which is not sufficiently solved. If the employee does damage to a client of his employer, the employee is liable to the client himself. He may get recovery by his employer. This is of no problem, if employer and employee agree about the amount of recovery and if the employer is solvent. If this is not the case, the employee is liable for the damage himself without the possibility of recovering. There should be a compulsory insurance for employers, at least as far as they occupy drivers etc.

Another similar problem is that the employer may have excluded or restricted his liability to a third party without extending this to his employees. So the employee may be liable to a third party in a case, where his employer, if he had acted himself, would not be liable.

Both problems cannot be solved by jurisdiction but need an activity of the legislation.

Problems arise in the case of personnel leasing. Although the AÜG contains a lot of measures of control, in reality there is quite a lot of illegal personnel leasing. The efficient way to stop this seems to be to make the borrower liable. By this he is indirectly obliged to control the concession of the lender, otherwise he will have to pay taxes or social security contributions the lender has not paid and he must take over the employees of the illegal lender. This is what law can do, the main problem is that of police and labour law inspectorates to find out illegal practices.

In conclusion the German Arbeitnehmerüberlassungsgesetz seems to be a good arrangement for the problems of personnel leasing.

III. Self-employment (except cases of economic or other dependency)

1. *Concept*

The law of occupation is divided into the two groups of employees and self-employed. The German courts and most of the scholars have no real concept of the connections and differences between the two types. They still see as the most important criterium for the difference the so-called *personal dependency* of the occupied person, which is by a teleological point of view only a secondary criterium. They fail to understand that the real basis of the difference is an economic one. This has been known in Germany up to the thirties of this century. Since then the economic aspect of the difference, which is the main aspect, has gone by some „Begriffsjurisprudenz“ (formal view with lack of the real themes). According to a new view, developed by Wank, in „Arbeitnehmer und Selbständige“, 1988, the main difference is an economical one. While the self-employed can care for risks of work and risks of live by himself and therefore needs little state protection in labour law and social security law, the employee has no economical chances of his own and therefore needs law protection.

In the court the concept of „personal dependency“ still prevails, although several Landesarbeitsgerichte (labour courts of the Länder) have ruled in favour of the new theory on „entrepreneurial risk“.

Two late decisions of BAG und BGH on Eismann-drivers show that the two theories („personal dependency“/“entrepreneurial risks“) have during the last years developed more convergent (see *Wank*, *Recht der Arbeit* 1999, p. 271 ff.).

In the discussion of scholars, the new sec. 7 para 4 SGB IV could have given a chance for a new discussion of substantial questions. But as new law of remarkably bad legislative quality, the whole discussion concentrates on his and not on progress of practical discussion. Scholars of labour law have not taken the chance but have reinstalled their battles of the past (see *Wank*, *Recht der Arbeit* 5/1999).

2. *Modalities (craftsmen, farmers, liberal professions etc.)*

In the past it has been a habit to make a difference only between an employer and the partner of a contract of service. This was not correct, because the contrary to the employer is not only the partner of a contract of service but everyone who works as a self-employed. But as the concept was wrong also the instruments of definitions were wrong.

Following a proposal in *Wank*, „Arbeitnehmer und Selbständige“, today as a contrast to employees one speaks of self-employed in general, not restricted to a special type of self-employment. Therefore according to this modern view it does not matter, in which profession the self-employed is engaged and by which kind of contract.

Only if you have made the decision between an employee and a self-employed and have come to the result that the person is a self-employed, you must go into details concerning which kind of contract of a self-employed and which special law for this special profession in commercial law or other branches of law is applicable.

For a *craftsman* e.g., regarding his personal status the law of contracts for service, sec. 631 BGB, is applicable. Besides there is special law for craftsmen, like the Handwerksordnung (Statute on Craftsmen), requiring special examinations (Meisterprüfung) if somebody wants in this branch to start a job as a self-employed.

There is no special law for *farmers* in labour law and social security law as far as employees or workers are concerned. Self-employed farmers have special statutes in social security law, like a statute on old age pensions for farmers.

