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In Search of a Legal Model of Self-Employment in Poland A Comparative Legal Analysis Part I

W poszukiwaniu prawnego modelu samozatrudnienia w Polsce Analiza prawnoporównawcza – część I

edited by
Tomasz Duraj

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INTRODUCTION INTO THE INTERNATIONAL RESEARCH PROJECT "IN SEARCH OF A LEGAL MODEL OF SELF-EMPLOYMENT IN POLAND. A COMPARATIVE ANALYSIS"[1]

Abstract. The purpose of the present article is to present to the readers the key concepts underlying the international research project funded by the National Science Centre and led by Prof. Tomasz Duraj titled "In Search of the Self-Employment Model in Poland. A Comparative Analysis". The chief research task undertaken by the project participants is a complex legal analysis of self-employment – not only from the perspective of Polish regulations and case law, but also with regard to solutions existing in international and Union law as well as in selected European countries. The area of study covered such legal systems as those of the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, as well as Lithuania, Latvia, and Estonia. Most centrally, the results of the study will serve to develop an original legal model of self-employment in Poland, which will redefine the special status of the self-employed in an optimal way. The final result of the international research project are two twin studies to be published by Lodz University Press, one in Polish, in the form of a multi-author monograph, and the other in English, as two issues of the journal *Acta Universitatis Lodziensis. Folia Iuridica*. The present article demonstrates the scale, significance, and implications of self-employment as an atypical form of providing work, as well as the key scholarly objectives of the international research project and its importance for legal theory and practice. Next, the author discusses the concept and the plan of research work adopted in the project, the research methods applied, and the publication and popularization activities carried out by the project participants. The research undertaken under the project is innovative. This is because until now, no such large-scale study into the legal conditions of self-employment in Poland has been carried out. The final conclusions drawn in the research project make a significant contribution to the development of the theory of labour law and social security law, enriching the academic discourse in this area. An added value for Polish scholarly work is the organized study of foreign regulations on self-employment in selected European countries. Moreover, the *de lege ferenda* remarks prepared in the research project may be helpful to the Polish authorities in developing new legal solutions in the area of self-employment.

Keywords: Self-employment, activity as a self-employed person, economic dependence, bogus self-employment, protection guarantees to the self-employed, comparative law, labour law, social security law, optimal model of self-employment.

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WPROWADZENIE DO MIĘDZYNARODOWEGO PROJEKTU BADAWCZEGO „W POSZUKIWANIU PRAWNEGO MODELU SAMOZATRUDNIENIA W POLSCE ANALIZA PRAWNOPORÓWNAWCZA"

Streszczenie. Celem artykułu jest zapoznanie czytelnika z kluczowymi założeniami, jakie legły u podstaw stworzenia międzynarodowego projektu badawczego finansowanego ze środków Narodowego Centrum Nauki, zrealizowanego pod kierunkiem prof. UŁ dra hab. Tomasza Duraja nt. „W poszukiwaniu prawnego modelu samozatrudnienia w Polsce. Analiza prawnoporównawcza". Podstawowym zadaniem badawczym, które postawili przed sobą uczestnicy projektu jest kompleksowa analiza prawna samozatrudnienia, nie tylko z perspektywy polskiej regulacji i orzecznictwa sądowego, ale także w aspekcie rozwiązań obowiązujących w prawie międzynarodowym i unijnym, jak również w wybranych krajach europejskich. W obszarze badań naukowych znalazły się ustawodawstwa takich państw, jak: kraje wchodzące w skład Zjednoczonego Królestwa, Niemcy, Austria, Hiszpania, Francja, Włochy, Węgry oraz Litwa, Łotwa i Estonia. Co najważniejsze, wyniki przeprowadzonych badań posłużą do opracowania autorskiego prawnego modelu samozatrudnienia w Polsce, który na nowo w optymalny sposób zdefiniuje szczególny status osób samozatrudnionych. Końcowym rezultatem międzynarodowego projektu badawczego są dwa bliźniacze opracowania, które ukażą się nakładem Wydawnictwa Uniwersytetu Łódzkiego. Jedno w języku polskim – w formie monografii wieloautorskiej, a drugie w wersji angielskojęzycznej – w dwóch numerach czasopisma *Acta Universitatis Lodziensis. Folia Iuridica*. Artykuł w kolejnych częściach ukazuje skalę, doniosłość i znaczenie samozatrudnienia jako nietypowej formy świadczenia pracy zarobkowej, najważniejsze cele naukowe międzynarodowego projektu badawczego oraz jego znaczenie dla nauki prawa oraz praktyki. Dalej autor przedstawia przyjętą w projekcie koncepcję i plan badań naukowych, wykorzystane metody badawcze, a także podjęte przez uczestników projektu działania publikacyjne i popularyzatorskie. Realizowane w ramach międzynarodowego projektu badania naukowe mają charakter nowatorski. Do tej pory nie były bowiem prowadzone w Polsce na tak szeroką skalę badania nad prawnymi uwarunkowaniami samozatrudnienia. Sformułowane w ramach projektu badawczego wnioski końcowe stanowią istotny wkład w rozwój nauki prawa pracy i prawa ubezpieczeń społecznych, wzbogacając dyskurs naukowy w tym obszarze. Wartością dodaną dla polskiej nauki jest ujęcie w ramy uporządkowanego opracowania regulacji obcych dotyczących samozatrudnienia w wybranych krajach europejskich. Przygotowane w projekcie badawczym uwagi *de lege ferenda* mogą być również pomocne polskiemu ustawodawcy przy tworzeniu nowych rozwiązań prawnych w zakresie samozatrudnienia.

Słowa kluczowe: Samozatrudnienie, praca na własny rachunek, zależność ekonomiczna, samozatrudnienie fikcyjne, gwarancje ochronne samozatrudnionych, prawo porównawcze, prawo pracy, prawo ubezpieczenia społecznego, optymalny model samozatrudnienia.

1. PRELIMINARY REMARKS

We hereby present to you the result of the work of scholars from various European countries who joined the research project funded by the National Science Centre and led by Prof. Tomasz Duraj, titled "In Search of the Self-Employment Model in Poland. A Comparative Analysis" (amount awarded: PLN 202,440). The project was ranked third in the OPUS 15 programme's legal panel. Project

work began in January 2019, and the team was joined by outstanding scholars from various academic centres around Europe: Prof. Catherine Barnard from the University of Cambridge, Prof. Rolf Wank from Ruhr-Universität Bochum, Prof. Gyulavári Tamás from Pázmány Péter Catholic University, Dr Ingrida Mačernytė Panomariovienė from the Law Institute of the Lithuanian Centre for Social Sciences, as well as Prof. Aneta Tyc, Dr Tatiana Wrocławska, Dr Marcin Krajewski, and Dr Mateusz Barwaśny from the University of Lodz.

The chief research task undertaken by the project participants is a complex legal analysis of self-employment – not only from the perspective of Polish regulations and case law, but also with regard to solutions existing in international and Union law as well as in selected European countries. The area of study covered such legal systems as those of the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, as well as Lithuania, Latvia, and Estonia. The final result of the international research project titled "In Search of the Self-Employment Model in Poland. A Comparative Analysis" are two twin studies to be published by Lodz University Press: one in Polish, in the form of a multi-author monograph, and the other in English, as two issues of the journal *Acta Universitatis Lodziensis. Folia Iuridica*, which has been indexed by the prestigious Scopus database. The publications have been funded by the National Science Centre (agreement no. UMO-2018/29/B/HS5/02534, research project no. 2018/29/B/HS5/02534).

2. THE SCALE AND SIGNIFICANCE OF SELF-EMPLOYMENT AS AN ATYPICAL FORM OF PROVIDING WORK

The phenomenon of self-employment has been known for many years in the European Union as a manifestation of individual entrepreneurship in the form of economic activity that provides a source of income for the individual. The spread of this form of activity, sometimes referred to as "gainful activity on one's own account", "independent gainful activity", or "self-employed activity", is the result of a further stage in the development of the labour market, which was preceded by the frequent use of part-time work, fixed-term work, or employee leasing.[2] Self-employment has been an important part of the EU labour market for many

[2] The development of modern technology, computerization, and digitalization has undoubtedly contributed to the spread of self-employment. This has resulted, among other things, in the expansion of platform work, which is very often provided by the self-employed. Currently, as many as 11% of EU citizens provide work in this form, which is a permanent source of livelihood for three million people. It is estimated that incomes in gig economy in the EU have increased by around 500% over the past five years. Currently, more than 28 million people in the EU perform work through online platforms. Their number is expected to reach 43 million in 2025. See https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021PC0762 Platform work in the context of self-employment is discussed in this research project by Prof. Aneta Tyc (Tyc 2022, 35 et seq.).

years. According to the most recent data published by the OECD, the average rate of self-employment in all EU Member States in 2021 was 15.27% of the total workforce[3] and has been reaching similar values for several years. However, looking at long-term statistics, it appears that the rate of self-employed individuals within the European Union has been gradually increasing. OECD documents from 2000 show that the proportion of the self-employed was around 12% (The partial renaissance of self-employment, OECD 2000, p. 159), while according to data published in 2002, the rate fluctuated around 14%. The largest share of self-employment is found in the service sector, where around 60% of workers are self-employed.[4]

The OECD recorded the highest level of self-employment in the European Union in 2021 in some southern European countries (Greece – 31.82%, Italy – 21.83%) and the lowest in countries such as Latvia (12.98%), France (12.61%), Hungary (12.51%), Austria (11.91%), Lithuania (11.63%), Sweden (10.60%), Luxembourg (10.23%), Denmark (8.84%), and Germany (8.75%).[5] EU countries that ranked close to the EU average in this statistical comparison include: Czechia (15.94%), Spain (15.84%), the Netherlands (15.77%), Portugal (15.48%), Finland (14.57%), and Belgium (14.14%). Relating this information to global data, the highest levels of self-employment in 2021 according to the OECD were in Colombia (53.06%), Mexico (31.82%), Turkey (30.16%), and Costa Rica (27.44%). In contrast, countries such as Israel (12.44%), Japan (9.83%), Australia (9.52%), Canada (7.69%), the United States (6.59%), and Norway (4.70%) performed well below the EU average.[6]

According to the OECD statistics presented above, Poland's 2021 level of self-employment amounting to 19.73% significantly exceeded the EU average. In turn, estimates by the Polish Central Statistical Office (GUS) for the fourth quarter of 2022 indicate that there are nearly 16.8 million economically active people in Poland, of whom 3.13 million (18.63% of all employees) carried out gainful activity on their own account.[7] In this group, 686,000 were employers (entrepreneurs who hire at least one employee). After deducting them, the number of the self-employed in Q4 2022 amounted to 2.45 million people,[8] or 14.6% of the total workforce.[9]

[3] https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart

[4] Self-employment is most common in areas of activity such as construction, transport, trade, business, hospitality, catering, IT, professional and scientific activities, healthcare, finance, and insurance.

[5] https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart

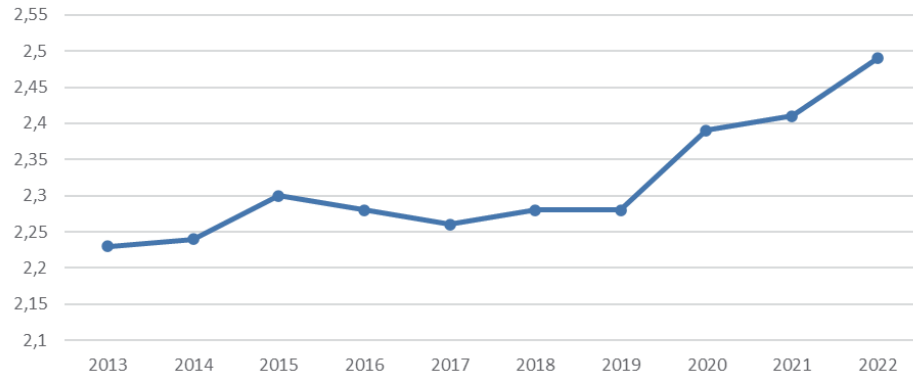
[6] https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart

[7] https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo--wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-4-kwartal-2022-roku,4,49.html

[8] These figures include the agriculture, forestry, hunting, and fishing sectors. Excluding these industries, the number of self-employed non-employers in Q4 2022 was 1.36 million.

[9] The differences between GUS and OECD data are due to a different methodology for counting the self-employed. In particular, GUS, unlike the OECD, does not count unpaid family workers, who are treated as a separate category of workers in the statistics, among the self-employed.

This is a high number, as it means that almost one in six people who carry out gainful activity in Poland does it personally as a self-employed worker, using their own knowledge, qualifications, and competences. It is worth noting that between 2013, when the average number of the self-employed was around 2.23 million, and 2022, when it settled around 2.49 million, this level increased by as many as 260 thousand people. Based on LFS studies,[10] it is clear that the scale of self-employment in Poland grows continually, as shown in the chart below.[11]



The primary reason why self-employment has become more widespread in Poland and other European countries since the early 1990s is the increase in competitiveness in business, creating the need to reduce business costs (Duraj 2007). The use of self-employed workers allows contracting entities to significantly cut employment costs compared to the traditional employment relationship. Firstly, all public law burdens are shifted to the self-employed when it comes to both income tax and compulsory social security contributions. Secondly, the employer transfers to the self-employed all the social risks inherent in hiring employees (these risks are, by operation of law, borne by every employer in an employment relationship). In particular, there is no obligation to grant paid annual leave and other paid breaks and exemptions from the obligation to work (also in relation

[10] The LFS survey (Polish: BAEL) is one of the basic surveys carried out by the Polish Central Statistical Office since May 1992 in the area of the labour market. It enables an ongoing assessment of the degree of utilization of labour resources and, at the same time, a broader characterization of individual population groups distinguished by their status on the labour market (the employed, the unemployed) or remaining outside the labour market (the economically inactive). Cf. https://stat.gov.pl/badania-statystyczne/badania-ankietowe/badania-spoleczne/badanie-aktywnosci-ekonomicznej-ludnosci-bael/

[11] The chart shows the number of non-employer self-employed people in Poland according to LFS in 2013–2022 – average per year (data in millions). Own elaboration based on GUS – Economic activity of the Polish population 2022 (LFS), https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-4-kwartal-2022-roku,4,49.html (accessed: 7.06.2023).

to pregnancy) or compensation for overtime, night work, or work on Sundays and holidays, and the self-employed, although very often economically dependent on the contracting entity, are deprived of most social rights and employee privileges.

Moreover, the large-scale use of self-employment guarantees the flexibility of the employment policy. The use of self-employed workers allows the contracting entity, which does not have to reckon with the constraints inherent in an employment relationship, to adapt the level of employment to its real needs, the economic situation, and the dynamically changing economic climate (especially in times of pandemics and armed conflicts). In this respect, it is not bound by the provisions of labour law, which provides for general and special protection of the permanence of employment. This is important especially in Poland, which is characterized by an unstable economic situation and, consequently, unstable demand for and supply of labour.

Another reason why the use of self-employment has grown in popularity is the possibility to use the potential of human labour more effectively. This is because the contracting entity is not bound by the restrictions imposed by labour legislation on the extent to which the employee is available to the employer. In particular, maximum daily and weekly working time standards, guaranteed rest periods, or restrictions on the permissibility of overtime, night work, or work on Sundays and public holidays do not apply.

Furthermore, the entity contracting out work to the self-employed is in a much better position to effectively protect its property interests. Firstly, a self-employed person – unlike an employee – always bears full material liability for both actual losses and lost benefits. Secondly, it is possible to introduce additional legal mechanisms into a civil law contract which are not allowed under the employment relationship and which will enable effective enforcement of property claims against a self-employed person (such as, for example: liquidated damages, blank promissory note, or external guarantee). Another major factor is the far-reaching freedom of shaping relations applicable under civil law contracts, which for example in Poland provided for under article 353^1 of the Civil Code (Act of 23 April 1964, i.e. Journal of Laws of 2022, item 1360, as amended. Hereafter: the KC). As a result, the parties (especially the contracting entity) are in a position to shape mutual rights and obligations in a relatively free way, which is out of the question under the labour relationship, where the principle of employee privilege applies (Article 18 of the Labour Code, Act of 26 June 1974, i.e. Journal of Laws of 2022, item 1510. Hereafter: the KP). In particular, the parties to civil law contracts may introduce provisions that increase the motivation of the self-employed person to work better and more efficiently (performance evaluation criteria, result-based remuneration systems, result-based liability). This, in turn, makes it possible to reduce the economic risk of the business.

Another important reason for the growth of self-employment in Poland and other European countries is the perception of this form of gainful activity as one of the basic instruments for creating new jobs in the economy. Indeed, the development of self-employment constitutes an important mechanism for counteracting unemployment and for the professional activation of the unemployed, and is a factor influencing the reduction of the so-called shadow economy. The setting up of a business by an individual not only rids them of the status of the unemployed, but also creates an opportunity to generate new jobs in the future in the event their business develops successfully. This is why the state's anti-unemployment policy consists in creating mechanisms to make it easier for individuals to become self-employed as sole proprietors.

However, from the perspective of the self-employed, the attractiveness of this form of activity stems from the need to be an independent and autonomous worker who is not subject in providing work to the strict management by an employer entitled to specify the day-to-day duties of the self-employed person by means of binding instructions. This is a manifestation of the entrepreneurial and creative attitude in society. Such behaviour stimulates individuals to take up and run their own business and bear the associated risks. This phenomenon is particularly evident among young people (school leavers) and people of pre-retirement age, for whom – due to their qualifications and limited capacity for retraining – self-employment is the only viable form of earning an income.

