

The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? Bernd Waas*

1. The judge-made law. 1.1. Criteria: Work Instructions, Work Control and Integration. 1.1.a. The so-called typological method. 1.1.b. Freedom to structure one's work and to decide one's working hours. 1.1.c. Integration. 1.2 Indicators. 2. Principle of primacy of facts. 3. Section 611a of the Civil Code. 4. What has been achieved? 5. Conclusion.

Abstract

For a long time, there was no legal definition of “employee” or “contract of employment” in Germany. This did change in 2017 when the lawmaker introduced the new section 611a into the Civil Code (*Bürgerliches Gesetzbuch*) which, however, is based on the existing judge-made law. This article first gives an overview of the definition of the courts (1.) and then presents the “new” legal regulation (2.). On this basis, the question will be discussed what has been achieved by the legislator (3.). The paper ends with a concluding remark (4.).

Keywords: service contract; personal dependence / subordination; power to direct; typological method; freedom to structure work; direction power; integration; indicators; primacy of facts; legal definition of employment contract; digitalization.

1. The judge-made law¹.

In Germany, a contract of employment is a sub-category of the so-called ‘service contract’ (*Dienstvertrag*)². The term ‘service contract’ is defined in section 611(1) of the Civil Code (*Bürgerliches Gesetzbuch*). Pursuant to section 611(1), a ‘service contract’ is a contract on the basis of which ‘a person is obliged to perform work [sub-ordinated or not] in exchange for remuneration owed by another person.’ What distinguishes a contract of employment from

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¹ This discussion is largely based on Waas B., in Waas B., Heerma van Voss G. (eds.), *Restatement of Labour Law in Europe*, vol. I *The Concept of Employee*, 2017, 251.

² Sceptical, however, Greiner S., ‘*Erfolgsbezogene Vergütungen im Arbeitsverhältnis – oder: der Arbeitsvertrag als spezieller Werkvertrag?*’. In *Recht der Arbeit (RdA)*, 2015, 218, pointing to the fact that agreements on performance-related remuneration may render contracts of employments to specific cases of so-called ‘contracts to perform work’ within the meaning of s 631(1) of the Civil Code rather than service contracts.

others is the existence of personal subordination (*persönliche Abhängigkeit*) between the service provider and the other party to the contract³.

According to the definition provided by the courts, an employee is a person ‘who on the basis of a contract of private law is obliged to perform work in the service of another person’. This definition points to the fact that an employee is directed by another in the performance of his/her duties. In other words, he/she is subordinated to or personally dependent upon another (*persönlich abhängig*). According to the Federal Labour Court, it is this very personal dependence that is ‘one of the essential reasons for the development and strengthening of labour law’⁴.

With regard to the question what constitutes ‘personal dependence’ (*Weisungsabhängigkeit*), section 84(1) of the Commercial Code (*Handelsgesetzbuch*) was regularly referred to. At first glance, it provides no more than a legal definition of the term ‘commercial agent’ (*Handelsvertreter*). According to section 84(1) sentence 2, if a person is “essentially free to arrange his professional activities at his own discretion and decide when to perform work”, that person is considered self-employed (*selbstständig*). This provision represents the starting point for defining the term ‘employee’; however, as such a person is not free to arrange his/her professional activities at his/her own discretion and is not allowed to decide when to perform work.

1.1. Criteria: Work Instructions, Work Control and Integration.

As already mentioned, a contract of employment is characterised by a relationship of personal dependence or subordination between the parties. In this regard, it is crucial to determine whether and to what extent a person is subjected to another person’s power to direct⁵, the scope of which may vary depending on whether it comprises work content, the mode of performance of work, time, work period and place of work. Equally important is the extent to which another person forms part of the work organisation of another.

1.1.a The so-called typological method.

To determine whether a person is sufficiently subordinated to justify the relationship with another person as qualifying as an employment relationship, the Federal Labour Court applies the co-called ‘typological method’. The starting point of the legal analysis is that the term ‘employee’ refers to a mere ‘type’ (*Typusbegriff*), meaning that all of the decisive criteria must not necessarily be met in individual cases. Nor is there a feature of dependent work that is not also occasionally found among self-employed persons.⁶ Moreover, the Federal Labour Court denies the possibility of fixing abstract criteria in advance that must be met in

³ The concept of ‘personal subordination’ will be explained in more detail below.

⁴ Federal Labour Court of 15 March 1978 – 5 AZR 819/76, explicitly refers to the labour law scholar Hueck A.