In *liberal professions*, too, we have a difference between employees and self-employed, like medicines working in a hospital and others working on their own as self-employed. For those working as employees the normal labour law and social security law is applicable, whereas for self-employed there is a number of special statutes regarding their relationship to the state social security system, and there are special organisations concerning old age pensions of medicines.

A problem in the liberal professions is that beginners in the profession of medicine or law may be exploited. An advanced

advocate who agrees to take up an advocate who has just done his examinations may offer him a job only as a self-employed, not as an employee, because this will be cheaper for him. If you follow the criteria for the difference between employee and self-employed many of these young advocates are in reality employees, but disguised employees. Because they want to get and to keep their job and because they do not want to get difficulties if they change to another advocate they keep silent until they get an adequate position for themselves.

3. *Trends:(a) quantitative evolution (increase, stability, reduction) in general, and by sectors of activity*

The number of self-employed in Germany during the last years has not much changed. Our statistics are not very reliable in as far as they combine figures of helping family members and real self-employed. The figures keep being around 10 per cent of the population with employment. There is an increase or reduction according to economic development in general and according to tendencies in enterprises like outsourcing. Also, the state policy in either hindering or promoting foundation of a new enterprise has effect on the number.

As in all developed countries greatest increase in number is in the service sector.

(b) Qualitative evolution, main characteristics

As in other European countries there is a tendency of increase in the service sector. In Germany in this sector are already more persons employed than in the production sector. Although the general idea of enterprises is that of big companies, most employees are occupied in small oder middle-sized enterprises. As a result of these facts new enterprises of self-employed arise in the service sector with either no or only a few employees.

4. *Legal systems governing the main forms of self-employment. Main instruments (including constitutional provisions) to regulate it*

As shown before, the main legal system governing these kinds of occupation is that of the civil law, especially contract of service and contract for service. As far as risks in life and profession are concerned, self-employed must care for themselves. They are in general excluded from social security systems, which means that they must either provide for risks by private insurance companies or own savings.

The constitution grants the freedom of self-employed occupation in art. 12 GG, which article also grants the freedom of employees. The jurisdiction of our Bundesverfassungsgericht (BVerfG, Constitutional Court) has developed a special theory about when and how far state may regulate conditions of self-employed (see *Papier*, will appear in *Recht der Arbeit* 1999).

5. *Main rights and obligations of self-employed workers*

In general the conditions of the contract are left to liberty of contract. In reality, these conditions are normally regulated by general terms and conditions of trade.

Besides the conditions laid down in the contract there may be further commands of the partner of a contract of service or a contract for service. There is a connection between the degree of commands and the status of the occupied person. If the partner goes too much into detail with his commands, this may make an employee of the former self-employed. The idea is for the BAG and the prevailing opinion, the degree of commands makes the difference between the two types, while according to another theory it is not a matter of any kind of commands but a matter of entrepreneurial freedom. If the partner of the contract robs the employed person of his entrepreneurial freedom then this person has by a teleological point of view no chances to cover up his own risks and therefore needs state protection. The two theories have come in some convergence in latest past (see *Wank*, *Recht der Arbeit* 1999, p. 271 ff.).

So the protection runs in two steps: First, if the partner creates too many commands, the employed person may turn out to be an employee. If not, then the conditions of the contract may - in case of general terms and conditions of trade - be controlled by the courts following the AGBG (Statute on General Terms and Conditions of Trade).

6. *Protection of workers and main problems concerning lack of adequate protection - formal or effective - as regards:(a) conditions of employment and remuneration*

For real self-employed (not disguised employees) conditions of employment are a matter of their contract and it depends on the courts how much they will control contracts which include too many restraints to the working person. As far as the remuneration is concerned, the freedom of contract leads to the effect that the price for service or goods are free.

(b) Occupational safety and health conditions

As long as the self-employed works in his own rooms, he is responsible for health and safety conditions himself. When he works in the rooms of his partner, there is no special law saying that the partner of the contract is obliged to care for health and safety of a self-employed, but the courts and literature agree that sec. 618 BGB either directly (contract of service) or in analogy (contract for service or others) is applicable in these cases.