3. ACADEMIC OBJECTIVES OF THE RESEARCH PROJECT

The fundamental research objective of the project is a comprehensive theoretical analysis of the legal conditions of self-employment in a broad context taking into account both the international and the EU legal system, as well as the regulations of selected European countries, with particular emphasis on Polish rules. Most centrally, the results of the study will serve to develop an original legal model of self-employment in Poland, which will redefine the special status of the self-employed in an optimal way. For this purpose, it is necessary to present in the subsequent parts of the project a detailed legal analysis of self-employment in the light of international and EU regulations, as well as on the grounds of selected national legal systems in force in the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, Lithuania, Latvia, and Estonia. The choice of the countries is far from random. It reflects the authors' conscious effort to show the diversity of national legislative approaches to the regulation of self-employment. The subject of analysis are therefore both those countries that have decided to adopt a separate law comprehensively and systematically regulating the legal situation of the self-employed (Spain) and those that have more or less extensive regulations in this area.

The specific research objectives of the project include in particular: to carry out a theoretical analysis of the terminology used to describe the institution of self-employment (clarification of the definition and the related conceptual system); to determine the way in which self-employment is standardized and the form of this regulation; to justify the need for the self-employed to benefit from the protection that labour law provides for workers hired under an employment relationship; to determine the scope of this protection and its distinctive criteria; to create an optimal model of legal protection of self-employment in Poland, which will take into account the standards of international and EU law and the requirements of the Polish Constitution, as well as the experience of the European countries analysed in the research project; to carry out a theoretical analysis of the phenomenon of bogus self-employment and to assess the effectiveness of the mechanisms to counteract this phenomenon in force in the Polish legal system; to develop a coherent and comprehensive model to counteract this pathology in Poland, combining solutions of labour law with tax law and social insurance law mechanisms; and to develop a uniform and coherent concept of self-employment in the Polish social insurance system.

The principal research hypothesis of the project is the observation that the current Polish legal system lacks a comprehensive regulation that would systematically standardize the most important aspects of the work of the self-employed, such as: the principles of providing services, working conditions, social and insurance protection, and the specific legal status of these persons. The Polish legislative approach to the matter of self-employment lacks a coherent idea, and the legal solutions regulating the situation of this category of workers are fragmented and rather haphazard. This results in a range of controversies and doubts, both in the legal doctrine and in court rulings, rendering the status of this group of persons unclear. Due to the lack of a legal regulation in our country that would comprehensively and systematically standardize the rules related to performing work as a self-employed person as well as clarify the legal status of this group of persons, it should be assumed that *de lege lata*, the general provisions of constitutional law, economic law, civil law, social insurance law, and tax law apply.

Following a comprehensive analysis of the existing regulations, the aim of the research project will be to prove the necessity to prepare a complete regulation defining the basic principles of operation and the specific status of the self-employed, forming a coherent legal model of self-employment in Poland. The research project should involve considering the manner of standardizing this matter and the form of this regulation (whether it should be a uniform legal act or maybe specific provisions in various acts already in force).

A further research objective will be to theoretically analyse the terminology used to describe self-employment and to develop a clear conceptual system of the subject. There is no uniform definition of self-employment either in international and EU law or in many of the national legal systems examined in the research

project. In Poland, similarly, the authorities have not developed a legal definition of the term so far. Difficulties related to the interpretation of the term "self-employment" arise from the fact that this form of providing work has a complex character and, moreover, may involve numerous various activities. The concept of self-employment covers both natural persons who are sole proprietors based on an entry in the Central Registration and Information on Business Activity as well as natural persons who carry out their business in the form of a private partnership or as members of a liberal profession. This situation results in considerable discrepancies regarding the interpretation of the term "self-employment" in economics and legal theory. As a consequence, it is difficult to determine with any precision the group of persons to whom the status of the self-employed can be attributed and to whom the rules governing their legal situation apply. Broadly speaking, self-employment is a type of activity in which the natural person carrying out the activity in question, from a legal point of view, bears all the financial consequences and economic risks of such activity and is liable for its results with all their assets. There is little doubt that the phenomenon analysed in the research project primarily concerns natural persons with the statutory status of entrepreneur. However, there are significant discrepancies in the doctrine of law regarding the additional conditions that a natural person should fulfil in order to obtain the attribute of a self-employed person. Firstly, the question arises as to whether self-employment only arises when an individual provides their services exclusively or primarily to a single principal, so that there is a relationship of economic dependence between them (the so-called dependent self-employed), or whether the phenomenon also includes cases where work is provided to several (multiple) principals (the so-called independent self-employed). Secondly, there is also the issue of whether the self-employed should include only natural persons who employ no third parties to provide services to the principal, or whether this status should likewise be attributed to natural persons who engage third parties to carry out their own business activity, thus acquiring the status of employer.

Another problem is to determine the material scope of the legal solutions regulating the work of the self-employed. With regard to this issue, the most important research task of the project will be to find an answer to the question of whether the self-employed should benefit from the protection that the labour legislation provides for persons hired on the basis of an employment relationship. As a matter of principle, the phenomenon of self-employment does not fall within the scope of labour law regulations, which governs employment, nowadays more often referred to as voluntarily subordinated work. In this type of work, a worker (employee) undertakes to perform activities of a specific type personally and against remuneration for the benefit of the employing entity (employer) and under its direction, at a place and time designated by the employer and at the employer's risk (Duraj 2013). Meanwhile, work provided by a self-employed person is performed independently, autonomously, and without subordination to the

employing entity as to the manner of its performance, and on the account and at the risk of the employee (sole proprietor), not of the employing entity (Duraj 2009, 24 et seq.). However, it should be noted that self-employed workers, especially if they provide their services to only one recipient, are most often strongly dependent on this entity. This dependence is, of course, of a completely different nature than employee subordination. It is multifaceted and may be manifested in particular in the following ways: economic dependence, where work for a given contracting entity constitutes the sole (main) source of income; control over the performance of tasks; making the self-employed person accountable for the results of their work (possible reduction in remuneration or contract termination); certain elements of subordination in terms of place and time of work; and the order and organization of work. However, in spite of the differences between this type of subordination and employee subordination, the situation of self-employed workers bears a significant resemblance to that of employees in many areas. It should therefore be considered whether self-employed persons in conditions of such (especially economic) dependence on the contracting entity should not, by analogy with persons providing work under an employment relationship, benefit from the protection regulated by labour law. The authors of the project put forward a research hypothesis that such protection is fully justified (Duraj 2018a, 37 et seq.; 2018b). The research objective will be to establish the scope of this protection and its distinctive criteria. Undoubtedly, this protection may not be as broad as that on the grounds of the employment relationship. The tendency to extend legal protection to the self-employed is in line with both international and EU law standards, where the protective regulations usually cover all working people, use the term "employee" in a broad sense ("workers" or "travailleurs"), and with the norms of the Polish Constitution (Basic Law of 2 April 1997, Journal of Laws No. 78, item 483, as amended), which broadly define protective guarantees (Duraj 2020b, 15 et seq.). This is also confirmed by the regulations of selected European countries studied in this project, where the self-employed are guaranteed (to a greater or lesser extent) certain rights and privileges characteristic of the employment relationship; most often, however, to a limited extent. Moreover, the spread of self-employment, where persons engaged in gainful activity very often function similarly to employees, forced the Polish authorities to extend to this category of workers protection which until recently had been reserved exclusively for employees. At present, the self-employed enjoy under Polish law: the protection of life and health, which covers all self-employed persons providing work in an establishment belonging to the entity organizing it (Duraj 2022a, 69 et seq.; 2022d, 103 et seq.); the prohibition of discrimination and the requirement of equal treatment in employment (Duraj 2022b, 161 et seq.); the guaranteed minimum wage and the protection of remuneration for work (Duraj 2021b, 49 et seq.; 2021e, 433 et seq.); the protection of maternity and parenthood (Duraj 2019a, 11 et seq.; 2019b, 341 et seq.; 2019c, 73 et seq.); and the right of association in trade unions,

which consequently gives them broad collective rights (Duraj 2018c, 127 et seq.; 2018d; 2020a, 67 et seq.; 2020c, 1348 et seq.; 2021a, 7 et seq.; 2021c, 63 et seq.; 2021d, 83 et seq.; Tyc 2021, 135 et seq.). The actions of the Polish legislature in extending legal protection to self-employed persons should, in principle, be assessed positively. However, it is difficult to speak of the existence of a legal model for the protection of the self-employed in Poland at the moment. On the contrary, in the opinion of the authors of the research project, even a cursory analysis of the provisions reveals a complete lack of a systemic and comprehensive approach to this issue. We are dealing with randomness and fragmentation of legal solutions adopted in the field of protection of the self-employed. Changes in this area are often made ad hoc, without a coherent and well-thought-out concept, including under the influence of political factors. Legal regulations on the protection of persons who carry out business on their own account are not properly correlated with international and EU standards and the Polish Constitution. The rights guaranteed to the self-employed are scattered across many legal acts, which use diverse conceptual systems and unfounded criteria to determine the scope of this protection. Polish authorities completely fail to acknowledge the criterion of economic dependence on the contracting entity in this area. Such a criterion for the application of protective guarantees to the self-employed is present in the legislations of many of the European countries studied in the project, such as Spain, Italy, or Germany (Tyc 2020, 20 et seq.).

The research objective of the research project is to demonstrate the defectiveness of Polish norms regulating the rights guaranteed to the self-employed and to attempt to create in Poland an optimal model of legal protection of the self-employed that will take into account the standards of international and EU law and the requirements of the Polish Constitution, as well as the experience of the legislation of European countries analysed in the research project (Duraj 2017c; 2022c, 257 et seq.; 2022e, 5 et seq.; Barwaśny 2022, 183 et seq.; Duraj 2022f, 58 et seq.). The authors believe it reasonable to introduce in Poland a two-tier model of protection for this category of workers. The first tier should cover all self-employed who personally, at their own responsibility and risk, provide services as an entrepreneur to at least one contracting entity in the form of B2B cooperation. At this level, there is a need for a list of basic social rights applicable to all individuals performing paid work regardless of the legal basis. Referring to both the standards of international and EU law as well as the experience of the European countries' legislation analysed in the research project and the provisions of the Polish Constitution, Polish authorities should provide the self-employed with the following in particular: protection of life and health, protection against discrimination and unequal treatment, protection of human dignity, protection of women immediately after childbirth, the right to maternity benefit, as well as freedom of association and the resulting collective protection and protection of the permanence of the civil law contract of a trade union activist. The second

tier of protection, on the other hand, must apply to those self-employed who personally provide their services under conditions of economic dependence on a specific contracting entity. The idea is therefore to create a separate category of economically dependent self-employed persons, which will be positioned between workers hired under an employment relationship and ordinary self-employed entrepreneurs. They should be guaranteed the widest range of rights and privileges, most akin to the standard enjoyed by the employees. It is important that the provisions regulating the protection of the self-employed take full account of the specific nature of their activities and do not resort only to referring to the appropriate application of labour law provisions regulating the legal situation of employees. The problem of extending protective labour law provisions to the self-employed raised in the research project is part of a broader discussion on the future of labour law and its personal scope. Some representatives of the Polish legal theory advocate the concept of the expansion of labour law into non-employment relations (including self-employment), which is associated with the replacement of labour law by so-called employment law.

An important research objective of the project is the theoretical analysis of the phenomenon of bogus self-employment, which occurs on a large scale in Poland (Duraj 2017b, 103 et seq.). As our research shows, this pathology is present also in other European countries, albeit not as clearly as in Poland. The Polish Economic Institute assumes that the number of bogus self-employed circumventing labour provisions in our country fluctuates between 130,000 and 180,000 people,[12] although according to Prof. Tomasz Duraj (project PI), these figures are severely underestimated, with the number of such people being considerably higher (close to 500,000). According to the Institute, bogus self-employment remained at a similar level between 2010 and 2020 (the highest rate was recorded in 2018), and the phenomenon is most common in industries such as: IT (26,000 people), professional and scientific activities (25,000), healthcare (24,000), transport (17,000), construction (17,000), industry (13,000), finance and insurance (12,000), and trade and vehicle repair (11,000).[13] The primary reason for the use of self-employment in violation of labour legislation is the desire to reduce the public and legal burden and the labour costs associated with engaging employees, and the need to render the process of providing work more flexible. Therefore, it is very

[12] Calculations from a report prepared by the Polish Economic Institute based on data from the Labour Force Survey of the Central Statistical Office. Importantly, the bogus self-employed include only those who meet a total of three conditions: 1. they are self-employed (excluding farmers), 2. they do not employ workers, 3. they declare that they work exclusively or mainly for one client (principal). Cf. *Tygodnik Gospodarczy Polskiego Instytutu Ekonomicznego* 2022, No. 3, https://pie.net.pl/wp-content/uploads/2022/01/Tygodnik-Gospodarczy-PIE_03-2022.pdf

[13] Calculations of the Polish Economic Institute for 2020 made for the sections of the Classification of Business Activities (PKD) in which estimated bogus self-employment is higher than 4,000 persons.

common in practice to use self-employment to perform work under conditions characteristic of an employment relationship (Duraj 2017a, 61 et seq.). Poland is witnessing a pathology whereby employers force their employees into self-employment bearing all the features of an employment relationship, in violation of labour law. According to A. Zoll, former Commissioner for Citizens' Rights in Poland, forcing employees to shift to self-employment is a violation of human rights. In his opinion, "this pathology results from the situation on the labour market and the stronger position of the employer". The aim of the research project is to carry out an in-depth analysis of the causes and circumstances of the use of self-employment in violation of labour law and to assess the effectiveness of mechanisms to counteract the phenomenon of bogus self-employment present in Polish law (Duraj 2023). The existing legal regulations in this area are insufficient and ineffective (Duraj 2017d, 355 et seq.). As the scale of abuse related to bogus self-employment in Poland is enormous, the research objective of the research project will be to attempt to develop a coherent and comprehensive model for counteracting this pathology, combining solutions from the field of labour law with mechanisms used in tax law and social security law. The optimal implementation of this objective will be achieved through a comparative analysis of legal solutions present in this area in the legislations of the European countries examined in the project. The phenomenon of bogus self-employment is in fact combated in all legal systems, even in the liberal United Kingdom, where it is referred to as "fake self-employment". Furthermore, the problem of the abuse of self-employment in conditions characteristic of an employment relationship has been brought to the attention of the European Union. The European Economic and Social Committee has therefore issued an opinion on the abuse of the self-employment status,[14] which provides detailed guidance for the Member States. These will be used by the authors of this research project to construct a Polish model for counteracting this pathology.

Moreover, the research project aims at a theoretical analysis of self-employment from the perspective of social insurance law and an attempt to develop a uniform and coherent concept of self-employment in the Polish social insurance system (Krajewski 2021, 279 et seq.). Under current Polish law, we are faced with a situation in which self-employed persons, depending on the characteristics of their business activity, are subject to social insurance on the basis of various insurance titles. As a result of changes made to the Polish social insurance system, the provisions regulating the situation of the self-employed are often inconsistent, rendering it unstable. The proposition prepared in this research project will be based on the following principles: clear distinction of employment and self-employment in the social insurance system, distinction

[14] Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion), OJ C 161, 6.06.2013, 14.

of the economically dependent self-employed and their coverage by insurance on the basis of the rules applicable to other employed persons (Krajewski 2022, 223 et seq.), preservation of the preference system for persons starting (running) non-agricultural activity in Poland, and exclusion of the economically dependent self-employed from the preference system.

4. SIGNIFICANCE OF THE RESEARCH PROJECT

The popularity of self-employment, the importance of this issue discussed above, as well as the lack of a comprehensive regulation that would systematically regulate the most important aspects of the work of self-employed persons determine the relevance of in-depth theoretical study of the legal aspects of self-employment. The problems of interpretation regarding the application of self-employment in Poland that arise in legal theory, case law, and practice point to the need to develop a uniform and comprehensive legal model of self-employment in Poland. The legal regulations in force in this area are not sufficient, and the Polish authorities have not even decided to elaborate a definition of "self-employment" and the related conceptual system. This gives rise to a number of controversies and doubts, making the status of this category of persons performing gainful employment unclear.

On the basis of the existing legal regulations in Poland, self-employed persons, even if they provide work for the contracting entity in conditions of strong economic dependence on it, similar to the situation of employees, enjoy no protection or privileges that would fully take into account the standards of international and EU law and the principles enshrined in the Polish Constitution. Therefore, there is evidently a need to carry out thorough research aimed at developing legal mechanisms in Poland that would guarantee the self-employed who are economically dependent on the contracting entity a minimum standard of social protection, obviously much lower than in the case of the employment relationship, using solutions in force in other European countries analysed in the project. This is where the theoretical significance of the research project can best be seen. The attempt to develop a legal model of self-employment in Poland that would take into account the social protection of the self-employed in conditions of economic dependence goes back to the foundations of labour law and its most basic legal constructions. It is a theoretical problem of great importance for labour law studies, referring to the future of this law and its personal scope. It is related to the concept of the expansion of labour law into non-employment relations (including self-employment), which may result in the replacement of labour law by so-called employment law.

Another matter of great scholarly importance is the theoretical elaboration of legal solutions in the fields of both labour law and social security law that would

effectively support the development of self-employment, which in turn would encourage this form of gainful activity in Poland. The regulations in force in this area are inconsistent and not very transparent. In this context, there is a need to create a uniform concept of self-employment in the Polish legal system.