⁵ This power is dealt with in section 106 sentence 1 of the Factories Act (*Gewerbeordnung*).

⁶ Federal Labour Court of 23 April 1980 – 5 AZR 426/79.

individual cases.⁷ In some cases, the Court went so far as to state that there is simply no single criterion among the many that must be applied in the process which may be considered indispensable.⁸ Instead, courts use various criteria that are indicative of the existence of an employment relationship. The basis of the corresponding legal qualification of the contract is in any event an ‘evaluating general assessment’ (*wertende Gesamtbetrachtung*), meaning that courts—in deciding individual cases—take a ‘holistic view’ to determine whether a person qualifies as an ‘employee’.⁹ The criteria for determining personal subordination vary from one case to another.

1.1.b Freedom to structure one’s work and to decide one’s working hours.

In determining personal subordination, the freedom of a person to structure his or her work and to decide his/her working hours is of key importance. This derives from section 84(1) of the Commercial Code (*Handelsgesetzbuch*) on self-employed persons, which can be used as an *argumentum e contrario* when determining whether a person is an ‘employee’. In general, the courts will ask whether and to what extent a person is subjected to the power of another person to direct the content of the job duties, the mode of performance, the time, working period and place of work¹⁰. As already mentioned, the courts acknowledge that the extent of the necessary power to direct may vary from case to case with respect to location, time, and work content. For instance, members of outdoor staff are regularly free to determine their place of work. Even so, they (may easily) qualify as employees when considering work instructions, time constraints and organisational integration. In short, the degree of subordination required is dependent on the characteristics of the concrete activities¹¹. Accordingly, in their assessment of the facts, courts may inquire whether a person’s independence is in some way compensated by dependence on another person. Since the Federal Labour Court explicitly holds that the existence of an employment relationship is dependent on the ‘degree’ of personal subordination,¹² the only thing that can safely be said is that the more far-reaching the power is to direct a person, the more likely the contract of that person will be considered a contract of employment¹³.

⁷ See, especially Federal Labour Court of 23 April 1980 – 5 AZR 426/79.

⁸ Federal Labour Court of 23 April 1980 – 5 AZR 426/79 provides ‘as regards the differentiation between employees and ‘independent ‘persons, no single criterion exists that must be present from the large variety of possible features in order to speak of personal dependence. It is therefore inevitable for practical reasons and legal certainty to make the necessary distinction by applying a typological method’.

⁹ Federal Labour Court of 23 Apr. 1980 – 5 AZR 426/794. An application of this ‘general evaluation assessment’ in cases of ‘economy on demand’ by Lingemann S., Otte J., ‘*Arbeitsrechtliche Fragen der ‘economy on demand’*”, in *Neue Zeitschrift für Arbeitsrecht*, 2015. 1042.

¹⁰ See, eg Federal Labour Court of 30 Nov 1994 – 5 AZR 704/93 and, more recently, of 21 July 2015 – 9 AZR 484/14.

¹¹ Federal Labour Court of 15 March 1978 – 5 AZR 819/76.

¹² See, eg Federal Labour Court of 15 March 1978 – 5 AZR 819/76.

¹³ See, eg Federal Labour Court of 13 Nov. 1991 – 7 AZR 31/91.

1.1.c Integration.

In addition to assessing the extent of another person's power to direct, the courts often use the 'integration test' and ask whether a person forms part of the organisational structure of an undertaking (integration – *Eingliederung*)¹⁴. The question then is whether work is performed within the framework of an organisation, which was constituted by another¹⁵. Integration in that sense is often referred to as 'organisational dependence' which essentially means dependence on the tools and materials provided by the employer and a possible necessity to collaborate with other persons and to adapt one's own work with that of others. The legal literature has sometimes criticised that the integration test must fail when there is no work organisation. Some authors also claim that emphasising integration is often little more than paraphrasing personal subordination¹⁶. In any event, the 'integration test' is of little value, if integration is derived from personal subordination, which is sometimes the case in rulings of the Federal Labour Court¹⁷.

1.2 Indicators.

In the Federal Labour Court's view, the essential feature of employment is that the individual, the employee, is directed by another¹⁸. Hence, the existence of work instructions is the main indicator of subordination¹⁹. However, work instructions as such do not suffice to justify qualifying a person as an employee, since a self-employed person can also be the addressee of instructions; with regard to contracts for work (*Werkvertrag*), section 645(1) sentence 1 of the Civil Code explicitly deals with 'instruction(s) given by the customer for the performance of the work'²⁰. Apart from that, it must be noted that in case of work that requires a high standard of know-how, instructions tend to be the exception rather than the rule²¹.