(c) Social security

Social security law is generally only meant for employees and not for self-employed. There are only little exemptions.

(d) Freedom of association

Our constitution grants the freedom of association in art. 9 para 3 GG only to employees and employee-likes, not to self-employed. They may also associate and do so, but these associations are no trade unions. They therefore have not the rights of trade unions.

(e) Collective bargaining

Collective bargaining works directly for members of the associations and it works bindingly. This effect is not given to contracts by other associations than trade unions and employers' associations.

Besides, the right to strike is also only given to employees and employee-likes, but not to self-employed. There are sometimes quasi-strike actions, like in the latest past that of medicines who protested against the conditions with state social security system. Strike in the legal meaning of labour law, however, is not allowed to self-employed.

(f) Access to justice (competent jurisdiction, applicable procedure)

The jurisdiction for self-employed is not that of labour courts but only that of the normal civil courts.

IV. Self-employment in situations of economic or other dependency

1. *What characterises these workers?*

These workers are characterised by the fact that they have a business consisting only of themselves without other people working for them, a small enterprise especially in the service branches and work only for one or a few „Auftraggeber“ (contractual partner).

2. *Denomination: terms most currently used, in professional circles or by the wider public, to designate such workers*

In common language there is no special denomination for this kind of workers.

a) In *labour law*, they are called „Arbeitnehmerähnliche“ , „employee-like workers“. Although this name seems to indicate that they have a clear position in law, this is not the case. There are difficulties to describe this group first referring to the side of legal conditions, secondly referring to the side of legal consequences.

aa) There are statutes, which know the term „Arbeitnehmerähnliche“ expressively. In some of these statutes this term is described, in others the term is only used but not described.

(aaa) Sec. 2 sentence 2 Bundesurlaubsgesetz (BUrlG, Statute on Leave) says: employees in this statute are also persons who because of their economic dependency are employee-likes.

Similarly is sec. 5 sentence 2 Arbeitsgerichtsgesetz (ArbGG, Statute on Labour Process).

Sec. 2 para 2 no. 3 Arbeitsschutzgesetz (ArbSchG, Statute on Health and Safety) defines as employees for this statute „employee-likes as in sec. 5 para 1 Arbeitsgerichtsgesetz“.

(bbb) Besides these general definitions of employee-likes there are two special groups of employee-likes with special statutes.

One group are so - called *homeworkers*, who have the „Heimarbeitsgesetz“ (HeimarbeitsG, Statute on Homeworkers) as their own statute. Homeworkers are defined as people who in a working place chosen by themselves work alone or only with members of their family professionally for one contractual partner helping him to sell his products. The statute has special sections on health and safety, on special collective bargaining, on homeworking committees and on control of salaries. There is also a dismissal protection in this statute.

(ccc) Furthermore there is another group, that of „*employee-like agents*“. Sec. 92 a Handelsgesetzbuch (HGB, Commercial Code) says that for agents working only for one contractual partner the Ministry of Labour may make a regulation concerning the minimum salary. As this regulation does not exist, this section is of no effect. It only serves courts and scholars as a proof, that agents who work as self-employed are by the fact that they only work for one contractual partner not automatically employees.

As shown, the group of employee-likes is a heterogen group in law.

bb) Besides all the differences on the side of the constituents of the rule there is a problem of the side of legal consequences. As all courts and scholars in Germany agree, employee-likes belong to the group of self-employed. They are a sub-group of self-employed who need more protection than other self-employed. As the name

for this group exists and because there really are a handful of statutes, some scholars derive from this that this group is sufficiently protected by German law (especially *Buchner*, NZA 1998, p. 1144 ff.; *Hanau*, Die Anforderungen an die Selbständigkeit des Versicherungsvertreters nach den §§ 84, 92 HGB, 1997). This is what one may call „science fiction“ (see as a realistic study *Appel/Frantzoch*, Arbeit und Recht 1998, p. 93).