The theoretical analysis of bogus self-employment, whose huge scale poses currently a significant social problem in Poland, is likewise of great academic significance. Thorough research is therefore warranted to develop a coherent and uniform strategy to combat this pathology resulting in the development of effective legal mechanisms on the grounds of labour law, tax law, and social insurance law, allowing for the restriction of self-employment in conditions of employee subordination. The current legal solutions in this area are inconsistent and do not guarantee an effective fight against bogus self-employment in Poland.

The studies undertaken under the research project are innovative. So far, there has been no large-scale study in Poland into the legal conditions of self-employment that would cover not only the state of Polish legal regulations and jurisprudence, but also the solutions existing in international and EU law, as well as in selected European countries (the area of research includes the legal systems of such countries as: the United Kingdom, Germany, Austria, Spain, France, Italy, Hungary, Lithuania, Latvia, and Estonia). The issue of self-employment is of interest mainly to economics, as evidenced by the publication entitled *Praca na własny rachunek – determinanty i implikacje* (*Self-employment – Determinants and implications*), edited by Prof. Elżbieta Kryńska (No. 1 HO2C 074 28) (Kryńska 2007). On the other hand, legal theory analyses this issue in a very superficial, fragmentary, and general manner. There is no monographic study in the Polish legal literature that would comprehensively and exhaustively characterize the legal aspects of self-employment. The existing publications are usually merely commentaries and minor contributions and typically concern selected legal aspects of self-employment. This is why we have decided to undertake a research project whose objective is to attempt to prepare an original legal model of self-employment in Poland, taking into account the current views of legal theory and case law, international and EU regulations, as well as solutions employed in selected European countries.

The results of the study render it possible to redefine the specific legal status of the self-employed in terms of the rules on the provision of services, working conditions, responsibility for the performance of tasks, and the scope of social and insurance protection. They will contribute to resolving a number of disputes and clarifying a range of doubts that currently exist in legal doctrine and judicial decisions in the context of the legal situation of the self-employed. The final conclusions drawn in the research project make a significant contribution to the development of the theory of labour law and social security law, enriching the academic discourse in this area. An added value for Polish scholarly work is the organized study of foreign regulations on self-employment in selected European

countries. Moreover, the *de lege ferenda* remarks prepared in the research project may be helpful to the Polish authorities in developing new legal solutions in the area of self-employment. The conclusions unequivocally show that the intervention of our authorities is necessary and urgent. There is no time for passivity and apathy on the part of the Polish legislature regarding the adoption of a comprehensive regulation of self-employment, which will systematically standardize the most important aspects of the work of self-employed persons, with particular emphasis on their social protection.

Finally, it should be highlighted that the achievement of the research objectives of this project is of universal value for labour law studies, going well beyond the issue of self-employment. Indeed, the results of the project will render it possible to point to new directions in the development of labour law and to reflect on the legitimacy of extending the protective regulations of labour law to various categories of persons who provide work independently, outside the employment relationship (especially on the basis of civil law contracts) in conditions of economic dependence on the employing entity, as well as on the scope of this protection and the most important criteria for its distinction.

5. RESEARCH CONCEPT AND PLAN

The project's research concept is based on the identification of separate research areas, which will result in subsequent articles published in English in two issues of the journal *Acta Universitatis Lodziensis. Folia Iuridica*.[15] The project has been divided into eleven research areas. The first seven will be discussed in the present issue of *Folia Iuridica*, while four more will appear in an issue to be published in 2024. The first article constitutes an introduction. It demonstrates the relevance of the subject matter in question, the main principles, the research objectives, and the methodology of the research project. The second article is devoted to the issue of self-employment from the perspective of international and EU regulations. This part of the study provides an excellent background for a detailed analysis of self-employment, which will be presented in the following articles from the perspective of national regulations, theoretical views, and case law in the United Kingdom (article 3), Germany and Austria (article 4), Spain (article 5), France and Italy (article 6), Hungary (article 7), and the Baltic States (Lithuania, Latvia and Estonia – article 8). The subject of the ninth article will be a thorough and multifaceted characterization of the Polish regulations shaping the legal situation of the self-employed, taking into account the position of legal theory and judicial decisions. This part will be concluded with critical comments

[15] A parallel study will be published in Polish by Lodz University Press in the form of a multi-author monograph.

on the current regulation of self-employment in Poland. The analysis will exclude the aspect of insurance of the status of the self-employed, which will become the subject of the tenth research area. Its essence will be a theoretical analysis of the issue of self-employment from the perspective of Polish social insurance law, as well as an attempt to develop a uniform and coherent concept of self-employment in the Polish social insurance system. The entire research project will be closed by the eleventh article, which will have a concluding character. This part will present the final results of the study. Based on the results, an attempt will be made to create an optimal legal model of self-employment in Poland, taking into account both the existing body of doctrine of Polish law and the jurisprudence of domestic courts, as well as international and EU regulations and legal solutions in force in selected European countries analysed under this research project. The model will propose a comprehensive regulation of self-employment in Poland, which will systemically standardize its most important aspects, such as: the principles of the provision of services, working conditions, social protection, and the special legal status of the self-employed. This section will conclude with *de lege ferenda* remarks addressed to the Polish legislature concerning the need to amend the existing legislation in the area of self-employment.

6. METHODS

The international research project financed from the funds of the National Science Centre, carried out under the direction of Prof. Tomasz Duraj, entitled "In Search of the Self-Employment Model in Poland. A Comparative Analysis", involved the use of several research methods. This was demanded by the multifaceted nature of the study on the legal status of the self-employed and the interdisciplinary approach to the issue in question. The primary research method in the project is the doctrinal methodology, which consists in a thorough and multi-level analysis of the norms regulating the situation of the self-employed. In addition, extensive use has been made of the comparative legal method. The present project involved top researchers from various European countries with extensive knowledge and experience in the legal aspects of self-employment, who carried out a thorough and multi-level analysis of foreign legal regulations in this research area. The selection of the countries covered by the study was not random, as already mentioned in an earlier section of this chapter. The regulations in force in selected European countries analysed in the project have been assessed from the point of view of their usefulness for the Polish legal system and will serve to build a legal model of self-employment in Poland. Taking into account the special character of the labour law rules, the axiological method, which refers to the basic values that should guide the authorities in shaping the legal situation of the self-employed, also could not be omitted. The historical method is likewise

useful from the point of view of the undertaken considerations. It will help reveal the change in the legislature's approach to the protection of the self-employed, resulting in the gradual expansion of labour law to include them in its personal scope. Moreover, this method is used in the analysis of the legal mechanisms for counteracting the phenomenon of bogus self-employment. The statistical method, in turn, is helpful in assessing the effectiveness of existing self-employment regulations (e.g. in terms of counteracting bogus self-employment or motivating individuals to become self-employed). The multifaceted approach of the authors of the project, which involved the intertwining and complementation of the above-mentioned methods in the study of self-employment, has resulted in a thorough and multifarious analysis of the title research issue.

7. THE PUBLICATION AND POPULARIZATION ACTIVITIES BY THE PROJECT MEMBERS

In the course of the research project entitled "In Search of the Self-Employment Model in Poland. A Comparative Analysis", its participants published partial results of the study of self-employment in academic journals and monographic studies, most of which are available online under the rules of open access. This activity resulted in the preparation of 15 articles in academic journals and four chapters in books. In addition, the research project participants presented their analyses and opinions on the legal status of the self-employed at numerous conferences, both international and regional (mainly in Poland), with their papers being published in conference proceedings.

As part of their scholarly and popularizing activities, Prof. Tomasz Duraj (project PI) and the Polish part of the research team organized three Polish conferences in the form of a cycle titled "Nietypowe stosunki zatrudnienia" ("Atypical Employment Relations"), which promoted partial results on the legal aspects of self-employment. The events were held at the Faculty of Law and Administration of the University of Lodz with the participation of the Centre for Atypical Employment Relations operating at the Faculty[16] and under the honorary patronage of the major Polish authorities that enforce in practice the regulations governing self-employment – the National Labour Inspectorate and the Social Insurance Institution. On 3 October 2019, the 2nd national conference titled "Zbiorowe prawo pracy czy zbiorowe prawo zatrudnienia? Ochrona praw i interesów zbiorowych osób wykonujących pracę zarobkową poza stosunkiem pracy" ("Collective Labour Law or Collective Employment Law? Protection of

[16] The Centre for Atypical Employment Relations was established by Order No. 15 of the Dean of the Faculty of Law and Administration of the University of Lodz of 3 July 2017 and has been operational since 1 September 2017, with Prof. Tomasz Duraj as its head. See https://www.wpia.uni.lodz.pl/struktura/centra-naukowe/cnsz.

the rights and collective interests of persons engaged in gainful employment outside the employment relationship") was held. It resulted in conference proceedings published in open access (*Folia Iuridica* 2021, No. 95).[17] It includes two papers by Prof. Tomasz Duraj: "Collective Rights of Persons Engaged in Gainful Employment Outside the Employment Relationship – an Outline of the Issue" (Duraj 2021a, 7–18) and "Powers of Trade Union Activists Engaged in Self-Employment – Assessment of Polish Legislation" (Duraj 2021d, 83–100), as well as an article by Prof. Aneta Tyc titled: "Collective Labour Rights of Self-Employed Persons on the Example of Spain: is There any Lesson for Poland?" (Tyc 2021, 135–142). An important role from the point of view of the promotion of the present research project and the dissemination of partial research results on the legal aspects of self-employment was played by the 4th Polish conference "W poszukiwaniu prawnego modelu ochrony pracy na własny rachunek w Polsce" ("In Search of a Legal Model for the Protection of Self-employment in Poland"). It was a two-day event (8–9 December 2021) and the largest Polish academic conference on labour law in 2021. A total of 228 people registered for the conference and 55 speakers delivered papers. The event was crowned with excellent proceedings volume titled "W poszukiwaniu prawnego modelu ochrony pracy na własny rachunek w Polsce" ("In Search of a Legal Model for the Protection of Self-employment in Poland"), which was published in open access in the journal *Folia Iuridica* 2022, No. 101.[18] The volume contained, among others, articles by the project members: Prof. Tomasz Duraj – "Prawny model ochrony pracy na własny rachunek – wprowadzenie do dyskusji" ("Legal Model of the Protection of Self-Employment – Introduction to the Discussion") (Duraj 2022e, 5–19) and "Protection of the Self-Employed to the Extent of Non-Discrimination and Equal Treatment – An Overview of the Issue" (Duraj 2022b, 161–181), as well as: Dr Marcin Krajewski – "Economically Dependent Self-Employment – Is it Time to Single out a New Title to Social Security?" (Krajewski 2022, 223–234) and Dr Mateusz Barwaśny – "Right to Rest of the Self-Employed under International and EU Law" (Barwaśny 2022, 183–191). The promotion of partial results of research on the legal model of self-employment in Poland was also the subject of the 5th Polish academic conference titled "Stosowanie nietypowych form zatrudnienia z naruszeniem prawa pracy i prawa ubezpieczeń społecznych – diagnoza oraz perspektywy na przyszłość" ("The use of atypical forms of employment in violation of labour law and social insurance law – diagnosis and prospects for the future"). The event was held on 1–2 December 2022. It was attended by more than 300 people, including many prominent representatives of the doctrine of labour and social insurance law, as well as numerous representatives

[17] See https://czasopisma.uni.lodz.pl/Iuridica/issue/view/763?fbclid=IwAR0ZTmSxauvBenGAZhYCFcyIVnJt-tR0tfw12xDjWwaQZkHp6moei7HciAw.

[18] See https://czasopisma.uni.lodz.pl/Iuridica/issue/view/1253.

of the State Labour Inspectorate and the Social Insurance Institution. The two days of proceedings featured 40 speakers representing not only the labour and social insurance law academia, among them Prof. Tomasz Duraj with a paper titled "Stosowanie pracy na własny rachunek z naruszeniem przepisów prawa pracy – wnioski z projektu NCN nr 2018/29/B/HS5/02534" ("The use of self-employment in violation of labour law – conclusions from the NCN project No. 2018/29/B/HS5/02534") (Duraj 2023). The perfect culmination of the event will be the publication of conference proceedings by Lodz University Press in 2023.

Another important event for the promotion of the research project and the dissemination of the partial results of the study on the legal aspects of self-employment was a separate panel organized by Prof. Aneta Tyc and the project PI at the prestigious international conference ICON•S Mundo, Conference of the International Society of Public Law: The Future of Public Law, held on 6–9 July 2021. The panel entitled "Legal Aspects of Self-employment", chaired by Robert Siciński, M.A. (Faculty of Law of the University of Lodz), featured presentations by Prof. Aneta Tyc – "Collective labour rights of self-employed persons: a comparative approach", Dr Marcin Krajewski – "Social insurance for the self-employed in Poland – selected issues", and Dr Mateusz Barwaśny – "Legal protection against discrimination and unequal treatment of self-employed in Poland", with Prof. Tomasz Duraj as one of the panellists.

Then, on 11 May 2022, a meeting was held between members of the research team and Prof. Jaime Cabeza Pereiro of the University of Vigo, who gave two lectures relating his topic to the present project. The topics were: "Boundaries between subordinate work and self-employment taking into account the case law of the CJEU" and "Self-employment – collective rights and competition law".[19] In the course of this seminar, the project participants as well as the visitors were able to learn about the legal regulation of self-employment in Spain and to confront the experiences of its application in practice. Spain is the first EU Member State to have adopted a separate law, LETA of 11 July 2007, to comprehensively and systemically regulate the legal status of the self-employed. The conclusions from this event were used in the construction of the legal model of self-employment in Poland.

All publication and popularization activities of the participants of the research project entitled "In Search of the Self-Employment Model in Poland. A Comparative Analysis" undertaken in 2019–2023 are described in detail on the project's webpage, which can be found on the website of the Faculty of Law and Administration of the University of Lodz.[20] Thanking all the participants of the

[19] Link to the Facebook event: https://www.facebook.com/events/255668160060237?ref=newsfeed

[20] Project's webpage: https://www.wpia.uni.lodz.pl/en/struktura/centra-naukowe/centrum-nietypowych-stosunkow-zatrudnienia/international-research-project-in-search-of-a-legal-model-of-self-employment-in-poland-comparative-legal-analysis.

international project for their full professionalism and commitment to all the research objectives, I present to you the first part of the study consisting of seven articles included in this Volume No. 103 of the journal *Folia Iuridica*.

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SELF-EMPLOYMENT IN THE LIGHT OF INTERNATIONAL AND UNION LAW

Abstract. The chapter discusses self-employment in the context of international and Union law. The phenomenon of self-employed activity grows in popularity as a result of massive social and economic as well as technological change. The author presents various definitions of self-employment and legal guarantees granted under international and Union law to persons who carry out business activity as a self-employed person. It should be noted that no uniform definition of self-employment exists. Moreover, there is no comprehensive approach to or coherent regulations of this matter. Legal rules concerning self-employment are fragmented and often inconsistent. The author points out that international protective standards cover all "working people". As a result, the self-employed are accorded certain rights in areas such as: life and health, remuneration, non-discrimination and equal treatment, parenting, rest, and protection of collective interests. Due to the growing popularity of self-employed activity and the significance of human rights, national legislations should grant persons who pursue gainful activity for their own account appropriate protective guarantees. Another important matter is counteracting bogus self-employment, which deprives numerous working people of a proper standard of protection.

Keywords: self-employment, protective guarantees for the self-employed, right to rest, remuneration, salary, protection of life and health, parental rights, collective rights, bogus self-employment.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA MIĘDZYNARODOWEGO I UNIJNEGO

Streszczenie. Niniejszy rozdział omawia kwestię samozatrudnienia w kontekście prawa międzynarodowego i unijnego. Zjawisko samozatrudnienia jest coraz bardziej popularne ze względu na liczne przemiany społeczno-gospodarcze i rozwój nowoczesnych technologii. Autor rozdziału przedstawia różne definicje samozatrudnienia i gwarancje prawne przyznane osobom pracującym w tej formule na gruncie prawa międzynarodowego i unijnego. Dostrzec należy, że nie istnieje jednolita definicja samozatrudnienia. Brakuje również kompleksowego podejścia i spójnych regulacji prawnych w tej dziedzinie. Unormowania dotyczące samozatrudnienia są fragmentaryczne i często niejednolite. Autor rozdziału zwraca uwagę na to, że międzynarodowe standardy ochronne obejmują wszystkich "ludzi pracy", co daje samozatrudnionym pewne uprawnienia w takich

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obszarach, jak: zdrowie i życie, wynagrodzenie za pracę, niedyskryminacja i równouprawnienie, rodzicielstwo, wypoczynek oraz ochrona interesów zbiorowych. Z uwagi na rosnącą popularność samozatrudnienia oraz znaczenie podstawowych praw człowieka, ustawodawstwa krajowe powinny przyznawać odpowiednie gwarancje ochronne osobom wykonującym pracę zarobkową na własny rachunek. Istotną kwestią jest również walka z fikcyjnym samozatrudnieniem, które pozbawia wielu wykonawców pracy należytego standardu ochrony.

Słowa kluczowe: samozatrudnienie, gwarancje ochronne samozatrudnionych, prawo do wypoczynku, wynagrodzenie za pracę, ochrona życia i zdrowia, uprawnienia rodzicielskie, uprawnienia zbiorowe, fikcyjne samozatrudnienie.