This leads to another element of subordination, namely that work may be carried out within specific hours or at an agreed place. The Federal Labour Court has often denied employee status if a person proved to essentially be free in his/her decision when to perform

¹⁴ The criterion of integration is reminiscent of an old and now outdated doctrine (so-called *Eingliederungstheorie*) according to which an employment relationship comes into existence on the basis of the employee's integration rather than contractual consensus between the parties concerned. See n 15 above.

¹⁵ Federal Labour Court of 20 July 1994 – 5 AZR 627/93.

¹⁶ See Richardi R., *Münchener Handbuch zum Arbeitsrecht*, 3rd ed. 2009 (older edition), § 16 note 25.

¹⁷ Federal Labour Court of 30 November 1994 – 5 AZR 704/93: 'Inclusion in a work organisation that was established by another essentially arises from that person's power to direct'.

¹⁸ Federal Labour Court of 15 March 1978 – 5 AZR 819/76.

¹⁹ Federal Labour Court of 20 July 1994 – 5 AZR 627/93.

²⁰ This often leads to the difficulty to differentiate between directions under a contract for work and an employment contract. See, in this regard, for instance, Federal Labour Court of 25 September 2013 – 10 AZR 282/12 according to which the former is 'instructions which relate solely to the agreed work', while everything points to an employment contract if an activity is planned and organised by another person and the 'contractor' is incorporated in a foreign work organisation to an extent that autonomous organisation of the work is de facto all but impossible.

²¹ Federal Labour Court of 20 July 1994 – 5 AZR 627/93: Being bound to work instructions is rather atypical when it comes to high quality work. This type of activity may bring with it that the persons concerned enjoy a high degree of freedom when designing their work, perform work on their own initiative and are independent in terms of job content.

work.²² That the availability of a person is required under a contract, on the other hand, points to subordination (or integration). The obligation to be available most of the time strongly indicates an ‘employee status’²³. Yet persons may still qualify as employees even if they are essentially free to determine the place and time of work (and are not subjected to work instructions, either). In the Federal Labour Court’s view, the employee status may follow in such cases from the fact that these persons rely on the employer’s technical equipment and are part of a team²⁴. The latter points to integration or organisational dependence. In the context of integration, one question that is occasionally asked by the courts is whether similar work is performed in the undertaking by persons who undoubtedly qualify as employees, and whether the employer generally does not differentiate between persons who are employees and the person whose legal qualification is being examined²⁵.

The fact that work is performed solely or primarily for the benefit of another (*Fremdnützigkeit*) in the sense that ‘an employee—unlike an entrepreneur—is not free to use his labour in accordance with the purposes fixed by himself, at his own authority and at his own risk’, but must place it at the disposal of another person²⁶, may also form an indicator of an employment relationship²⁷. Apart from this, the courts sometimes examine whether the division of opportunity and risk between the parties is fair. In the Federal Labour Court’s view, employees are usually not burdened with business risks. If a party which provides services bears entrepreneurial risk under the terms of the contract, it cannot be regarded to be objectively necessary for establishing an employment relationship²⁸. Some authors go even further and consider it a key element that an employee, due to the extent of his/her obligations, may have lost the possibility to use his/her working abilities for his/her own entrepreneurial purposes²⁹.

Under German law, work that is performed under an employment contract must not necessarily be carried out in person. According to section 613 sentence 1 of the Civil Code, the party under the duty of service must, in case of doubt, render that service in person; the parties to the contract are, however, free to provide otherwise. Even so, the performance of work in person is an indication of the existence of a contract of employment. On the other hand, it is contraindicative if a person is allowed to delegate work to, for instance, family

²² See, eg Federal Labour Court of 16 July 1997 – 5 AZR 312/96. In this decision, the Court opined that delivering newspapers was a simple activity which only provided limited freedom for individual work arrangements. In the Court’s view, subordination in such cases generally arises from the fact that the deliverer is mostly assigned to a specific geographical area and provided with a list of clients to which the newspapers must be delivered within a pre-determined timeframe.

²³ See, eg Federal Labour Court of 30 November 1994 – 5 AZR 704/93 according to which radio broadcasters and translators, who perform work based on service schedules, are likely to be employees, even if they are allowed to reject certain assignments.

²⁴ Federal Labour Court of 15 March 1978 – 5 AZR 819/76.