Sec. 5 ArbGG only says that this group can go to labour courts, but this has no effect on the material conditions for their contractual relationship. Sec. 5 takes out of all facts that rule the working conditions, only the vacations. That health and safety must be regarded also for self-employed as long as they work on the premises of the contractual partner, is nothing new but has been developed as an interpretation of sec. 618 BGB decades ago. Different from this, sec. 12a Tarifvertragsgesetz (TVG, Statute on Collective Bargaining) declares this statute also applicable on „persons who are economically dependent and similar to an employee need social protection (arbeitnehmerähnliche Personen). Here not only one criterium is used (economically dependent) but also a second one, the need for social protection similar to an employee.

Although Bundesurlaubsgesetz und Arbeitsgerichtsgesetz only use one of the two criteria, courts and scholars understand employee-likes in these two statutes also as defined by the two criteria of sec. 12a TVG.

In sec. 12a TVG the definition after

- economically dependent and- needing social protection continues like this:

if

- they work mainly for one other person or- if they get by one person on average more than half of the income they have as income totally.

This definition is a failure (see *Wank* in Wiedemann, Tarifvertragsgesetz, 1999, § 12a, note 33 ff., 60 ff.). It seems to indicate that you have to proof the first two criteria first and the other two criteria afterwards. The courts and most scholars step into this trap and proceed like this. In fact, however, the first two criteria are not needed. They only tell what is the motive of the legislator. But the legislator has used, besides the two material criteria, operational criteria and only these are applicable. That means that you only have to look if a person works on the basis of a contract of service or a contract for service and if he is working only for one other contractual partner or gets by him more than half of his total income.

Courts and scholars agree, that they cannot refer to the operational criteria of sec. 12 a TVG as criteria of a common definition of an employee-like. This is an error again. If what is expressed by the material criteria is operationally defined by the other criteria then why not differ according to the operational criteria in other statutes that lack those operational criteria and to refer to those of sec. 12 a TVG.

Sec. 12 a TVG does in reality only help people employed with broadcasting systems and with the press. Only in this area collective bargainings for employee-likes exist, but in no other area. Therefore it is almost cynical when other scholars point to sec. 12 a

TVG claiming that employee-likes have enough protection in German law.

For people working in the broadcasting area, however, the protection by collective bargaining agreements is very effective. The broadcasting systems have their own agreements, differing between employees and „employee-likes“.

The law on homeworkers and that on agents only refer to these special groups and can by no way be transferred to other groups of employee-likes.

If you ask for all the other working conditions of an employee-like there is no statute law regarding employee-likes like employees. In some cases the courts make an analogy, but this is only punctual (see *Neuvians*, Thesis on Arbeitnehmerähnliche, will appear 2000).

As a summary the group of employee-likes in German labour law is a group which has a name but almost no labour law protection.

b) Besides the statutes in labour law you must also look for statutes in *social security law*. There is no straight line concerning this group. In some statutes they are regarded like employees, in others they are regarded as self-employed.

The way of legislation in social security law is different from that in labour law. Until recently there has not been the „employee-like“ as a special definition, either homeworkers or specially named professions.

This has changed by January 1st 1999. As shown above, there is a new sec. 7 para 4 SGB IV, giving a definition of an employee for the purposes of all kinds of social security law.

Together with this, a new sec. 2 no. 9 SGB VI has given a new definition of an „employee-like“ for the purposes of old age social

security. A person who fulfils the first numbers of the definition in sec. 7 para 4 SGB IV (see above) namely- to work with no staff- to work only for one partner

is an employee-like for SGB VI (old age social security).

3. Trends(a) quantitative evolutions (increase, stability, reduction) in general and by sectors of activity

As employee-likes are to be found in all sectors of activity and as there are no special statistics on them (because they are a subgroup of self-employed, you only find statistics on self-employed), you cannot find out the quantitative evolution. What you can say is parallel to the development of disguised employees. There has been an increasing number of disguised employees and of „employee-likes“ during the last years out of the same reasons. As shown above, the number of „employee-likes“ depends to a certain degree on the definition of the employee. As the inquiry of the IAB found out, according to the definition (BAG-Modell, Verbände-Modell, Alternativmodell) the figures of disguised employment vary. There is a strong tendency among scholars, to keep a narrow definition of the employee and to call others „employee-likes“. As shown above, for the persons needing protection this is of nothing but cosmetic character.