1. INTRODUCTION

Extensive social and economic change as well as the development of modern technologies have resulted in the emergence of new, flexible forms of providing work. One of the types of gainful activity that have been evolving most dynamically over the last years has been self-employment. This phenomenon is well known around the world, as can be seen from numerous documents, reports, and studies of international institutions and organizations that obtain and analyse statistical data related to the labour market, such as the OECD and Eurostat. According to research carried out by the OECD in 2021, the self-employment factor reached a level of 16.5% of the total number of working people in all countries (own calculations based on an OECD study from 2021 In https://data.oecd.org/emp/self-employment-rate.htm (accessed: 28.02.2022)). This means that on average, every sixth working person is self-employed. The study found that the lowest rates are observed in: the United States (6.3%), Norway (6.5%), Denmark (8.5%), and Canada (8.6%). In contrast, the highest rates of self-employment were recorded in Colombia (50.1%), Mexico (31.9%), Greece (31.9%), and Turkey (31.5%). Then, according to Eurostat, more than 25.3 m people in total carried out self-employed activity in the third quarter of 2021 in the EU Member States. The highest numbers of the self-employed among EU countries are recorded in Italy (4.3 m), France (more than 3.2 m), Germany (3 m), Poland (3 m), and Spain (2.9 m) (https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do (accessed: 28.02.2022)). Yet the data reflecting the level of self-employed activity around the globe are not uniform. This results from the fact that many countries and international organizations adopt different definitions of self-employment, which will be discussed further on in the present chapter. Still, it should be noted that the self-employed constitute a very numerous group in the entire working population. The purpose of the present chapter is to present self-employed activity in the light of international and Union law, including to present its definitions and the legal guarantees granted to persons who perform this type of work.

2. SOURCES OF THE LEGAL REGULATION OF SELF-EMPLOYED ACTIVITY – INTERNATIONAL AND EU STANDARDS

The idea of developing a universal and international system for the protection of human rights emerged already after the end of World War I. An important element of this system are acts of the United Nations Organization (UN), in particular the Universal Declaration of Human Rights passed on 10 December 1948 (UDHR). Although the stipulations of the Declaration are not binding, it is acknowledged as one of the crucial acts establishing fundamental human rights. It should be noted that the UDHR focuses chiefly on the protection of the human being with regard to socio-economic aspects. Among other things, it grants the right to carry out gainful activity under clearly named terms. The Declaration does not refer to self-employed activity directly. Still, its stipulations guarantee specific rights to every human being. As a result, all people enjoy the protection it provides, regardless of the legal basis on which they provide work. Beneficiaries of the socio-economic guarantees are not only those who work under an employment relationship, but also self-employed persons. In the case of the latter group of working people, the following rights should be highlighted: right to freedom and dignity (Article 1 UDHR), right to non-discrimination and equal treatment (Article 2), right to equality before the law (Article 7), right to own property and to protection of ownership (Article 17), right to social security and to realization of their economic rights (Article 22), and right to free choice of employment and to favourable conditions of work (Article 23). The guarantees listed above undoubtedly constitute the basis for providing work as a self-employed person as well as affect existing legal regulations in the analysed area.

Much the same can be said of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (passed by the UN on 19 December 1966 in New York, Journal of Laws of 1977, No. 38, item 169.) which specifies and extends the list of human rights enshrined in the UDHR. An analysis of its provisions reveals beyond doubt that its addressees are all who pursue gainful activity, regardless of its kind and legal form. Significant provisions from the perspective of the self-employed are Articles 2 and 3, which provide for non-discrimination (especially based on sex) with regard to exercising one's economic rights, as well as Article 4, under which rights in the analysed area (including economic rights) may be subject to limitations only by means of statutory provisions and only in justified situations. This means that the ICESCR grants every person the right to exercise their economic rights, which include the unrestricted freedom to take up and carry out business activity as a self-employed person.

Other international regulations, including mainly conventions and recommendations of the International Labour Organization (ILO) as well as acts of the Council of Europe (CoE), give specific legal guarantees chiefly

to employees. The ILO in particular is an organization primarily concerned with the protection of workers' rights. Nevertheless, some ILO acts refer directly to self-employed activity, which will be discussed in more detail further on in the present chapter. The CoE, in turn, is an international government organization concerned predominantly with the protection of human rights. The scope of its activity, however, includes also social and economic matters, that is the development of self-employment, as well. The key legal documents in this area are: the European Convention on Human Rights (ECHR) (opened for signature on 4 November 1950 in Rome, and amended by Protocols 3, 5 and 8 and supplemented by Protocol 2 (Journal of Laws of 1993, No. 61, item 284, as amended)) and the European Social Charter (ESC) (opened for signature on 18 October 1961 in Turin (Journal of Laws of 1999, No. 8, item 67, as amended)). Especially the provisions of the ECS refer to the issue of self-employment. Its very Preamble indicates that its primary objective is to pursue economic and social development. Articles 1 and 2 guarantee every person the right to engage in work in a freely chosen occupation and the right to just conditions of work. Article 18, in turn, grants the right to engage in a gainful occupation in the territory of other contracting parties and calls for applying existing regulations in a spirit of liberality and for simplifying related formalities and reducing costs. Another noteworthy provision is Article 19(10) ESC, which expressly mentions extending the protection and assistance granted to migrants and their families to self-employed migrants insofar as such measures apply to them.

Furthermore, it should be noted that many English versions of ILO and CoE documents use the term "worker" rather than "employee", which is material when ascertaining the personal scope of legal protection. "Employee" is a person hired exclusively under a contract of employment. The concept of worker, in turn, covers persons who work under a contract of employment as well as outside an employment relationship, including as self-employed. As a result, the term "worker" covers a much wider group of working persons compared to "employee" (http://www.emito.net/poradniki/praca/umowa_i_rodzaje_zatrudnienia/pracownik_worker_a_pracownik_kontraktowy_employee (accessed: 17.03.2022)). Therefore, we can look for sources of the legal regulation of self-employed activity also in acts issued by the above mentioned international organizations that guarantee a specific model of legal protection to all who carry out gainful activity.

Under EU provisions, self-employed activity is promoted as a vital means to increase the professional activity of Union citizens. The functioning of the EU is based on the principle of the freedom of the internal market, which is the principle underpinning the legal framework for self-employment. The first legal document that should be mentioned is the Charter of Fundamental Rights of the European Union (CFR) (Charter of Fundamental Rights of the European Union of 7 December 2000 (Nice) (OJ C 303, p. 1, as amended)). Under Article 15 CFR, everyone enjoys the freedom to choose an occupation and the right to engage

in work. This freedom, having no counterpart in the ECHR (Jurczyk 2009, point 3.2.2), covers: the right to engage in work and to pursue a freely chosen or accepted occupation; freedom of all EU citizens to seek employment, to work, to exercise the right of establishment, and to provide services; and the right of nationals of third countries to work in the territories of the Member States in working conditions equivalent to those of citizens of the Union. Consequently, Article 15 CFR guarantees not the right to work, but the right to provide it according to the individual's will, in any form (Hambura, Muszyński 2001, 92). Then, Article 16 CFR expressly provides for freedom to conduct a business in accordance with Union law and national laws and practices. Thus, self-employed activity is expressly listed as an element of the freedom of establishment in the internal market. Under Article 49 of the Treaty on the Functioning of the European Union (TFEU) (opened for signature on 18 October 1961 in Turin (Journal of Laws of 2004, No. 90, item 864, as amended)) freedom of establishment covers, among others, taking up and carrying out self-employed activity. To this end, the TFEU prescribes the enactment of directives to give effect to the principle of freedom of establishment, which follows directly from Article 50(1) TFEU. In addition, Article 50(2)(d) TFEU stipulates protection for potential self-employed workers where they have exercised business activity in the territory of another Member State and wish to start such an activity in the country in which they have arrived. Article 56 TFEU, in turn, prohibits restrictions on the freedom to provide services, which, under Article 57(d) TFEU, includes self-employed professionals. The direction and intentions of the EU legislature regarding the promotion of this form of gainful employment have been confirmed also in the European Pillar of Social Rights (EPSR) (European Pillar of Social Rights of 17 November 2017 (Göteborg); Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights (OJ L 113, 29.04.2017, p. 56)). According to Principle 5, "Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated". Moreover, pursuant to Principle 12 of the Pillar, "Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection". Self-employed workers are mentioned also in Principle 15, which guarantees to both employees and the self-employed in retirement the right to "a pension commensurate to their contributions and ensuring an adequate income". Taking the provisions of the EPSR into account, it should be said that the authors of the document had begun to acknowledge the dynamically evolving socio-economic reality. This is why the Pillar includes calls for flexibility on the one hand and social protection of the self-employed on the other. The above mentioned freedoms are realized by removing a number of restrictions and barriers and granting appropriate rights to self-employed workers in the internal market. These include, among others: prohibition of discrimination

on grounds of nationality with regard to freedom to provide services and freedom of establishment; residence rights enhancing the mobility of self-employed workers and their families (Directive 2004/38/EC[1]); the principle of mutual recognition of professional qualifications and diplomas (Article 53 TFEU); the inclusion of self-employed workers in the system of social security coordination (Art. 48 TFEU[2]); anti-discrimination rights (Directive 2000/43/EC[3] and Directive 2000/78/EC[4]); the principle of equality between self-employed women and men (Directive 2010/41/EU[5]), as well as other rights, which will be further discussed in further sections of this chapter on the protective guarantees granted to the self-employed.

3. THE CONCEPT OF SELF-EMPLOYMENT IN THE LIGHT OF INTERNATIONAL AND UNION LAW

As has been mentioned in the introduction, there is no uniform definition of self-employment under international and Union law. Various international organizations often adopt a different understanding of the concept, which results in numerous interpretation problems. Statistical analyses likewise use various definitions of self-employed activity, which only increases the terminological chaos in this area. According to the OECD, a self-employed worker is a person who carries out business activity as a self-employed and who does or does not hire employees (employer), has their own farm business, or is a member of a producers' cooperative or an unpaid family worker (Buchelt, Pauli, Pocztowski 2016, 42). Moreover, it is pointed out that a self-employed person does not have to provide services under a formal agreement or contract or to obtain fixed remuneration for their work. In order to distinguish the self-employed, the OECD does not

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.04.2004, p. 77).

[2] Article 48 TFEU refers explicitly to the self-employed and guarantees the establishment of a system whereby these persons, as well as migrant employees and self-employed workers, retain their acquired rights and acquire new rights in terms of social security and, above all, acquire the right to the payment of benefits from that system in the Member State in which they reside.

[3] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.07.2000, p. 22).

[4] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

[5] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.07.2010, p. 1).

include directors and corporation managers in this group.[6] It follows that the OECD has determined a very broad personal scope of the analysed concept, as the group of self-employed workers includes both persons who carry out business activity and employ others and persons who provide services personally, as well as persons who run agricultural establishments. Furthermore, the category of the self-employed includes assisting family workers who receive no remuneration, but participate in the income generatEd. by the business. In contrast, studies prepared by Eurostat contain various definitions of self-employment. The institution does not carry out any research on its own. The statistics are obtained from the Member States as part of the Labour Force Survey (LFS).[7] This results in terminological inconsistencies in its publications. According to some analyses by Eurostat, self-employed workers are persons who carry out business activity or run an agricultural undertaking or their own practice. Moreover, in order to be classified as self-employed, such persons have to, in the week subject to the study, provide work (services) for the purpose of making profit or provide work (services) for the purpose of running their own business, or perform activities aiming to establish their own business (Lasocki, Skrzek-Lubasińska 2016, 6). In addition, Eurostat defines self-employed workers as persons who carry out self-employed activity on their own or as co-owners of businesses that have no legal personality. The group does not include self-employed persons providing work for one party, who are considered to be employees under flexible employment contracts (Buchelt, Pauli, Pocztowski 2016, 42). Instead, Eurostat qualifies as self-employed unpaid family workers, outworkers, and persons providing work to meet their own needs, including to accumulate their own capital (EU LFS statistical database In http://ec.europa.eu/eurostat/web/microdata/european-union-labour-force-survey (accessed: 20.03.2022)). The ILO, in turn, uses the International Classification of Status in Employment (ICSE), which was adopted by the Fifteenth International Conference of Labour Statisticians in January 1993. The ICSE distinguishes the following: employees, employers, own-account workers, members of producers' cooperatives, and contributing family workers. In this document, the ILO defines self-employed workers as persons who create their own jobs. As opposed to employees, the remuneration of the self-employed depends directly on the profits gained as a result of producing goods or providing services. Moreover, the self-employed provide services at their own risk and take independent decisions concerning the functioning of their business (OECD, Glossary of statistical terms, https://stats.oecd.org/glossary/detail.asp?ID=2426 (accessed: 11.04.2022)).

The concept of self-employment appears also in international documents and legal acts, especially those issued by the ILO. Discussion on this issue should

[6] These persons are regarded as employees [in:] OECDiLibrary, http://www.oecd-ilibrary.org/sites/factbook-2011-en/07/01/04/index.html?itemId=/content/chapter/factbook-2011-61-en (accessed: 10.03.2022).

[7] In Poland under the name of Badanie Aktywności Ekonomicznej Ludności (BAEL).

begin with a citation of the provisions of the Convention relating to the Status of Refugees, which was drawn up on 28 July 1951 in Geneva (Journal of Laws of 1991, No. 119, item 517). Under Article 18 of the Convention, self-employed activity is defined as engaging on one's own account in agriculture, industry, handicrafts, and commerce, and establishing commercial and industrial companies. Moreover, the term "self-employment" appears in the ILO Rural Workers' Organisations Convention, 1975 (No. 141) (http://libr.sejm.gov.pl/tek01/txt/mop/1975a.html (accessed: 20.03.2022)). Article 2(1) of the Convention contains a definition of the rural worker. The term refers to persons engaged in agriculture, handicrafts, or a related occupation in a rural area, whether as a wage earner or as a self-employed person. Likewise relevant in this aspect is section 2 of this article, which excludes from protection those self-employed workers whose main source of income is not agricultural work and those who employ permanent labour or a large number of seasonal workers, or have the land cultivated by sharecroppers or tenants. Only those self-employed persons enjoy protection who work the land themselves or with the help of their families, or who engage the help of outside labour, but only occasionally. The concept of self-employed activity can be found also in ILO Safety and Health in Construction Convention, 1988 (No. 167) (https://www.mop.pl/doc/html/konwencje/k167.html (accessed: 20.03.2022)). Under its Article 7, the member states undertake to adopt legal regulations requiring that employers and self-employed persons have a duty to comply with the prescribed safety and health measures at the workplace. Furthermore, Article 8 provides for the obligation of employers and self-employed persons who undertake activities simultaneously at one construction site to cooperate in terms of applying health and safety measures. As for self-employed activity, the Convention refers the readers to the definition applied under national provisions. More importantly, however, the Convention clearly distinguishes between the "employer" and the "self-employed", which means that it perceives self-employed persons as workers who hire no workers themselves. ILO Employment Relationship Recommendation, 2006 (No. 198) (http://www.dialog.gov.pl/gfx/mpips/userfiles/m.niewiadomska/zalecenie_198_pl_weryf.pdf) similarly omits to define self-employed activity. However, it calls for the states to provide any guidance on how to effectively determine the employment relationship and distinguish between employed and self-employed persons in order to provide workers with adequate protective guarantees. Furthermore, the Recommendation prescribes that the fact whether an employment relationship exists should be ascertained primarily on the basis of the circumstances of the performance of the work and the remuneration of the worker, irrespective of how the relationship has been characterized by any arrangement, such as a contract.

Union law likewise lacks a uniform definition of self-employment. Under the legislation of both the EU and the Member States, the concept refers now to so called freelancers, now to all persons who carry out business activity on their own

account, regardless whether they engage outside labour.[8] A characteristic feature of self-employed activity is that the person does not enter into an employment contract, but provides services under a commercial civil law contract. This is why the European Commission has been calling for greater transparency in the legal definitions of employment and self-employment in the Member States for many years now. It was found in the 2006 Green Paper titled "Modernising labour law to meet the challenges of the 21st century" that the lack of a general EU definition of self-employment could cause numerous problems, especially in cases of cross-border work (and cross-border provision of services). This is also the thrust of the opinion of the European Economic and Social Committee (EESC),[9] which likewise recognizes that, despite the efforts of many Member States, no precise definition has been drawn up to distinguish between employees and the self-employed. (opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (2013/C 161/03) In https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52012IE2063&from=EN (accessed: 1.04.2022)). According to the EESC, the creation of such a definition is important not only for labour law reasons, but also for the enforcement of social security and tax law. The EESC has divided this category of working people into two main groups. The first includes highly qualified and experienced professionals in various fields who are aware of their market position and wish to carry on business on their own account (genuine self-employment). The other category comprises self-employed people whose status has no purpose other than to reduce the administrative and financial burden on the client. People in that situation have little or no freedom of choice and are entirely economically dependent on their client (bogus self-employment). For this reason, attempts have been made in a number of Member States to make a clear legal distinction and define criteria for distinguishing an employment relationship from self-employment. Presenting these will make it possible to define self-employment. According to the EESC, employment (as opposed to self-employment) consists in performing work under the direction of another person in return for remuneration.[10] Moreover, it

[8] The Commission emphasizes that various definitions of self-employed activity are used in the individual countries and distinguishes a range of sub-categories, e.g. based on the legal status of the business, on the existence of employees, or on the sector of the business (e.g. agriculture). Moreover, various categories of the self-employed exist in some countries. For instance, there is a separate definition of "dependent self-employment" (which will be discussed in more detail further on) or "genuine self-employment" and "bogus self-employment".

[9] Hereafter: EESC.