²⁵ Federal Labour Court of 3 October 1975 – 5 AZR 445/74; 28 June 1973 – 5 AZR 19/73.

²⁶ See Federal Labour Court of 15 March 1978 – 5 AZR 819/76.

²⁷ Some authors, however, criticise that by relying on this argument, the Court confuses cause and effect; see Richardi R., *Münchener Handbuch zum Arbeitsrecht* (n 15) § 16 note 34. It may be due to this critique that the argument is no longer used in later decisions of the Court.

²⁸ See Federal Labour Court of 13 August 1980 – 4 AZR 592/78.

²⁹ Lieb M., ‘Beschäftigung auf Produktionsdauer – selbständige oder unselbständige Tätigkeit?’, in *Recht der Arbeit (RdA)*, 1977, 210 and, more recently Schwarze R., ‘*Arbeitnehmerbegriff und Vertragstheorie*’, in *Zeitschrift für Arbeitsrecht (ZfA)*, 2005, 81. See also Federal Labour Court of 29 Jan. 1992 – 7 ABR 25/91 stating that ‘in case of doubt, he is an employee who is contractually bound to another person permanently instead of having established a number of business contracts with others in the market’.

members³⁰. If a person is in no position to meet his/her contractual obligations alone, but relies on other persons whom he/she hires him-/herself, it might be that no employment relationship exists.

As regards the issue of remuneration, it is acknowledged that an employment relationship typically involves an agreement on pay or, in any event, with a 'reasonable expectation' of the service provided to be remunerated³¹. However, a service can also be provided on the basis of a so-called mandate (*Auftrag*) which is characterised by the very fact that the service provided is not remunerated³². In any event, it is acknowledged that the mandate (in the context of voluntary work) may not lead to the circumvention of employment law³³.

In addition to these indicators, there is quite a number of secondary indicators for the existence of an employment relationship. Among these are periodic payments or otherwise, payments in kind, recognition of entitlements that are typical for an employment relationship, travel payments by the person requesting the work, granting of annual leave, payment of income tax and social security contributions, keeping and retaining social documents at the place of work. An indication of an employment relationship may also be when a person places his/her entire working abilities at the disposal of another person and any secondary activities are prohibited under the contract. Another indication may be the provision of tools or materials by the person requesting the work³⁴. Business registration, on the other hand, has not been considered to be of relevance by the courts³⁵. In any event, the Federal Labour Court has made it clear that secondary indicators must be treated with caution. In particular, the conduct of the other party to the contract (for instance, not demanding a certificate of incapacity for work in case of illness) is irrelevant if it is attributable to an erroneous legal position. Apart from that, the actual facts may be mere appearances which are either incidental or can freely be changed by the employer by virtue of his/her power to organise his/her business³⁶.

2. Principle of primacy of facts.

In Germany, the principle of 'primacy of facts' is acknowledged in the sense that the 'true nature' of the contract, irrespective of its 'labelling' by the parties, is the determining factor when legally assessing the relationship between the parties³⁷. In the Federal Labour Court's view, the basic idea of employment law as an instrument of protecting employees from the

³⁰ Federal Labour Court of 16 July 1997 – 5 AZR 312/96; 12 December 2001 – 5 AZR 253/00; 4 December 2002 – 5 AZR 667/01 (highly controversial).

³¹ See section 612(1) of the Civil Code: 'Remuneration is deemed to have been tacitly agreed if in the given circumstances it is to be expected that the services are only rendered for remuneration.'

³² See section 662 of the Civil Code stating that 'by accepting a mandate, the mandatary agrees to carry out a transaction entrusted to him by the mandator for the mandator gratuitously'. This implies that the mandatary in case of doubt may not transfer the performance of the mandate to a third party (s 664(1) sentence 1) and, in addition, is in principle subjected to instructions of the mandator (s 665 sentence 1).

³³ Federal Labour Court of 29 August 2012 – 10 AZR 499/11 (the Court held that voluntary work at a telephone counselling service did not qualify as employment).

³⁴ See, eg Federal Labour Court of 8 June 1967 – 5 AZR 461/66.

³⁵ Federal Labour Court of 19 November 1997 – 5 AZR 653/96 (concerning the status of a driver who had his own car).

³⁶ Federal Labour Court of 9 March 1977 – 5 AZR 110/76.

³⁷ See, eg Federal Labour Court of 19 November 1997 – 5 AZR 653/96.