(b) Qualitative evolution: main characteristics

As employee-likes cover all kinds of activities, the only thing you can say is that parallel to a general development in the workforce

there is an increasing number of employee-likes in the service branches.

4. *Main causes of this kind of work*

People who belong to this group often have a small business in the first step of making themselves self-employed. These people may hire own employees later on and may widen their enterprise.

The legislator of sec. 7 para 4 SGB IV has been unable to acknowledge this. Although there has been a hint in literature (see *Wank*, Empirische Befunde) there is no special paragraph leaving people creating a new existence as a self-employed out (see *Wank*, RdA 5/1999).

There is another group of „employee-likes“ that keeps in this status all their life, like agents or drivers, who have their sufficient income working for one or only a few contractual partners. Because to enlarge your enterprise you need capital and another entrepreneurial attitude, a number of people in this group have no interest in increasing.

5. *Main activities currently carried out by self-employed workers who are in situations of dependency*

All professions that are listed referring to disguised employment (see above) may also be counted as examples for „employee-likes“. In literature there are sometimes tables with court decisions on „employee-likes“, suggesting that these tables can give an information as to where „employee-likes“ can be found. But these lists are misleading in as much as „employee-likes“ may be found in every profession.

As newest example of judicature you can take the decisions of BAG and BGH on Eismann-drivers (see above), who are either employees or „employee-likes“.

6. *Should these workers be classified as:*

(a) self-employed workers, with the same status as such workers?

(b) subordinate workers, with the same status as such workers?

(c) workers in a different situation who have, or merit, their own legal treatment?

In Germany at the moment we have the solution (a). These people are regarded as self-employed, but some statutes for workers are applicable also on them. In reality, the number of statutes doing so is so small, that no real protection is reached. There is not even a real discussion on the question, how much they should be equalled to workers and what should be the result. Therefore to concentrate the efforts for this task I should prefer solution (c). They should be regarded as self-employed, as is the fact so far, but there should be a social statute on employee-like self-employed which contains all statutes that are applicable on them.

Contrary to what is said by some scholars, that there is enough legal or jurisdictional protection for „employee-likes“, in fact there is not, as the BAG as well as scholars deny in most cases of labour law statutes an analogy for „employee-likes“ (see the thesis of *Neuvians*, appearing 2000). This is methodologically correct, but proofs that it is a matter for legislation.

7. *Workers protection and the main problems resulting from lack of protection - formal or effective - as regards*

(a) conditions of employment and remuneration

Besides health and safety law there is almost no legal ruling of employee-like self-employed. Only a few other statutes are made applicable on them by analogy. There is not even yet a discussion or an inquiry how many and which other statutes should be applicable on them as well.

As far as remuneration is concerned, there is only the special statute on homeworkers (which in reality does not help much, because the salary of homeworkers is the lowest of all professions), whereas all other employee-likes have no protection of remuneration at all. The only exemption are people working with broadcast and press, for whom there exist some collective bargainings fixing also their salary.

(b) Occupational safety and health conditions

As employee-likes are regarded as employees in the Arbeitsschutzgesetz (see *Wank*, Technischer Arbeitsschutz, § 1 ArbSchG note 11), they get the same protection in this area as employees; no improvement is necessary.

(c) Social security

As shown above, German legislation is based on the idea, that self-employed can care for their own risks and that there is no need to give social security to them. Our social security law does not differ between self-employed in general and employee-like self-employed. There is a new exemption for „employee-likes“ in old age social security (see above).

(d) Freedom of association

Art. 9 para 3 Grundgesetz grants the freedom of association also for employee-likes.