[10] The worker is similarly defined under Article 45 TFEU (freedom of movement for workers). Following the criteria adopted in the judgment of the Court of Justice of 3 July 1986, C-66/85, Deborah Lawrie-Blum v Land Baden-Württemberg (ECR 1986/7/2121), an employee is a person who – regardless of the basis for employment – performs services of some economic value for a given time for another person and under their direction in consideration for remuneration, and their professional activities are real and significant.

is material whether remuneration is the worker's sole (main) source of income and whether they bear no economic risk. According to these guidelines, a self-employed person will therefore be a person who does not perform work under direction and who is subject to economic risk. In addition, according to the EESC Opinion, (Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (OJ C 161, 6.06.2013, p. 14)) it is a person who:

- is not dependent on the entity for whom they provide services as regards determining the type, place, and method of performing the commissioned work;
- does not use equipment, tools, or materials provided by the party for whom they provide services;
- is not subject to the work schedule adopted by the party for whom they provide services;
- does not subcontract work to others, but performs it personally;
- is not included in the structure of the production process, work organization, or hierarchy of the business or another organization;
- does not perform similar tasks as workers employed by the party for whom they provide services.

Furthermore, CJEU case law has specified the characteristics of an independent self-employed. According to the Court, an independent service provider enjoys freedom in the recruitment of their own staff and more leeway in terms of choice of the type of work and tasks to be executed. Furthermore, they can freely decide on the manner in which that work or those tasks are to be performed, and on the time and place of work (Judgment of the CJEU of 10 September 2014, C-270/13, IIraklis Haralambidis v Calogero Casilli, ZOTSiS 2014, No. 9, item I-2185). Then, a definition of self-employment was presented in the judgment of 20 November 2001 in case C-268–99 (Judgment of the CJEU of 20 November 2001, C-268/99, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, ECR 2001, No. 11A, item I-8615) which pertained to pursuing economic activity as a self-employed person by a sexual worker in the Netherlands. The CJEU defined self-employed activity as providing services outside any relationship of subordination concerning the choice of that activity, working conditions, and conditions of remuneration, under the self-employed person's own responsibility, and in return for remuneration paid to that person directly and in full. Next, in the order in case C-692/19, (Judgment of the CJEU of 22/04/2020, C-692/19, B v Yodel Delivery Network Ltd., OJ C 2020, No. 287, item 22) issued under the Working Time Directive 2003/88/EC (Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9)) the Court admitted the possibility to apply working time standards to bogus self-employed workers. The Court pointed out in the order that a self-employed person, as opposed to an employee, can use

subcontractors or substitutes, can accept various tasks, can provide work (services) to other parties, and can independently determine their hours and place of work.

To sum up the above considerations, it is important to stress that, in line with the thesis set out at the beginning, there is no uniform terminological set describing the concept of self-employment. In their attempts to define this concept, institutions, international organizations, and EU bodies rely on its characteristics and the differences between self-employment and employment. However, the analysis leads to the conclusion that there are features – common to many of the definitions cited above – that distinguish self-employment from employment. These are the absence of subordination and subjection to the employer's authority, and freedom as to the specific conditions, time, and place of providing work. What remains ambiguous is the use of the work of others under various bases of gainful activity. It follows from the above presented arguments on the concept of self-employment under international and EU law that this category of actors includes both those who employ others and those who perform work personally. However, this distinction is only relevant for the definition of economically dependent self-employed, which refers only to solo self-employed persons.[11]

4. PROTECTION OF THE SELF-EMPLOYED IN THE LIGHT OF INTERNATIONAL AND UNION LAW

4.1. Protection of the self-employed in the area of life and health

The protection of human health and life is a cornerstone of the modern world. It should therefore be universal and cover every human being, and in particular the working person, since the pursuit of gainful activity can be a source of danger to their health and life. The right to protection in this area does not derive only from legal acts; it has its basis also in natural law and the teachings proclaimed by the Roman Catholic Church.[12] The protection of human life and health,

[11] A new category of working persons has emerged in some EU Member States (e.g. Italy, the UK, Germany, and Spain), namely the economically dependent self-employed. This is an intermediary category between employees and self-employed workers. The general purpose of creating this category was to provide them with better protection without including them in the group of employees. It has been noted in the countries that introduced this intermediary category that the phenomenon of dependence is related to granting a range of rights exclusively to this group of the self-employed. This is a compromise solution: it gives working people the option to choose self-employed activity while retaining (provided that they meet certain criteria) some rights granted to employees.

[12] This is evident in both Leo XIII's encyclical Rerum novarum as well as in Laborem exercens by John Paul II (Majka 1996, 28; Wyka 2011, 456–459; 2015, 121–130). The main demand voiced in those works was to guarantee working people decent working conditions, including, above all, the right to work in a way that is safe and does not endanger their life and health (Auleytner 1996, 134–135). Moreover, according to the social teaching of the Church, the right to the protection

however, has primarily a normative basis and is the subject of international and EU legislation. It covers not only employees, but also the self-employed.

First of all, the UN acts should be cited. The UDHR guarantees each person the right to work under safe and satisfactory conditions. Article 3 of the UDHR should be noted here, which stipulates that "everyone has the right to life, liberty and security of person". The right to life corresponds directly to the right to security. It means that everyone has the right to an adequate level of security, in any situation, including during the provision of work. It should be noted that providing security is linked to the obligation to comply with legal provisions and instructions for the proper performance of work, including the proper use of protective equipment. These obligations apply to both the party commissioning the work and the contractor, who may perform the work also as a self-employed person. Therefore, the commissioning parties are obliged not to expose the person performing the work to loss of health and life in any way, as otherwise the fundamental rights of the individual could be violated. Article 23 UDHR, on the other hand, guarantees everyone the right to adequate and satisfactory working conditions. It is listed among other rights addressed to the beneficiaries of social economy. On this basis, the protection of self-employed persons is justified in terms of: guaranteeing them a high level of health and safety at work, eliminating conditions that are harmful and arduous to health, shaping a proper working environment, preventing them from being involved in accidents at work, and providing them with preventive health examinations and access to training related to compliance with regulations affecting the safety of work. The self-employed worker is therefore entitled to work in safe and hygienic conditions. At this point, it is worth noting the list of socio-economic rights set out in the ICESCR. The issue of labour protection and social security is placed at the very beginning of this list, which shows its high rank in the hierarchy of human rights.[13] The ICESCR, like the UDHR, addresses the issue of safe and hygienic working conditions. According to Article 7 ICESCR, everyone has the right to enjoy "just and favourable conditions of work". Its basic element is, first and foremost, the provision of health and safety at work for all workers (Article 7b). Article 12, on the other hand, guarantees everyone the right to "the enjoyment of the highest attainable standard of physical and mental health", which refers in particular to "the improvement of all aspects of environmental and industrial hygiene" (Article 12(2)(b)), the prevention of, among others, occupational diseases (Article 12(2)(c)), and the "creation of conditions which would assure to all medical service

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of life and health is understood in a broad sense and not only includes the obligation to guarantee safe and hygienic working conditions to those who work, but also requires the observance of appropriate rules on working time and rest (Mazurek 1986, 180–181).

[13] The ICESCR takes precedence over ILO regulations in Florek, Seweryński (1988, 45), which means that the rights it stipulates, including the right to protection of health and life, are universal in nature in Matey (1977, 500).

and medical attention in the event of sickness" (Article 12(2)(d)). An analysis of the provisions of the ICESCR shows that, as in the case of the UDHR, the right to protection of health and life not only extends to workers, but is universal in nature. Indeed, it is enjoyed by anyone who provides work on any legal basis (Wyka 2003, 67) and therefore also by the self-employed. Consequently, states should implement appropriate steps, both legal and technical,[14] to protect, at least to a basic extent, every human being in the above area.

The standardizing activity of the ILO is very important in building a universal system of protection for workers, especially in the field of occupational health and safety (Wyka 2019, point 15.1.2). First of all, it should be noted that many of the acts of this organization, through their broad personal scope, extend protection in the area of health and life to the self-employed. An example is the Declaration of Philadelphia of 10 May 1944, introducing the new principles and objectives of the ILO.[15] Under Article III(7) of the Declaration, "adequate protection for the life and health of workers in all occupations" should be achieved, which allows for the extension of occupational health and safety guarantees to all persons performing work, regardless of the legal basis of their work (Wyka 2003, 69). This approach proves the fact that protection in the area of life and health has been extended to self-employed workers, as well. The ILO initially envisaged occupational health and safety protection only in very narrow aspects (so-called protection against specific hazards).[16] Gradually, however, its extension to specific industries and occupations could be observed.[17] Moreover, the ILO began to issue acts of a global nature establishing general standards for occupational health and safety.[18] These acts called for the member states to take appropriate steps to guarantee the self-employed the same protection as is provided for employees.[19] One of the most important ILO

[14] This follows directly from Article 2 ICCPR.

[15] http://www.mop.pl/doc/pdf/inne/dekfil.pdf (accessed: 15.03.2022). The Declaration was an annex to the ILO Constitution (Part XIII of the Treaty of Versailles).

[16] E.g.: ILO White Lead (Painting) Convention, 1921 (No. 13), Journal of Laws of 1925, No. 54, item 382; ILO Benzene Convention, 1971 (No. 136), http://www.mop.pl/doc/html/konwencje/k136.html; ILO Occupational Cancer Convention, 1974 (No. 139), http://www.mop.pl/doc/html/konwencje/k139.html (accessed: 15.03.2022) etc.

[17] E.g.: ILO Protection against Accidents (Dockers) Convention, 1929 (No. 28), http://www.mop.pl/doc/html/konwencje/k028.html (accessed: 15.03.2022); Safety Provisions (Building) Convention, 1937 (No. 62), Journal of Laws of 1951, No. 11, item 83; ILO Hygiene (Commerce and Offices) Convention, 1964 (No. 120), Journal of Laws of 1968, No. 37, item 261, etc.

[18] E.g.: ILO Occupational Health Services Convention, 1985 (No. 161), Journal of Laws of 2005, No. 34, item 300; ILO Labour Inspection Convention, 1947 (No. 81), Journal of Laws of 1997, No. 72, item 450; ILO Occupational Safety and Health Convention, 1981 (No. 155), http://www.mop.pl/doc/html/konwencje/k155.html (accessed: 15.03.2022) etc.

[19] See e.g. Occupational Health Services Recommendation, 1985 (No. 171), http://www.mop.pl/doc/html/zalecenia/z171.html (accessed: 26.03.2022), which was passed to supplement ILO Occupational Health Services Convention, 1985 (No. 161), http://www.mop.pl/doc/html/konwencje/k161.html (accessed: 26.03.2022).

acts in the field of occupational health and safety is the Occupational Safety and Health Convention, 1981 (No. 155) (http://www.mop.pl/doc/html/konwencje/k155.html (accessed: 26.03.2022)) along with its complementary Occupational Safety and Health Recommendation, 1981 (No. 164). (http://www.mop.pl/doc/html/zalecenia/z164.html (accessed: 26.03.2022)). These two documents are considered to be an "international code of occupational health and safety" (Wyka 2019, point 15.1.2; 2003, 73). Their provisions introduce a universal personal and sectoral scope. They apply to all workers, including the self-employed (Wyka 2003, 73; Florek, Seweryński 1988, 215–216). ILO Recommendation No. 164 explicitly refers to self-employed workers. It proposes broad protection in terms of health and safety at work. It contains a number of principles and rules that should guide member states when regulating this protection. In section 1, the Recommendation advocates that this protection should be extended to the self-employed by taking necessary and practically feasible legal measures. In addition, the ILO has enacted several pieces of legislation related to the protection of the self-employed from specific hazards in various industries and occupations.[20] An important act relating to the protection of the life and health of the self-employed is the Safety and Health in Construction Convention, 1988 (No. 167). (http://www.mop.pl/doc/html/konwencje/k167.html (accessed: 26.03.2022)). The fact that its provisions apply to the self-employed follows expressly from Article 1(3). Under its Article 7, the member states undertake to adopt legal regulations requiring that employers and self-employed persons have a duty to comply with the prescribed safety and health measures at the workplace. Next, Article 8 imposes on employers and the self-employed an obligation to co-ordinate the prescribed safety and health measures whenever they undertake activities at one construction site.[21] The Convention calls for member states to cover the self-employed with protective health and safety regulations to the same extent as other employees.[22]

Similarly, acts of the CoE extend protection in the area of occupational health and safety to each provider of work, that is including self-employed workers. In

[20] See e.g.: Working Environment (Air Pollution, Noise and Vibration) Recommendation, 1977 (No. 156), http://www.mop.pl/doc/html/zalecenia/z156.html (accessed: 26.03.2022); Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148) (Journal of Laws of 2005, No. 66, item 574); Safety Provisions (Building) Convention, 1937 (No. 62) (Journal of Laws of 1951, No. 11, item 83 – it came into force on 4 July 1942 and was accompanied by three Recommendations: 53, 54, and 55. See more in: Florek, Seweryński (1988, 226).

[21] The Convention is supplemented by ILO Safety and Health in Construction Recommendation, 1988 (No. 175), http://www.mop.pl/doc/html/zalecenia/z175.html (accessed: 26.03.2022). Under section 3 of the Recommendation, its provisions should also apply to self-employed persons. Pursuant to section 4, national legislation should require that employers and self-employed persons have a general duty to provide a safe and healthy workplace and to comply with the prescribed safety and health measures.

[22] The same is said in the ILO Chemicals Recommendation, 1990 (No. 177), http://www.mop.pl/doc/html/zalecenia/z177.html (accessed: 26.03.2022).

the context of the analysed field, we should note chiefly Articles 2 and 5 ECHR, which guarantee the right to life and the right to liberty and security, which applies to every sphere of the human being, personal and professional alike. Both a negative obligation (prohibition to deprive someone of life) and a positive obligation (order to take appropriate steps to protect life) follow from these provisions (Nowicki 2017, art. 2 and 5). It is worth emphasizing that the rules do not limit the personal scope only to employees, but are addressed to every human being. This means that protection in the area of the right to life and liberty and security is – under this act – available to self-employed persons, as well. The ECS likewise recognizes in Article 3 the right to work in safe and healthy conditions (Florek, Seweryński 1988, 70). This is regarded as one of the social rights (Blanpain, Matey 1993, 263–264; Makowski 2020) to which the self-employed are also entitled.

Protection in terms of occupational health and safety under Union law has undergone a true evolution. At the outset, the EU made no attempts to regulate this domain (Wyka 2020, point 23.2.). The need to introduce rules in the area of occupational health and safety became the reason for the passing of the Single European Act.[23] The TFEU is one of the major EU acts that take up this subject. Its most important part for the protection of life and health is Title X, which covers social policy. Article 151 stipulates that, having in mind the provisions of the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers, the Union and the Member States should promote employment and improve living and working conditions while at the same time maintaining progress and adequate social protection. It should be emphasized that this provision does not pertain to employees only, but concerns the process of providing work, which shows that the regulation covers also self-employed persons. The most important provision from the perspective of protecting the self-employed from workplace hazards is Article 153(1) TFEU (ex Article 137 TEC), which specifies the objectives listed in Article 151. It provides that the Union should support the Member States in improving the working environment and the working conditions in order to protect the health and security of all workers. Importantly, these activities are mentioned first in order to highlight the significance of the right to occupational health and safety among all workers' rights. (Sanetra 2012, 924; Wyka 2020a, point 23.2.2). Furthermore, this provision granted the Union the right to adopt directives concerning occupational health and safety. As a result, occupational health and safety has gained strategic importance for the EU, which follows also from the Opinion of the EESC on the communication from the Commission to the European

[23] Journal of Laws of 2004, No. 90, item 864, as amended. Under the Act, Article 118a TEWG was adopted, according to which the Member States will endeavour to bring about favourable changes in the workplace (working environment) in particular, with a view to protecting the health and safety of workers, and will endeavour to harmonize tasks in this area in a spirit of progress (section 1).

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU strategic framework on health and safety at work (2014–2020) (OJ C 230, 14.07.2015, p. 82). Thus, the provision of Article 151 TFEU does not limit the personal scope to employees within the meaning of national labour law only, but extends protection to persons who provide work outside of an employment relationship (Wyka 2007, 336–344; Sobczyk 2013, 162; Liszcz 2018, 139–148; Sanetra 2012, 926). This is why Article 153(1)(a) TFEU covers self-employed workers, too (Wyka 2020a, point 23.2.2).[24] As a result, we should agree that TFEU provisions concerning the protection of workers' life and health, and in particular the obligation to provide work in safe conditions, is directed at the self-employed, as well (see more in: European Parliament, Sprawozdanie z 26 października 2015 r. w sprawie strategicznych ram UE dotyczących bezpieczeństwa i higieny pracy na lata 2014–2020, A8–0312/2015).

Another legal act that is worth noting is the Charter of Fundamental Rights of the European Union. The rules stipulated by this document highlight the need to provide an adequate level of protection of life and to each working person, including the self-employed. Title II of the Charter, "Equality", contains a list of all rights and civil liberties that should be respected in order to properly protect fundamental human rights. Article 6 CFR stipulates that "everyone has the right to liberty and security of person". Article 31, in turn, guarantees proper and fair working conditions for every worker (Wyka 2020b, art. 31.1). The main point here is the right to respect for the worker's health and safety, as laid down in section 1 of the provision. Under section 2, workers have the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave, all of which similarly affect matters related to occupational health and safety. Another provision worth noting is Article 35 of the Charter, which grants every person the right to preventive health care and to medical treatment with the objective of attaining a high level of human health protection. Even though this stipulation pertains chiefly to matters related to access to medical care, it indicates that the central objective of the states signatories of the Charter was to achieve a high level of protection of human life and health, which covers protection of the life and health of all workers (including the self-employed). Moreover, the above rule concerns one of the main duties in the area of occupational health and safety, namely to carry out initial (as well as periodical) health surveillance – which, however, is not always compulsory for the self-employed. The European Pillar of Social Rights likewise refers to the protection of life and health of self-employed persons. Pursuant to section 10(a)

[24] Moreover, the CJEU ruled that the classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker under EU law if their independence is merely notional and serves to disguise an employment relationship, [in:] Judgment of the CJEU of 13 January 2004, C-256/01, Debra Allonby v Accrington & Rossendale College and others, ECR 2004, No. 1B, item. I-873.