(regularly economically more powerful) employer would be impaired, if the latter could set aside this protection by simply using contractual language that points in the direction of a ‘free service contract’. Mandatory provisions of employment law may not be evaded by choosing a contract which does not mirror the facts. How the parties to a contract describe their legal relationship is not decisive, nor are the desired legal consequences of a contract of any relevance.³⁸ The only thing that matters is the ‘actual content’ of the contract, which is derived from its practical implementation³⁹. As a result, if a contract is implemented in a way that contradicts the parties’ labelling thereof, its practical implementation will be decisive⁴⁰. However, the elements of practical implementation are only suitable for identifying an employment relationship if it is not atypical but a manifestation of a contractual practice that has been continuously observed by the parties⁴¹.

3. Section 611a of the Civil Code.

As mentioned above, in 2017 the legislator introduced a legal definition of an employment contract into the Civil Code.

According to this definition, the following applies: The employment contract obliges the employee, in the service of another person, to perform work which is subject to instructions and determined by a third party and which is personally dependent (section 611a sentence 1). The right to issue instructions may relate to the content, performance, time and place of work (section 611a sentence 2). Anyone who is not essentially free to organise his activity and determine his working hours is bound by instructions (section 611a sentence 3). The degree of personal dependence also rests on the nature of the activity in question (section 611a sentence 4). An overall assessment of all circumstances must be made in order to determine whether an employment contract exists (section 611a sentence 5). If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant (section 611a sentence 6).

As can be seen, the legislator has strongly oriented itself on the existing case law, not only with regard to the requirements developed by the courts, but also with regard to the relevance of the typological method (section 611a sentence 5) and the principle of primacy of facts (section 611a sentence 6).

³⁸ Federal Civil Court of 25 June 2002 - X ZR 83/00.

³⁹ Federal Labour Court of 19 November 1997 – 5 AZR 653/96.

⁴⁰ See, eg Federal Labour Court of 22 March 1995 – 5 AZB 21/94 (employee status of a member of Scientology). In its ruling, the Court underlined that establishing obligations under the by-laws of an association may not result in binding rules of labour law being evaded.

⁴¹ Federal Labour Court of 11 August 2015 – 9 AZR 98/14. The principle of the ‘primacy of facts’ as described above also applies in cases in which the courts examine the question whether a subcontractor’s employees, who work on the premises of an entrepreneur, are vicarious agents of that subcontractor or temporary agency workers. See Federal Labour Court of 27 January 1993 – 7 AZR 476/92: ‘Legal qualification of a contract as a contract to temporarily assign workers (...) is dependent on its actual business content. If practical implementation of the contract differs from the contractual language, the former will prevail (...)’. Currently, the government is proposing to add a new sentence to s 1 of the Act on Temporary Agency Work according to which temporary agency work exists if a worker is integrated in the establishment of a hirer-out and is subjected to the latter’s instructions.

This may well be understood as a sign of caution: ‘The legislator wanted—finally—to provide a legal definition, but in no case “do anything wrong”. In a first draft regulation, the legislator had been a little more courageous and had wanted to include a number of indicators in § 611a BGB—again on the basis of the existing case law. According to the Draft Act, an employment relationship should have been “if: a person (a) is not allowed to decide his or her working time, the services owed or his or her work place; (b) a person predominantly renders his or her services at the premises of another; (c) he or she regularly uses the resources of third parties to render services owed; (d) renders his or her services together with others who are deployed or charged by another party; (e) works exclusively or predominantly for another party; (f) does not own an operational organisation to render the services owed; (g) renders services that do not entail manufacturing or constructing a specific product or a specific work result; (h) does not guarantee the result of his/her work”. This Draft Act met with fierce resistance and was quickly withdrawn⁴².

4. What has been achieved?

Despite its caution, the legislator has been largely criticised in the labour law literature. Criticised is a lack of “skills of handicraft”⁴³. But the criticism goes deeper because it also aims at the relationship between legislation and jurisprudence in Labour Law. In this respect, many believe that it was quite legitimate for the legislator to have regulated the employment contract in the Civil Code. In this context, it is certainly acknowledged that in Germany – in contrast to other countries in Europe – there is no Employment Contract Act (and will probably be none in the foreseeable future). However, the justification for the regulation, namely securing legal certainty in identifying a contract of employment, does not support it in the view of the critics. Above all, however, it is considered problematic that the legislator wanted to fix the existing case-law in statutory law. In this context it is argued, that the Federal Labour Court does not formulate legal texts and that therefore it was not possible to gain clarity by simply copying passages from the grounds of judgments. On the contrary, it is argued, the codified text raises new questions. What worries the critics is, in other words, that the text of section 611a will now have a life of its own⁴⁴. Some authors formulated their criticism extremely clearly “Law students already know in the first semester that they cannot rely on key sentences in court rulings. This should also be taken into account in the legislative process.”⁴⁵.