(e) Collective bargaining

Sec. 12 a TVG allows collective bargaining not only for employees but also for employee-likes. Although this is open to all kinds of employee-likes with no limit on the kind of profession, in reality this has been a statute only for workers of broadcasting and press. Evidently, there have not been yet organisations of employee-likes for some professions at all or if they are, they do not think collective bargainings appropriate for their members or they are not strong enough to reach collective bargainings. There is no information about the reason why sec. 12 a TVG in reality only is applicable on a few professions.

(f) Access to justice (competent jurisdiction, applicable procedure)

In German law employee-likes have the same access to a special justice, the labour courts, as employees; the procedure is a special procedure for labour courts. Therefore in German law there is no need for more protection in this area.

V. Case studies

1. Truck drivers

a) The number of self-employed or so-called self-employed truck drivers has much increased in Germany during the last years. There are two main types, one delivering goods by the producer, another type delivering parcels (see *Wank*, *Empirische Befunde*, p. 107).

In most cases these truck drivers only work for one contractual partner. In most cases, also, they do not employ other employees themselves. The truck they use is in most cases loaned to them by the producer or contractual partner. They have to follow a strict programme of their contractual partner, who sets their route, does not allow them to work for others and sets a fixed salary.

There has been recently the famous case of *Eismann* truck drivers, which has been ruled by Bundesgerichtshof (BGH, Federal Civil Court) and by the Bundesarbeitsgericht (BAG, Federal Labour Court) as well. In both cases the BAG and the BGH had not to decide, whether these truck drivers were free self-employed or employees. As our German sec. 5 ArbGG divides between free self-employed on one side and employees and employee-likes on the other side, access is given to labour law courts for employees and „employee-likes“ as well. The BGH and the BAG ruled both, that these truck drivers where either employees or „employee-likes“ and that they had not to decide which of the two was right. These truck-drivers delivered frozen goods produced by the enterprise „Eismann“. The drivers had franchising contracts with Eismann. Experienced by a number of litigations in the past, Eismann had declared the franchising contracts as those of self-employed and had made short contracts only. In fact, Eismann drivers are regulated in every regard, but these regulations had been transferred into a handbook.

It is remarkable how the lower courts in civil law ruled, especially Oberlandesgericht Düsseldorf (district court Düsseldorf, NJW 1999, p. 2981): As franchising is known as giving a lot of control to the franchisor, the OLG Düsseldorf ruled by some kind of logical fallacy: Because Eismann has succeeded to put its grasp very close on its drivers, this proves that they are real self-employed, because franchising is always done by self-employed. Although this is obviously nonsense, this argument has been common with civil courts in the past and has been supported by scholars. BAG and BGH have both refused this argument. The decisions of BAG and BGH are especially remarkable because of the fact that both courts have in these cases adopted the idea developed by *Wank*, that to find out the status of a person you must not look at the risks he is given, but if there is a *fair combination of risks and chances*. The BGH expressively stated that Eismann imposed on their drivers only the risks of the job not letting them entrepreneurial chances. Therefore it was no doubt for BGH and BAG to qualify the Eismann truck drivers as either employees or employee-likes.

Both decisions are - disregarding some aspects of the grounds - completely in common with my kind of definition. At first you must not look at the contract but at reality, an idea which is meanwhile common with the courts. Secondly you must not only look at the risks, but also if the person employed has enough chances. This is new, the BGH and the BAG have disregarded this aspect in the past but have expressively pointed it out in these decisions. Thirdly you must not look at personal dependency with regard to any kinds of control, but you must look on entrepreneurial dependency, i.e. if a person has a chance to make his own profits by own employees, own enterprise and own prices.

b) In contrast to the Eismann-cases, there have been other cases of truck drivers, where BGH and BAG ruled that these persons were real self-employed and not employee-likes, with the result, that they had access to civil courts and not to labour courts (BAG, NZA 1999, p. 374; BGH, NJW 1999, p. 648).

The difference in the facts were that these persons did not work only themselves but with one employee they had hired and in the case of the BGH with a second truck they owned by themselves.