EPSR, workers have "the right to a high level of protection of their health and safety at work". Under section 10(b), they have the right to a working environment which is adapted to their professional needs and enables them to prolong their participation in the labour market. Taking into account section 15 of the Preamble, the above guarantees cover all working people, irrespective of their employment status, terms, or period. Consequently, principles on the creation of a safe and healthy working environment as well as protection regarding safe and hygienic working conditions pertain to self-employed workers, too.

The system of protection of the life and health of self-employed persons is shaped also by secondary EU legislation. The basic framework and general act (Florek 1996, 76; Florek 2010a, 207–208) in this matter is Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (Journal of Laws of 1989, No. 183, item 1, as amended). It is called the "EU labour code", the EU basis of occupational health and safety law, in subject literature (Wyka 2003, 89; 2018, 1203; Świątkowski 2015, 254–256) Both the material and the personal scope of the Directive are very broad, as the act was adopted with the aim to ensure protection against all kinds of risks in the working environment (Makowski 2020) (see also: Judgment of the CJEU of 3 October 2000, C-303/98 Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana, LEX No. 82998). It refers to the "working environment" meaning any place where work is carried out (Wyka 2003, 90). Therefore, it must be assumed that the protective guarantees included in the Directive cover self-employed workers who carry out their work at a registered office or other place designated by the principal (See e.g.: Świątkowski 2015, 257–258).[25] This follows also from the broad understanding of the term "employer", which refers to any natural or legal person that hires labour under various legal bases, regardless of their size, sector, or industry. Importantly, the Directive was the basis for adopting further, specific acts of secondary EU law, which introduced protection of workers in various aspects.[26] An important act in the field of protection of life, health, and security of self-employed persons is first and foremost Council Directive 92/57/EEC of

[25] However, some representatives of labour law theory believe that the Directive under discussion does not apply to the self-employed.

[26] E.g.: Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 393, 30.12.1989, p. 18, as amended; Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 156, 21.06.1990, p. 9, as amended; Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 9, as amended.

24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (Journal of Laws of 1992, No. 245, item 6, as amended). It seeks to extend the personal scope contained in earlier directives on the subject to self-employed workers and employers engaged personally in construction work. The aim of the Directive is to provide them with safe and hygienic working conditions. Moreover, the act extends the personal scope of other EU secondary legislation to self-employed workers. These include in particular Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive) (Journal of Laws of 1989, No. 393, item 13, as amended) and Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual Directive) (Journal of Laws of 1989, No. 393, item 18, as amended). It should also be borne in mind that the sources of EU occupational health and safety law are not only acts adopted on the basis of the Framework Directive 89/391/EEC, but also a number of other directives aimed at protecting the health and life of working persons.[27] All the aforementioned secondary EU legislation introducing occupational health and safety guarantees in various branches and industries revolves around the broadly defined "working environment". This means that they protect every worker (including the self-employed).[28]

[27] In particular, this is about: Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 131, 5.05.1998, p. 11, as amended; Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 262, 17.10.2000, p. 21, as amended; Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 42, 15.02.2003, p. 38, as amended; Directive 2013/35/EU of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC, OJ L 179, 29.06.2013, p. 1; Commission Directive 91/322/EEC of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work, OJ L 177, 5.07.1991, p. 22, as amended.

[28] E.g.: Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 9, as amended; Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers

4.2. Protection of the self-employed in the area of remuneration

Remuneration is an essential element of pursuing gainful activity. It has first and foremost a guarantee and maintenance function for any person making a living from the work of their own hands. It enables the person to support themselves and other family members. This has been recognized by international and EU legislatures, which introduced an appropriate standard of protection for remuneration also for the self-employed.

The UDHR is the first UN act to call for the protection of economic rights, including remuneration. From this point of view, Article 23(3) of the Declaration plays an important role. It stipulates that "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (Prusinowski 2019, point 12). Furthermore, the UDHR introduces remuneration protection in other aspects, such as the right to just and satisfactory working conditions (Article 23(1)) and the right to equal pay for equal work (Article 23(2)). This implies the principle of non-discrimination in matters of remuneration, with particular attention to the equal treatment of women and men. The privileges listed in Article 23(1) and (2) of the Declaration are guaranteed to every person, which highlights the broad personal scope of protection in the area under analysis. In contrast, "everyone who works" is covered by the right to adequate, satisfactory, and decent remuneration (Article 23(3) UDHR). This means that it is addressed to all "working people" regardless of the formal legal basis for the provision of work. Its personal scope includes not only employees, but also self-employed persons. From the perspective of the protection of the self-employed with regard to remuneration, Article 7 ICESCR concerning the right to just and favourable working conditions to which everyone is entitled is relevant (Prusinowski 2019, point 12; Bomba 2015, point 2). Article 7(a) ICESCR stipulates the right to remuneration which provides all workers with a subsistence minimum. In addition, this article introduces the right to fair wages and equal remuneration for work of equal value without any distinction (Florek, Seweryński 1988, 199). It demands that women be guaranteed working conditions no worse than those enjoyed by men as well as equal pay for equal work. Moreover, remuneration should be high enough to create satisfactory living conditions for workers and their families, which follows from Article 7(a)(ii). Another relevant provision is

in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 404, 31.12.1992, p. 10, as amended; Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 307, 13.12.1993, p. 1, as amended; Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 131, 5.05.1998, p. 11, as amended.

Article 7(d) ICESCR, which guarantees remuneration for work on public holidays. The personal scope of the above-mentioned privileges is very broad, as they apply to "all workers" regardless of the legal basis under which they provide work, and therefore also to the self-employed.[29]

The ILO has adopted a number of pieces of legislation on protection in the area of remuneration. In the preamble to the ILO Constitution (Journal of Laws of 1948, No. 43, item 308, as amended) the need to ensure an adequate living wage that allows for a decent livelihood is clearly emphasized.[30] This is reaffirmed in Article I(3) of the Declaration of Philadelphia,[31] where fight against poverty is recognized as a primary focus of the ILO (Prusinowski 2019a). The organization has adopted several pieces of legislation on this matter that extended minimum wage protection to all groups of workers (including the self-employed) and sought to ensure that the number of workers not covered by minimum protection was as low as possible (Florek, Seweryński 1988, 194; Prusinowski 2019a).[32] A relevant legal act from the point of view of the issue under analysis is the ILO Protection of Wages Convention, 1949 (No. 95) (Journal of Laws of 1955, No. 38, item 234. The Convention entered into force on 24 September 1952 and was ratified by Poland on 18 September 1954). Under its Article 2, the provisions of the Convention apply to "all persons to whom wages are paid or payable". This means that they apply to all working persons receiving remuneration for the provision of work possible (Florek, Seweryński 1988, 196; Prusinowski 2019a), which is related to the profit-making nature of the activity (including business activity). They therefore apply to all contractors who personally provide work to the principal in return for remuneration (wages), especially those who are economically dependent. Furthermore, the act applies to self-employed persons providing work under the above-mentioned conditions. The Protection of Wages Convention introduces a number of elements that make up the general protection of remuneration for work (wages). First, it stipulates that wages should, as a general rule, be paid in

[29] In addition, the use of the phrase "in particular" in Article 7 ICESCR indicates an exemplary list of rights related to just and favourable working conditions. This means that states parties should introduce other legal solutions that will positively contribute to raising the level of protection of remuneration for all workers.

[30] The ILO's minimum wage standard amounts to 50% of the average wage in a given country.

[31] The document was adopted on 10 May 1944, at the 26th Conference of the ILO in Philadelphia. The Declaration was annexed to the ILO Constitution in 1946 and forms an integral part of it.

[32] See also the ILO Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99) of 28 June 1951 (it entered into force on 23 August 1953. Poland ratified the Convention on 5 July 1977, Journal of Laws No. 39, item 176) together with the Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89) of 28 June 1951, http://www.mop.pl/doc/html/zalecenia/z089a.html (accessed: 18.03.2022), as well as the ILO Minimum Wage Fixing Convention, 1970 (No. 131) of 22 June 1970, http://www.mop.pl/doc/html/konwencje/k131.html (accessed: 18.03.2022) together with the Minimum Wage Fixing Recommendation, 1970 (No. 135) of 22 June 1970, http://www.mop.pl/doc/html/zalecenia/z135.html (accessed: 18.03.2022).

cash, only in legal tender (Article 3). Second, it requires that remuneration for work (wages) be, in principle, paid directly to the worker (Article 5). Third, it prohibits the employer (the commissioning party) from limiting in any manner the freedom of the workers to dispose of their wages at their own discretion (Article 6). Fourth, it prohibits the compulsion of workers to purchase services and goods through the employing entity (Article 7). Fifth, it points out that a deduction from remuneration (wages) may only occur under the conditions and within the limits prescribed by national legislation (Article 8). Sixth, it introduces protection in terms of attachment and prescribes that they may only be made in the manner and within the limits provided for by national legislation (Article 10). Seventh, it establishes the priority of the payment of remuneration (wages) over other claims in the event of bankruptcy or judicial liquidation of an undertaking (Article 11). Eighth, it ensures that remuneration (wages) should in principle be paid at regular intervals (Article 12). Ninth, it mandates that remuneration (wages) should, in principle, only be paid on working days and only at or near the workplace (Article 13). In conclusion, the ILO Convention cited above, together with ILO Protection of Wages Recommendation, 1949 (No. 85) (http://www.mop.pl/doc/html/zalecenia/z085.html (accessed: 23.03.2022)) laid the foundations for a series of national regulations on the protection of remuneration for employees and the self-employed. The stipulations included in this act were reaffirmed in the ILO Plantations Convention, 1958 (No. 110)[33] (Articles 36–35) (Florek, Seweryński 1988, 198).

A significant role in the context of international standards for the protection of the remuneration of the self-employed is played by the ESC. The act provides for the protection of the remuneration (wages) of the self-employed as long as they provide work personally for the principal (different views are expressed in: Prusinowski 2020). Article 4 of this act provides for the right to a fair remuneration, which consists of several essential elements. First, remuneration must be such as to give the workers and their families a decent standard of living (Article 4(1) ESC) (Florek, Seweryński 1988, 199). Second, under the Charter, workers have the right to an increased rate of remuneration for overtime work, subject to exceptions (Article 4(2) ESC). Third, men and women workers have the right to equal pay for work of equal value (Article 4(3) ESC). Fourth, the Charter provides for the right to a reasonable period of notice in the case of termination of employment (Article 4(4) ESC). Fifth, the provisions of the act under analysis permit deductions from wages only under conditions and to the extent prescribed by law. The above-mentioned rights should be guaranteed either by collective agreements or by national laws. In turn, Article 19(4)(a) ECS ensures that migrant workers are entitled to remuneration and employment and working conditions on the same basis as nationals of the given country. This is important

[33] It entered into force on 22 January 1960. It has not been ratified by Poland.

also from the perspective of the self-employed, as these persons often start their own businesses as self-employed workers in the foreign country. Finally, Article 20 ECS introduces the right to equal opportunities and to equal treatment in matters of employment and occupation without discrimination on the grounds of sex. One of the areas protected against discrimination are employment and working conditions, including the issue of remuneration.

Primary EU law likewise provides for remuneration protection for the self-employed. A *prima facie* analysis of the TFEU reveals that the issue of remuneration is in principle an exclusive competence of the Member States and subject to national regulation. The only exception to this rule is the guarantee concerning the application of the principle of equal opportunities and equal treatment of men and women in employment and occupation, including the principle of equal pay for equal work or work of equal value. These principles are supposed to be implemented not only by Member States, but also by EU bodies.[34] Although Article 153(5) TFEU expressly excludes the issue of remuneration for work from EU jurisdiction (Mitrus 2003, 45; Mitrus 2013, 20) the issue arises in the Treaty in the context of other EU objectives (Mitrus 2006, 56–57). Here, attention should be drawn to Article 157(1) TFEU, which obliges Member States to "ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied". The subsequent section defines the concept of remuneration.[35] Under Article 157(3) TFEU, EU bodies[36] are obliged to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.[37] Moreover, the protection of the remuneration of the self-employed is inferred from the fundamental EU principle of free movement of persons, services, and capital. Article 45 TFEU provides for the free movement of workers within the Union, which is a central feature of Member States' employment policies. Article 45(2)

[34] Article 157 TFEU.

[35] Pursuant to Article 157(2) TFUE, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of their employment, from their employer. The European Institute for Gender Equality was established to promote and monitor the principle of equality. That was done by Regulation (EC) No. 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403, 30.12.2006, p. 9.

[36] The European Parliament and the Council, following the ordinary legislative procedure and after consultation with the Economic and Social Committee.

[37] Moreover, it follows from section 4 of the provision that maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers is without prejudice to the principle of equal treatment of remuneration. This means that the above principles concerning the protection of remuneration under primary EU law cover self-employed workers.

specifies expressly that such freedom of movement "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". This means that EU citizens should be treated equally in these matters, including when they are self-employed as sole proprietors (Świątkowski 2014, 567).

Protection in terms of remuneration for the self-employed is found also in the Charter of Fundamental Rights. From the perspective of the issue under consideration, a relevant provision is Article 23 on equality between women and men, among others in the field of remuneration (Prusinowski 2020b). The provisions of the CFR emphasize that it is not an obstacle to the application of the principle of equality, including equality in pay, to maintain or adopt measures providing for specific advantages for the underrepresented sex (Majkowska-Szulc, Tomaszewska 2013, 770). The above rules refer to "every woman and every man", which means that the self-employed are covered by this regulation. Furthermore, rationale for protecting the remuneration of the self-employed should be sought in the provisions of the EPSR. Section 12 of this document explicitly addresses this category of workers: "Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection". It includes matters related to an adequate protection of remuneration, which often constitutes the main source of income for the self-employed and their family. Another provision relevant from the perspective of the area under analysis is Section 6, which is located in Chapter II of the Pillar (Prusinowski 2020c). It stipulates that workers have the right to fair wages that provide for a decent standard of living.

The EU Treaties have omitted to give EU bodies broad competence to legislate on the protection of remuneration. Nevertheless, it is worth highlighting several pieces of secondary EU legislation that introduce certain guarantees in this area, including for the self-employed. First and foremost, mention should be made of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (see more: Topolewski 2015). This act was adopted due to the existence of clear differences between national legislations in this matter.[38] The Directive regulates the rights and obligations of commercial agents and special protection as regards remuneration (Articles 6 et seq.). It follows from these provisions that in the absence of a contractual arrangement as to the amount of remuneration, a (self-employed) commercial agent is entitled to the remuneration customary in the place where they carry out their activity. Should there be no such customary practice, a commercial agent is entitled to reasonable remuneration taking into account

[38] It has been recognized that the aforementioned disparities have a negative impact on the conditions of competition and adversely affect the scope of protection of self-employed commercial agents, especially in their relations with their principals.

all the aspects of the transaction (Article 6(1) of the Directive). Then, Article 11 provides a closed list of circumstances in which a commercial agent may lose their right to remuneration (commission). It is noteworthy that the Directive grants a number of protective guarantees to self-employed commercial agents. Their rights are in many cases similar to those provided for employees, which is justified by the special economic position of agents vis-à-vis principals.

Similarly, protection of the remuneration of the self-employed is provided for in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 of 2006, p. 23). The personal scope of this act covers not only employees as well as retired and disabled workers, but also self-employed workers, which follows directly from Article 6 of the Directive. And according to its Article 4, "for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated". This means that the Directive guarantees to self-employed persons the protection of equal treatment of men and women in the field of employment, including ensuring equal pay for equal work.

Another act that should be mentioned in the context of protection of remuneration is Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (OJ L 275, 25.10.2022, p. 33). Even though it is highly controversial, as the EU lacks legislative competence in this area (see Article 153(5) TFEU) (see also: Bomba 2022, point 3.2.) it directs Member States to put in place certain mechanisms for setting minimum wages. It was adopted primarily with the aim of improving the living and working conditions in the EU, including in particular ensuring the adequacy of minimum wages and reducing wage inequalities.[39] The Directive applies to workers who have an employment contract or an employment relationship as defined by law, collective agreements, or practice in force in each Member State, taking into account the criteria for determining the status of a worker established by the Court of Justice (Article 2 of the Directive). This construction of the personal scope renders it possible to apply the provisions of the Directive to individuals who fall within the definition of "worker" under CJEU case law. Undoubtedly, the protection resulting from this act covers, among others, persons who are bogus self-employed and undeclared workers, as explicitly stipulated in point 21 of the preamble to the Directive (see also: Bomba 2022, point 3.2.). However, the question of the genuine self-employed raises doubts, because according to the preamble to the act in question, these individuals do not qualify for its personal scope. In my opinion, the EU legislature wrongly assumed

[39] See also section 13 of the preamble of Council Recommendation of 13 July 2021 on the economic policy of the euro area, OJ C 283, 15.07.2021, p. 1.

here that the genuinely self-employed need no protection in this regard. It has therefore failed to take into account the situation in which genuine self-employed persons may be economically dependent on a counterparty, which in my view entails the obligation to cover them with protection under the Directive. This view is based chiefly on the Directive's fundamental objective of ensuring that all workers – irrespective of the legal basis on which they work – are guaranteed a minimum wage set at an appropriate level by law or collective agreements. In my opinion, in order to bring order to this matter, the EU legislature should clarify that the Directive does not apply only to genuine self-employed persons who are not economically dependent on their counterparties, as only such individuals in principle require no protection in the field of remuneration.