More specifically, it is argued that the legislator did not provide any answers to the challenge of identifying employment relationships in times of digitalisation. In this context,

⁴² For a critique, see, eg Baeck U., Winzer T. and Kramer N., ‘Neuere Entwicklungen im Arbeitsrecht’, in *Neue Zeitschrift für Gesellschaftsrecht (NZG)*, 2016, 20-24; Schüren T., Fasholz S., ‘Inhouse-Outsourcing und der Diskussionsentwurf zum AÜG – Ein Diskussionsbeitrag’, in *Neue Zeitschrift für Arbeitsrecht (NZAr)*, 2015, 1473-1478 with regard to the position of temporary agency workers; Henssler M., ‘Überregulierung statt Rechtssicherheit – der Referentenentwurf des BMLAS zur Reglementierung von Leiharbeit und Werkverträgen’, in *Recht der Arbeit (RdA)*, 2016, 1-24.

⁴³ See Hromadka W., ‘Zur Auslegung des § 611a BGB – eine historisch-dogmatische Analyse’, in *Neue Zeitschrift für Arbeitsrecht (NZAr)* 2018, 1583-1586.

⁴⁴ See Hromadka W., *ibid.*, 2018, 1583-1586 (1583).

⁴⁵ See Richardi R., ‘Der Arbeitsvertrag im Licht des neuen § 611a BGB’, in *Neue Zeitschrift für Arbeitsrecht (NZAr)*, 2017, 36-39.

it is acknowledged that the legal assessment of phenomena like platform work is still in its infancy. The legislator is accused of not having provided any assistance in this respect. Rather on the contrary: Although platform workers are usually not subject to instructions, the legislator, with the new section 611a, had just expressly placed them at the centre of the determination of the existence of an employment contract⁴⁶.

On the other hand, some authors recognise that the legislator faced the great difficulty of having to grasp a diversified world of work by fixing a statutory definition of the employment relationship. Some are of the opinion that in its search for criteria, the legislator had used familiar but sufficiently abstract terms. In this regard, it is above all argued that the criteria are sufficiently flexible. The digital employment relationship is characterised by the fact that the employee can work from any location. There is no commitment with regard to the place and time of the provision of services. The contents of the work performance are often result-oriented. Moreover, there is an overall lack of control. In order to capture this, the legislator had given clear hints as section 611a(1) sentence 1 could also be read as follows: “An employment contract is present if the obligated person is bound by instructions or in another way externally determined and thus personally dependent”⁴⁷. In other words, some authors are hopeful because the legislator has explicitly mentioned the feature of external determination (“determined by a third party”) and thus has referred to a criterion which is potentially wider than the “classical” subservience to instructions issued by another.

One of the authors formulates his overall assessment as follows: “At first glance, disappointment seems to predominate: The regulation is imprecise in terms of craftsmanship, contains redundancies and inexplicable deviations from the specially formulated objective. Those who are preparing to make the relevant criteria transparent in legal form have not done full justice to their own tasks in view of these points of criticism. And yet: Section 611a is a bitterly necessary regulation of the employee, which is neither conceptually wrong nor superfluous. It would be presumptuous to expect a regulation that removes all demarcation issues and ensures comprehensive social protection.”⁴⁸.

5. Conclusion.

The legislator has disappointed most authors. They had hoped more from a definition they had to wait for so long. Others take a less critical view. In the end, it will again be the courts which – on the basis of section 611a – have to decide whether an employment relationship exists in a concrete case or not. In any case, the German case is a lesson for the often complicated relationship between legislation and jurisdiction – and for the difficulty of defining the employment contract in times like these.

⁴⁶ Cf Krause R., ‘Herausforderung Digitalisierung der Arbeitswelt und Arbeiten 4.0’, in *Neue Zeitschrift für Arbeitsrecht – Beilage*, 2017, 53-58.

⁴⁷ See Preis U., in Müller-Glöge R. et o. (eds), *Erfurter Kommentar zum Arbeitsrecht*, 19th ed. 2019, § 611a BGB, note 13, 2019.

⁴⁸ Preis U., ‘§ 611 a BGB – Potenziale des Arbeitnehmerbegriffes’, in *Neue Zeitschrift für Arbeitsrecht (NZAR)*, 2018, 817-826 (826).

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