These cases have been ruled also according to the theory of Wank. In these cases the claimants had own employees and had an own enterprise which are according to this new theory indicators of being a real self-employed (see also sec. 7 para 4 no. 1 and 4 SGB IV).

2. *A salesperson in a large store*

In the area of salespersons you must differ between those working in the office and those working outside.

a) With people working in the office there are in general no problems. They are employees. There has been created, however, a new kind of job, that of a „Propagandistin“. These persons work on the premises of a warehouse during the normal times and in coordination with the department of the store. The enterprise who employs these Propagandistinnen declares them as self-employed. Courts have, however, correctly described them as employees (LAG Köln AP Nr. 80 zu § 611 BGB Abhängigkeit; LSG Berlin AP Nr. 83 zu § 611 BGB Abhängigkeit; see *Wank*, *Zeitschrift für Sozialreform* 1996, p. 387, 398).

b) With salesmen working outside the store, the legal status is difficult to find out (see *Wank*, *Empirische Befunde*, p. 96 ff.). There is a special section for salespersons in the Commercial Code, differing between self-employed salespersons and dependent salespersons (sec. 84 HGB, see above). Although the text of this section makes it dependent on two expressed criteria, namely who can

- rule his own time- rule his own activities,

courts and scholars do not refer to the text of this section, but use their own, common definition of an employee. That means, that there are used quite a number of criteria, with none supervailing.

There is some more irritation regarding salespersons by the newly created sec. 7 para 4 SGB IV. Although the section has created a new definition of an employee (for the purposes of social security law), one group has been exempted, namely salespersons. For them, this newly created statute refers to sec. 84 HGB. This is crazy: The new statute has become necessary, because the former attempts by the courts and by the scholars have been of little help, because they were not guided by a theological theory and because they lacked operational criteria. So if this was the reason for the new statute, it makes no sense at all why for salespersons the statute refers to the former status of law which has been recognized as inappropriate. The only explanation seems to be the initiative of salespersons' lobby.

c) *Construction workers*

In general there is no doubt that construction workers are workers and no self-employed. There have been, however, during the last years attempts to make some of these people self-employed. There have been the examples of self-employed crane driver, self-employed locksmith etc. This has easily been recognized as a kind of evasion in all those cases where these construction workers only worked for one enterprise. The legal solution is different if the person does not work for one enterprise but offers his works sometimes for this enterprise and sometimes for another, keeping his freedom to whom and when to offer his work at what conditions. In this case the construction worker is an employee-like, because he has no own employees and no real enterprise, if you don't care for the simple machines he has for himself.

VI. Conclusion

1. *Different kinds of problems*

With the figure of „contract workers“ the ILO has tried to cover different problems, which can not be taken in one. As the analysis has shown, you must differ between triangular relationship on one hand and employee-likes on the other hand. Within triangular relationship you must again differ between special problems of personnel leasing. For this area there already exists an ILO-recommendation so that ILO should no longer put energy into this. As far as triangular relationship outside of personnel leasing is concerned, the problems can be dealt together with the general problem of how to differ between self-employed and employees.

2. *The definition of an employee*

If you once have an appropriate definition, you can also come up with the problem of disguised employees. This figure has come alive because legislators, courts and scholars have, in the past, been unable to give a correct, i.e. a teleological definition of an employee, and to give operational criteria, leaving everything to the facts of the case. This encourages certainly enterprises to create disguised employees, because they gain a lot if they call their employees self-employed. As courts do not know how to handle the cases correctly, there is a lot of legal uncertainty which only helps the growth of disguised employment. As soon as there is a correct and easily to use definition, courts and authorities and even the persons involved themselves will more easily make an end to this.

As the result of the German discussion, the main results to be taken into account for a definition are, that the main aspect is not a personal dependency but the economical dependency of the person working. The idea of the difference of employees and self-employed is that a self-employed has the economical strength by contracts giving him own entrepreneurial chances to care for the risks of live and for the risks of the profession by himself. On the other hand, an employee is a person who has no entrepreneurial chances and therefore needs the protection of law.