4.3. Protection of the self-employed in the area of non-discrimination and equal treatment

The principles of non-discrimination and equal treatment now underpin the functioning of a democratic state under the rule of law, making social justice a reality. They have a considerable impact on social and economic development. It comes therefore as no surprise that they have been introduced into various legal systems, including the international (Świątkowski 2008, 170) and the European (Świątkowski 2006, 230; Florek 1996, 76). One of the largest areas of discrimination is the labour market, so protection in this field is now a key challenge of modern labour law. As a result, the self-employed have been granted rights in the area of non-discrimination and equal treatment under both international and EU law.

The UDHR contains a list of fundamental human rights, including the right to non-discrimination and the right to equal treatment (Wujczyk 2019, point 11.3). Under Article 2 UDHR, "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The UDHR provides an open list of reasons for discrimination, which is of advantage from the perspective of the standard of protection in this area (Góral, Kuba 2017, point 1.2). Moreover the Declaration does not restrict the personal scope, as it applies to "everyone", without making differences based on their economic situation or other characteristics, including the legal basis on which they provide work. Consequently, the application of the rights and freedoms guaranteed by the UDHR and, above all, the protection against discrimination and unequal treatment, applies also to self-employed persons. In turn, Article 7 of the UDHR stipulates that "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Furthermore, pursuant

to Article 23(1) of the Declaration, "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment", and everyone, without any discrimination, has the right to equal pay for equal work (Article 23(2)).

The ICESCR likewise refers to the principles of non-discrimination and equal treatment. Under its Article 2(2), the states parties to the Covenant "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Kuźniar 2000, 15). Next, Article 3 ICESCR stipulates that the states should ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the document. Another noteworthy provision is Article 7, which obligates the states to recognize the right of everyone to the enjoyment of just and favourable conditions of work (Florek, Seweryński 1988, 151). In particular, the Covenant calls for ensuring equal remuneration for work of equal value without distinction of any kind as well as for guaranteeing women conditions of work not inferior to those enjoyed by men, with equal pay for equal work (Article 7(a)(i)). Moreover, Article 7(c) ICESCR provides for the right to equal opportunity to be promoted to an appropriate higher level, subject to no considerations other than those of seniority and competence (Wujczyk 2019, point 11.3).

The ICCPR, signed on 19 December 1966 in New York, is another document that refers to the issue of non-discrimination and equal treatment. Article 2(1) ICCPR, similarly as in the case of the ICESCR, obligates the states to respect and to ensure to all individuals the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, Article 3 introduces the principle of equal treatment of men and women with regard to the enjoyment of all civil and political rights, including protection against discrimination. In turn, Article 26 stipulates that "all are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Similarly as under the UDHR, protection in the area of non-discrimination and equal treatment is not addressed to a limited group of individuals, but extends to "all persons". Consequently, it applies to self-employed workers, as well (see more in: Kędziora, Śmieszek, 2010, 5–6).[40]

[40] A similar provision can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (Journal of Laws of 1969, No. 25, item 187). Article 5 ICERD stipulates that the states are obliged to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to work, to free choice of employment,

The most important ILO document regarding the analysed subject is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (http://www.mop.pl/doc/html/konwencje/k111.html (accessed: 28.12.2019); Journal of Laws of 1961, No. 42, item 218; see more: Walczak 2015, point 9.6). The Convention is a general act, in which all discrimination related to employment is considered unacceptable, regardless of the legal basis for the provision of work (see: Buchowska 1999, 59)[41] The list of grounds for discrimination included in this Convention is not exhaustive, as under Article 1(1)(b), the Convention prescribes that other manifestations of discrimination "as may be determined by the Member concerned after consultation with representative employers' and workers' organisations" are to be taken into account, as well (Góral, Kuba 2017, point 1.2.2). Moreover, the act contains provisions specifying situations where there is no discrimination.[42] It is noteworthy that the Convention does not make the granting of protection in terms of non-discrimination and equal treatment conditional on any legal basis for the provision of work, which implies that said protection extends to self-employed persons.[43]

Next, the ECHR contains provisions on non-discrimination and equal treatment that apply to self-employed workers. Article 14 stipulates that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Importantly, the list of reasons for discrimination is open, which guarantees legal protection to every person irrespective of the grounds for discrimination (Góral, Kuba 2017, point 1.2.3). From this perspective, another important document is Protocol No. 12 to the Convention adopted in Rome on 4 November 2000. It introduced the general principle of equality of all persons before the law as well as prescribed that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Nowicki 2013, 984–987). Both the ECHR and the Additional Protocol impose on the signatory states the obligation to take all measures to support equality of all persons by means of a common guarantee of a general prohibition of discrimination

to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.

[41] The Convention defines "discrimination" in Article 1(1) as any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

[42] Article 1(2) and Article 4 of the Convention.

[43] Attempts to restrict the Convention's personal scope and to exclude from it the self-employed were not accepted by the delegates to the Conference in Świątkowski (2008, 192).

and unequal treatment. It should be emphasized that, as in the case of other international instruments, the ECHR together with the Protocol broadly define the group of individuals entitled to benefit from anti-discrimination protection, and thus also include self-employed persons in their scope. Also noteworthy are the provisions of the ESC, including its Preamble emphasizing that "the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin" (Góral, Kuba 2017, point 1.2.3). Under Article 4(3) ESC, in order to ensure the effective exercise of the right to a fair remuneration, it is necessary to recognize the right of men and women workers to equal pay for work of equal value. Another relevant document in this regard is Additional Protocol to the ESC adopted on 5 May 1988, whose Part II, Article 1(1) provides for a right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. It clarifies the provisions of the ESC on the principle of non-discrimination and equal treatment and obliges states to take appropriate measures to ensure or promote its application in various areas, including, among others: access to employment, protection against dismissal and occupational resettlement, vocational guidance, training, retraining and rehabilitation, terms of employment and working conditions including remuneration, including pay, and career development, including promotion. It is worth highlighting that the above-mentioned list is open-ended, as Article 1(3) provides that specific measures may be adopted to remove de facto inequalities.

Protection in terms of non-discrimination and equal treatment of the self-employed is provided also under EU legislation. In the Union, the two principles are considered fundamental in the area of broadly understood employment (Florek 2002, 2–8). This is why the objective of relevant EU legislation work is to extend protection to all working persons, irrespective of the legal basis for providing work (see more in: Tomaszewska 2011, 285). The TFEU contains rules on protection in the area of non-discrimination and the principle of equal treatment (Góral, Kuba 2017, point 1.3; Florek 1996, 58). A relevant provision in this context is Article 8 TFEU, under which "in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women". Next, Article 10 stipulates that when defining and implementing its policies and activities, the EU will aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Then, Article 18 TFEU is the basis for prohibition of discrimination on grounds of nationality, which additionally grants the European Parliament and the Council the authority to adopt rules designed to prohibit such discrimination acting in accordance with the ordinary legislative procedure. Another noteworthy provision is Article 19, which confers additional legislative authority upon the Parliament to take measures to combat discrimination. Further stipulations significant from the perspective of the analysed subject are Article 45(2) and Article 49(1) TFEU. The former provides for freedom

of movement for workers and prohibits any discrimination as regards employment, remuneration, and other conditions of work. This prohibition applies universally to all forms of gainful activity. Thus, it extends to the conditions of access to employment, to self-employment, and to the exercise of a profession (Wujczyk 2020, point. 13.5) The latter provision, namely Article 49(1) TFEU, stipulates freedom of establishment and prohibits the adoption of any restriction on taking up and pursuing self-employed activities as well as on setting up and managing undertakings. Considerable emphasis is placed on matters related to equal pay for work and to guarantees of implementing the principle of equal treatment of men and women in the area of employment and work. Under EU law, protection in this regard includes the self-employed (Wujczyk 2020, point. 13.5). This means that persons who carry out a business on their own must not be discriminated against not only with regard to the taking up and pursuit of economic activity, but also in the area of remuneration and other working conditions. Then, Article 21(1) CFR lists characteristics protected by law covered by non-discrimination (See also Wujczyk 2020, point. 13.3).[44] The principle of non-discrimination is based on a non-exhaustive list of reasons for discrimination, as seen from the expression "such as" used in the provision (Maliszewska-Nienartowicz 2012, 59–60). It is worth noting here that the 2007 CFR has significantly broadened the material scope of characteristics protected by law compared to those included in the original version of the 2000 CFR. In addition, Article 21(2) prohibits discrimination on grounds of nationality within the scope of application of the Treaties and without prejudice to their specific provisions. Relevant to the issue under consideration is Article 23 CFR, which provides for equality between women and men in all areas, including employment, work, and pay. Moreover, this provision allows for the maintenance or adoption of measures providing for specific benefits to the underrepresented sex, as in such a case they do not violate the principle of equality. In addition, the CFR does not limit the personal scope of the prohibition of discrimination and the application of the principle of equal treatment, which means that these provisions protect all those whose rights are at stake, regardless of other characteristics, including the type of employment and the legal basis for providing work. Therefore, the provisions of the CFR should be considered to cover the self-employed. The development of EU anti-discrimination law is likely to move towards making the principle of non-discrimination a universal right of individuals, which will certainly lead to a higher standard of protection in this area in the future (Prechal 2004, 533).

Protection of the self-employed in terms of discrimination and equal treatment is not only enshrined in the Treaties, but also has its basis in secondary legislation,

[44] They include: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, and sexual orientation.

notably EU directives. Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood played an important role in this regard. This act set a main direction for the EU legislature, and with it the legislatures of the individual Member States, to follow when it came to building a standard of protection in terms of non-discrimination and the principle of equal treatment for the self-employed.[45] However, after several years, the act was repealed and replaced by Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (OJ L 180 of 2010, No. 180, p. 1). It was adopted with a view to improving the clarity of legislation and the effectiveness of the enforcement of the principle of equal treatment between men and women engaged in self-employed activities. However, the Directive's personal scope covered not only self-employed persons, but also their spouses or life partners.[46] In addition, the Directive defined the content of the "principle of equal treatment" for the self-employed.[47] It is worth noting that the document contains an open list, as the quoted provision only gives examples of situations in which the principle of equal treatment may be violated, which leaves a wide margin for interpretation. Furthermore, the Directive prohibits the use of harassment, including sexual harassment, against the self-employed, which are explicitly recognized as manifestations of sexual discrimination.[48] Then, in Article 10, the act introduces the right to obtain real and effective compensation or reparation. In this case, the Directive imposes on Member States that the compensation or reparation must effectively deter from discriminatory behaviour and that they must be proportionate to the loss or damage suffered by the victim of discrimination (whether already in business or wishing to start business activity). The protection of self-employed persons and their spouses and life partners from

[45] It should be noted that the Preamble to this act already indicated that the right to equal treatment is granted to all self-employed men and women. In addition, the authors of the act advocated that this right should be guaranteed to spouses who are not employees or partners and who participate in the activity on a permanent basis and perform the same or assisting tasks. Moreover, it was recognized that there are considerable differences in the standard of protection against discrimination among the Member States and that steps should therefore be taken to harmonize the national regulations existing in this field.

[46] These concepts are defined identically as in Council Directive 86/613/EEC, with the difference that the new (later) Directive extended the personal scope to include the life partners of self-employed workers.

[47] Pursuant to Article 4 of this act, "the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity".

[48] Article 4(2–3) of Directive 2010/41/EU of the European Parliament and of the Council.

discrimination on grounds of sex should be strengthened by the existence in each Member State of one or more bodies competent to analyse the problem of discrimination. This includes examining possible solutions and providing practical assistance to victims, as stipulated in Recital 22 and Article 11 of the Directive.

The core of EU anti-discrimination law along with primary legislation is made up today of three directives: 2000/43/EC, 2000/78/EC, and 2006/54/EC, all of which include provisions concerning self-employed workers (Wujczyk 2020, point. 13.3). Council Directive 2000/43/EC of 29 June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin (see: Parmar 2004, 131).[49] It aims primarily to combat discrimination on the grounds of racial or ethnic origin and to implement the principle of equal treatment. A relevant provision from the point of view of protection against discrimination and unequal treatment of the self-employed is Article 3 of the Directive, which defines its personal scope. Following this provision, the stipulations of the Directive apply to all persons, as regards both the public and the private sector, including public bodies, in relation to, among others, conditions for access to self-employment and to occupation. Moreover, the provisions of the Directive apply to selection criteria and recruitment conditions, regardless of the type of activity and at all levels of the professional hierarchy, including as regards promotion. The issue concerning the protection of the self-employed has been regulated jointly with the protection of employees, which indicates that these areas are not only very close to each other, but in fact closely related. Therefore, the standard of protection against discrimination and unequal treatment should be guaranteed at a comparable level for the two categories of working persons mentioned here.

The superior objective of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2000, p. 16) in turn, was to implement the principle of equal treatment in employment and to combat discrimination on grounds of religion or belief, disability, age, and sexual orientation. The scope of this act covers not only the conditions for access to employment, but also the prerequisites for admissibility of self-employment, including selection and recruitment criteria, regardless of the field of activity and at all levels of the professional hierarchy, including with regard to promotion. The directive therefore applies to the self-employed, too (Góral, Kuba 2017, point 1.3.2; Florek 2002, 2–8). In addition, the Preamble emphasizes that everyone is equal before the law and has the

[49] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22. Furthermore, it should be noted that the area of protection covered by this Directive goes beyond employment and work issues. This is why some representatives of the doctrine of anti-discrimination law call it "pioneering", as no other piece of legislation has defined the standard of protection against unequal treatment in such a comprehensive way.

right to protection against discrimination, as these are universal guarantees provided for in many acts of international law.[50] This means that protection under Council Directive 2000/78/EC is available to the self-employed in many areas of social, political, and economic life, including, above all, in the field of work and employment.

Another piece of secondary EU legislation that regulates protection against discrimination and unequal treatment is Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 of 2006, p. 23). Its purpose is primarily to structure the regulations on equal treatment of women and men as well as to take into account the recent case law of the CJEU regarding access to employment, including promotion and vocational training, working conditions, pay, and occupational social security schemes. It is noteworthy that, in some aspects, the self-employed fall into the personal scope of the Directive.[51] This is the case with the chapter on equal treatment in occupational social security schemes and the chapter covering equal treatment in the areas of access to employment, vocational training and promotion, and working conditions. The Directive prohibits all discrimination, both direct and indirect, on the grounds of sex (in the private and public sectors, including public bodies), among others with regard to the conditions of access to self-employment and pursuing a profession.

When analysing EU primary and secondary law on protection against discrimination and unequal treatment of self-employed workers, several important conclusions should be reached. Firstly, the standard of this protection increased with the enactment of successive primary and secondary legislation. The EU legislature began to recognize a growing need to extend protection to the self-employed in the area of non-discrimination and equal treatment. Therefore, it successively increased the level of guarantees in this field by gradually extending the personal and material scope of legal regulations concerning the analysed matter. Secondly, the protection granted to the self-employed in the field of non-discrimination and equal treatment concerns in particular discrimination on grounds of sex, although protection against discrimination on the basis of other criteria, such as ethnic origin or nationality, is not excluded, either. Thirdly, the EU legislature has granted a very similar scope of protection to both those in an employment relationship and those who work on another legal basis,

[50] The acts referred to are mainly: the Universal Declaration of Human Rights; the UN Convention on the Elimination of All Forms of Discrimination against Women; the UN International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Convention for the Protection of Human Rights and Fundamental Freedoms. All EU Member States are signatories to the above documents.

[51] Articles 6 and 14 of Directive 2006/54/EC.

including self-employment. Fourthly, the EU has recognized the importance of those cooperating with the self-employed. In the early days, this protection was narrowed only to spouses who assisted in the business. Now, however, it has been extended to life partners, as well.[52]

4.4. Protection of the self-employed in the area of parental rights

The protection of parental rights is one of the key issues regarding the realization of family life in the context of reconciliation with work (the concept of work-life balance). It was introduced to protect the family, marriage, and the rights of children. Maintaining a family is not only a major physical and emotional effort, but also a huge economic challenge. Many people choose to work in order to earn an income to support themselves and other family members, while balancing work and family life. For this reason, states have gradually started to introduce more extensive parenting rights for those working outside the employment relationship. Regulations on this issue can be found in a number of international and EU laws, some of which apply to the self-employed.

The UDHR regulates the basic list of human rights, including protection in terms of parental rights. It guarantees certain privileges to the family, with "family" defined as the fundamental group unit of society. Under Article 16(1) UDHR, women and men, without any limitation due to race, nationality, or religion, have the right not only to marry, but above all also to found a family (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17). It is noteworthy that Article 16(3) UDHR explicitly grants this basic social unit the guarantees to enjoy the protection from the state and society. Another relevant provision in terms of the protection of parenthood is Article 25 (Florek, Seweryński 1988, 232; Duraj 2019, 344). Its section 1 stipulates that everyone has the right not only to a standard of living adequate for the health and well-being of themselves and of their family, but also to social services and security in the event of various circumstances that may cause a loss of income, including maternity. Section 2, in turn, expressly provides for the right of the mother and her child to special care and assistance. Consequently, it is possible to maintain that the UDHR guarantees parental rights to self-employed persons.