The discussion also has shown, that it is preferable to give operational criteria which make it easy for all concerned to find out if a person is an employee or a self-employed. The discussion has shown, that the main criteria are: - if a person employs other employees himself,- if he works only for one contractual partner or for more- if he has an own enterprise or not.

There is one criterium which may not to be found out as easily as the others, but in cases of doubt makes it necessary to go into this: if by the contract with the contractual partner the person employed has entrepreneurial chances. Entrepreneurial risks alone do not count, but there must be a fair relationship between entrepreneurial chances and risks.

The newly created sec. 7 para 4 SGB IV has also shown that it is a mistake not to have a special clause for people building up their own existence. That means that for the first year (or perhaps for the first three years) you cannot really decide whether a person is a self-employed or an employee, because his enterprise as a self-employed may develop. Therefore there must be a chance for those planning to become self-employed to reject the protection of labour law for a special period.

The discussion has also shown that there should be a difference between those working in only one job and those working in a second job. While the first group needs all protection of labour law, the other may as well be protected by a civil law contract in their second job. As far as the ILO is concerned it may put some energy in the attempt to define an employee to give criteria against disguised employment.

3. „Employee-likes“

As the German experience shows, a way to reduce a lot of trouble would be to create a special group of „employee-likes“ in law. They can be protected by the courts (not effective), by collective bargaining agreements (effective only in a few branches) or by statute law, which seems the only effective way.

Statute law must be based on labour law and on social security law as well. In labour law there ought to be an inquiry first which parts of labour law are appropriate to be extended on „employee-likes“. Social security law should also be made open for all self-employed (possible as in some countries, but not necessary), but at least for „employee-likes“.

ILO should look for a definition of „employee-likes“. This can either be material (a self-employed who is economically dependent) or formal (a self-employed with no staff (or: no more than one employee) working only for one client, having only a small enterprise of his own).

The problem of „employee-likes“ is an actual, unsolved one for the European countries, but for countries in other parts of the world certainly in a much higher degree. As the standard of methodology and of practical scientific inquiries in Germany (as well as in other countries) on the subject of the definition of an employee and on the definition of an „employee-like“ is still low, it seems realistic, that the ILO at the moment cannot reach more than a recommendation that members of the ILO should make inquiries into the facts and legal solutions of „employee-likes“ and should care for statutes in labour law and in social security law, giving this group of persons a position between employees and economically free self-employed.

Workers' Protection

Annex

I. Statute Law

- Art. 9 Abs. 3 GG
- § 5 ArbGG
- AÜG
- § 2 BUrtG
- § 84 HGB
- § 7 SGB IV
- § 2 SGB VI
- § 12a TVG

II. Collective Bargaining Agreement

- See as an example „Tarifvertrag für arbeitnehmerähnliche Personen des WDR vom 1. Dezember 1976 in der Fassung vom 1.1.1979 zwischen den Gewerkschaften Rundfunk - Fernseh - Film - Union im Deutschen Gewerkschaftsbund, Rheinisch - Westfälischer Journalistenverband e.V. und dem Westdeutschen Rundfunk Köln (WDR)“

III. Courts decisions

- Bundesgerichtshof (Eismann), 4.11.1998, RdA 1999, p. 268 (*Wank*)
- Bundesarbeitsgericht (Eismann), 16.7.1997, NZA 1997, p. 1126 (= AP Nr. 37 zu § 5 ArbGG 1979)
- Bundesarbeitsgericht, 19.11.1997, NZA 1998, p. 364 (= AP Nr. 90 zu § 611 BGB Abhängigkeit)

IV. Articles, Commentaries

- *Wank*, Die „neue Selbständigkeit“, DB 1992, p. 90
- *Wank*, Telearbeit, NZA 1999, p. 225
- Erfurter Kommentar-*Wank*, § 1 AÜG, notes 26 ff.

V. Statistics, Empirical Inquiries, Authorities

- Bundesarbeitsblatt 4/ 1999, p. 57 ff., 75 ff.
- Empirische Befunde (summary), RdA 1999, p. 171