The ICESCR likewise contains regulations concerning parental rights. Under Article 10(1), the family should be accorded the widest possible protection and assistance, especially in the period of care and education of dependent children (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17). Section 2 complements the above provision in that it stipulates that special protection should be granted to mothers during a reasonable period before and

[52] Article 2(b) of Directive 2010/41/EU of the European Parliament and of the Council. It is worth noting that, in extending this protection to "life partners", the Directive has in this case specified that it is only those persons who are recognized under national law to that extent.

after childbirth. During this time, working mothers should receive paid leave or leave with adequate social security benefits (Florek, Seweryński 1988, 232). The special need to protect working women arises primarily from their psychological and physical characteristics and their responsibilities in the family (Zieliński 1986, 60). The parental rights guaranteed under the ICESCR extend to every working person, which includes the self-employed (Duraj 2019, 344). UN acts concerning the protection of parenthood include also the Convention on the Rights of the Child, which was adopted by the General Assembly on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526, as amended). It guarantees every child such protection and care as is necessary for their well-being, taking into account the rights and duties of their parents, legal guardians, or other individuals legally responsible for them (Article 3 of the Convention). Then, under Article 18, every child has the right to grow up in a family environment, to be brought up by parents or legal guardians, and to be cared for. The Convention does not make the enjoyment of these rights dependent on the legal basis of the provision of work by the parents or legal guardians, which indicates that it extends protection to children of self-employed persons (Duraj 2019, 344).

An analysis of ILO instruments on parental rights shows that they have a broad scope of application covering not only employees, but also other persons pursuing gainful activity outside the employment relationship, including the self-employed. Reference should first be made to the Maternity Protection Convention, 1919 (No. 3), which concerns the employment of women before and after childbirth (http://www.mop.pl/doc/html/konwencje/k003.html (accessed: 10.03.2022)). Under Article 2 of the Convention, a "woman" is any female person, irrespective of age, nationality, and marital status (married or unmarried). Pursuant to the Convention, a woman, regardless of whether she works in a public or private industrial or commercial undertaking or in any of their branches, is entitled to certain rights in connection with maternity (Article 3) (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2; Duraj 2019, 345). Those rights include: prohibition to work for six weeks following the labour, right to leave before labour, and the right to monetary and non-monetary benefits (such as free medical care) during her absence from work related to her pregnancy and labour. Moreover, Article 4 of the Convention stipulates that it is not lawful to give a woman who is absent as a result of maternity a notice of dismissal.

The issue under consideration is further pursued in ILO Maternity Protection Convention (Revised), 1952 (No. 103) (http://www.mop.pl/doc/html/konwencje/k103.html (accessed: 10.04.2022))[53] which revised Convention No. 3. (see: Florek, Seweryński 1988, 230; Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2). Under Article 3 of this act, every woman is entitled to a period of

[53] ILO Maternity Protection Convention, 1919 (No. 3) was ratified by Poland on 5 February 1976, Journal of Laws of 1976, No. 16, item 99.

maternity leave of at least twelve weeks, including a period of compulsory leave after childbirth of at least six weeks. The Convention prescribes the introduction by national legislation of additional pre-labour leave when a woman develops an illness in connection with pregnancy. Under Article 4 of the Convention, the woman is entitled to receive cash and medical benefits while absent from work on maternity leave. It is stipulated that these benefits should be paid through compulsory social insurance, while when a woman does not have a legal title to receive these benefits, she should receive them out of specific social assistance funds. Furthermore, the Convention recognizes the woman's right to a paid break included in her working time for the purpose of nursing her child (Article 5). Similarly to ILO Convention No. 3, this act stipulates in Article 6 that the employer may not dismiss a woman while she is absent on maternity leave (protection of continuity of employment) (Świątkowski 2008, 234). ILO Convention No. 103 was supplemented by the Maternity Protection Recommendation, 1952 (No. 95), (http://www.mop.pl/doc/html/zalecenia/z095.html (accessed: 10.04.2022)) which clarifies and expands the rights of women included in the Convention (see: Florek, Seweryński 1988, 231; Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2).[54] The above ILO acts do not make the granting of maternity rights conditional on any qualities. They apply to all women, regardless of the legal basis for their employment. It must therefore be concluded that maternity protection provided by these regulations covers self-employed women (Duraj 2019, 345).[55]

[54] The act calls for an extension of maternity leave to 14 weeks and an increase in benefits to 100% of their remuneration. In addition, the Recommendation introduces a prohibition on night work and overtime for pregnant and nursing women, and clarifies issues relating to the provision of adequate nursing breaks.

[55] See also ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), http://www.mop.pl/doc/html/konwencje/k102.html (accessed: 10.04.2022). It follows from Article 8 of this act that all medical conditions as well as pregnancy and childbirth, including their possible consequences, are the object of protection. According to the wording of Part VIII of ILO Convention No. 102, States should provide protected persons with certain maternity benefits. Article 47 explicitly stipulates that the protection should extend to pregnancy, labour, and their consequences, as well as the resultant suspension of earnings. Furthermore, Article 49 of the Convention grants women medical assistance and care before, during, and after childbirth, which should be provided by a midwife or a doctor. Pursuant to Article 49(3) of the act, the purpose of medical care is to seek the restoration or improvement of the protected woman's health and the recovery of her capacity to work. ILO Convention No. 102 does not make protection in this area dependent on the legal basis for the provision of work. It must therefore be agreed that it is fully applicable to women working as self-employed persons. See also ILO Income Security Recommendation, 1944 (No. 67), http://www.mop.pl/doc/html/zalecenia/z067.html (accessed: 10.04.2022). The ratio legis of the act was, among other things, to eliminate inequality and social injustice by unifying or coordinating social security systems and covering all workers and their families as well as the rural population and the self-employed. It is recommended in section 17 that social insurance should afford protection to all employed and self-employed persons as well as their dependants in the event of risks to which they are exposed. Next, under section 21, it is suggested that the self-employed be insured against invalidity, old age, and death under the same conditions as employed persons. Moreover, it is

Then, ILO Workers with Family Responsibilities Convention, 1981 (No. 156) (https://www.mop.pl/doc/html/konwencje/k156.html (accessed: 10.04.2022)) together with Recommendation 1981 (No. 165) of the same name (https://www.mop.pl/doc/html/konwencje/k165.html (accessed: 10.04.2022)) were adopted with the aim of protecting all women from disadvantage because of their family responsibilities. These acts guarantee the protection of continuity of employment, the right to parental leave at the end of maternity leave, and the right to leave to care for a sick child, to which both women and men should be entitled (Florek, Seweryński 1988, 234). They have a broad personal scope, as they apply to all areas of economic activity and to all categories of workers. This means that the guarantees provided for in the above mentioned normative acts cover the self-employed, as well.

Another ILO legal instrument of relevance to the issue under analysis is ILO Maternity Protection Convention, 2000 (No. 183).[56] With its broad scope of application, this document applies to all working women, including those performing atypical forms of dependent work (Article 2(1)). The Convention introduces important principles for the protection of the health of pregnant and nursing women as well as the right to maternity leave and the right to leave in the case of sickness or complications (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 17.2.2). It extends the minimum duration of maternity leave to fourteen weeks.[57] The Convention grants women the right to adequate monetary benefits at a level which ensures that the woman can maintain herself and her children in proper conditions of health and with a suitable standard of living (Article 6(2) of the Convention). In addition, every woman should be guaranteed medical benefits for herself and her child (Article 6(7) of the Convention) and leave pay (Article 6(8)) or assistance from a social assistance fund (Article 6(6)). It is noteworthy that Article 8 of the act under discussion not only introduces protection against the termination of a woman's employment during pregnancy and maternity leave, but also guarantees protection after her return to work. Furthermore, the burden of proving that the dismissal was not related to pregnancy or childbirth or their consequences or to the nursing of the child rests on the employer. Under Article 8(2) of the Convention, a woman should be able to return to work to the same position or an equivalent position paid at the same rate at the end of her maternity leave. Furthermore, Article 9 of the Convention stipulates protection in

suggested to consider insuring them against sickness and maternity necessitating hospitalization, sickness which lasts for several months, and extraordinary expenses incurred in cases of sickness, maternity, invalidity, and death. The Recommendation explicitly provides for income security for self-employed persons in the event of certain risks, including sickness and maternity.

[56] The act revises ILO Maternity Protection Convention, 1952 (No. 103) http://www.mop.pl/doc/html/konwencje/k183.html (accessed: 10.04.2022).

[57] This period amounted to six, and then to twelve months in the preceding ILO conventions (i.e. No. 3 and No. 103).

terms of non-discrimination on the grounds of maternity.[58] It should be noted that the above mentioned acts do not define the term "performance of atypical forms of dependent work", but it can be concluded that what is meant here are situations in which the woman worker is in any way dependent on the employer. It follows that maternity protection is available not only to women with employee status, but also to women who perform work outside of an employment relationship, including as self-employed workers, as long as they meet the condition of dependence on the employer.

The parental rights of self-employed persons have also become the subject of legislation enacted by the CoE. Here, attention should first be drawn to Article 8 ECHR. It introduced protection for everyone with regard to respect for private and family life, their home, and their correspondence. Next, Article 12 stipulates that men and women of marriageable age have the right to marry and to found a family. It is worth emphasizing that the rules do not limit the personal scope only to employees, but are addressed to every human being. Hence, it should be considered that self-employed persons are likewise entitled to protection in this area. Also the ESC contains legal solutions for the protection of maternity and the family. This is related to the basic premise of this act, which is to improve living and working conditions in order to render them equal while maintaining progress (Matey-Tyrowicz 2000, 3). Article 8 ESC regulates the right of employed women to protection (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.2). It introduces a number of demands that should be respected by states ratifying the act. Firstly, it establishes a woman's right to paid leave before and after childbirth of not less than twelve weeks. Secondly, it prohibits the employer from dismissing a woman from her job during her absence on maternity leave. Thirdly, it establishes the right for mothers who are nursing their infants to sufficient time off for this purpose. Fourthly, it prohibits the employment of pregnant women in underground mining and, as necessary, in all work that is unsuitable because it is dangerous, unhealthy, or arduous. Furthermore, Article 16 ESC establishes the right of the family to social, legal, and economic protection. And according to Article 17, states should take all appropriate and necessary measures to ensure the effective exercise of this right through the establishment or maintenance of adequate institutions or services. Then, Article 19 introduces the right of migrants and their families to protection and assistance. States should take care of them in many respects, including in the area of parenthood. It is noteworthy that section 10 of this article explicitly calls for the protection to be extended to migrant

[58] See also ILO Maternity Protection Recommendation, 2000 (No. 191), http://www.mop.pl/doc/html/zalecenia/z191.html (accessed: 10.04.2022), which supplements ILO Convention No. 183. In addition to detailing the issues contained in the Convention, the act introduced the possibility for the father of a child to take maternity leave when the mother – due to health reasons – cannot care for the child. Moreover, the Recommendation calls for the establishment of a right to parental leave at the end of maternity leave for the child's both working mother and working father.

self-employed persons insofar as these measures apply to them. An analysis of the provisions of the ESC demonstrates that the above mentioned guarantees regarding parental rights extend not only to women with employee status, but also to those who work outside of an employment relationship, including the self-employed. This interpretation of the act is supported by the general terms "woman"[59] and "mother" used in the provisions.

Similarly, the issue of maternity protection for those pursuing gainful activity has been recognized at EU level. Article 151 stipulates that, having in mind the provisions of the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers, the Union and the Member States should promote employment and improve living and working conditions while at the same time maintaining progress and adequate social protection. It ought to be emphasized that this regulation is not limited to employees only; its personal scope covers also persons performing work outside the employment relationship, including as self-employed workers.

In the context of the issue under analysis, attention should be drawn to the CFR, which contains the basic principles of EU labour law (see more: Rycak 2013 and the subject literature cited therein). Under its Article 7, "everyone has the right to respect for his or her private and family life, home and communications". Then, Article 9 provides for the right to marry and the right to found a family. Next, pursuant to Article 33 CFR, "the family shall enjoy legal, economic and social protection" and "to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child" (Duraj 2019, 345–346; Mitrus 2020, art. 33 KPP). Under Article 34, the Union recognizes and respects the entitlement to benefits in cases such as maternity as well as everyone's right to social security benefits and social advantages in accordance with Union law and national laws. Moreover, the Charter's Article 35 grants everyone the right of access to preventive health care and the right to benefit from medical treatment with a view to achieve a high level of human health protection. The above analysis shows the quoted act uses the expression "everyone" in many places, which confirms the wide personal scope of the guarantees it provides regarding parenthood protection. They are therefore not only addressed to women and workers, but apply to fathers and the self-employed, as well (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.4; Szczerba-Zawada 2014, 27).

Protective guarantees for self-employed workers with regard to parental rights are found also in the EPSR. Principle 9 calls for maintaining a work-life balance. It follows from it that parents and those with caring responsibilities should be guaranteed the right to suitable leave, flexible working arrangements, and access

[59] Sometimes also "employed woman".

to care services. In addition, women and men must have equal access to special leaves of absence in order to fulfil their caring responsibilities. It is also worth mentioning Chapter III of this act, which concerns social protection and inclusion. According to principle 12, regardless of the type and duration of their employment relationship, workers and, under comparable conditions, the self-employed have the right to adequate social protection, which includes protection in the area of parenthood protection (see: Duraj 2019, 346). It is thus evident that the authors of the EPSR recognized the dynamically changing socio-economic realities and called for, on the one hand, the pursuit of flexibility and, on the other, the introduction of the widest possible social protection for the self-employed.

Secondary EU legislation likewise contains provisions on the protection of self-employed persons regarding parental rights. First of all, we should mention Council Regulation (EEC) No. 1390/81 of 12 May 1981 (OJ L 143, 29.05.1981, p. 1) concerning the application of social security schemes. This act extended the personal scope of social security from only employees and their families to self-employed workers and their family members.[60] It was recognized that the free movement of persons was not limited to employees, but applied also to self-employed persons under the freedom of establishment and the freedom to provide services. The drafters of this document acknowledged that limiting oneself only to national legislation on social security may not be sufficient. Hence came the recommendation that, in order to provide adequate protection, the self-employed should be included in a coordinated system that applies across all EU Member States. In addition, it is advocated that, for reasons of equity, the self-employed should, as far as possible, be given the same rights as employees. This trend is evident also in Council Regulation (EC) No. 1606/98 of 29 June 1998 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and in Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71 with a view to extending them to cover special schemes for civil servants.[61] As these civil servants can be self-employed at the same time, the EU legislature included them in the coordinated social security system in order to grant them appropriate social protection, including maternity protection. Similarly, Regulation (EC)

[60] Regulation No. 1390/81 repealed Regulation (EEC) No. 1408/71, which covered employees only. In Regulation No. 1390/81, the term "worker" was replaced with "employed or self-employed persons", which extended the personal scope of those provisions.

[61] This trend is evident also in Council Regulation (EC) No. 1606/98 of 29 June 1998 amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and in Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71 with a view to extending them to cover special schemes for civil servants, OJ L 209, 25.07.1998, p. 1.

No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.04.2004, p. 1) provides for the extension of appropriate social security protection, including parental rights, to all working people – both employees and the self-employed. This act confers the same rights on both these categories of workers.

One of the major pieces of EU legislation on the protection of parental rights is Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. Its drafters concluded that the protection of the maternity and paternity rights of the self-employed should be much broader. The Directive's scope extends to self-employed workers and their spouses and life partners when they assist in the exercise of the business activity (Article 2). Under Article 7, spouses and life partners of self-employed workers should be able to benefit from social protection in accordance with national law (which means also in the area of maternity). Moreover, the drafters of the Directive recognized the particular economic and physical situation of pregnant self-employed women as well as of the female spouses and life partners of self-employed workers. That is why they decided to guarantee them the right to maternity benefits under the terms specified in the legislation of the Member States. The duration of these benefits should be similar to the length of maternity leave available to women with an employment relationship. Pursuant to Article 8(1) of the Directive, the period of maternity allowance enabling interruptions in their occupational activity must not be shorter than 14 weeks and must be at a sufficient level to guarantee an equivalent income (Article 8(3) of the Directive). In addition, it is provided that if the length of the maternity leave is increased, the duration of maternity benefits for pregnant self-employed women (female spouses and life partners) should likewise be extended. The same is true for access to all existing national social services (or the maternity benefit), which should benefit pregnant self-employed women (female spouses and life partners) to the same extent.

From the point of view of the issue under consideration, a relevant piece of legislation is Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (OJ L 188, 12.07.2019, p. 79) which repealed Council Directive 2010/18/EU. The purpose of this act is to improve access to work-life balance solutions and to increase the level of men's use of leave for family reasons (see more: Ślęzak-Gąsiorowska 2019, 12–16; Czerniak-Swędzioł, Kumor-Jezierska 2021, 189–207) and for flexible working arrangements. The subject of the Directive is therefore to introduce individual rights in relation to paternity leave, parental leave, and carers' leave, as well as the adoption of flexible working arrangements for workers who are parents or carers (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.3.3). The group of individuals entitled to benefit from this protection is not limited

only to those working under an employment relationship, and the provisions of this act will cover the self-employed, as well. This view is supported by the Preamble to the above-mentioned Directive, which specifies that the legal basis for this instrument were other directives expressly covering the self-employed.[62] Furthermore, Article 18 of the Directive obliges Member States to submit reports accompanied by "a study of the rights to family-related leave that are granted to self-employed persons". It is moreover worth noting that previous EU legislation explicitly prescribed the extension of protection regarding parental rights to persons who are not in an employment relationship. However, it should be clearly stated that the manner in which the personal scope of the Directive has been regulated is flawed and does not provide a sufficient guarantee that Member States will extend these rights also to self-employed persons by way of implementation into their legal systems. There are no such doubts regarding the provisions of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.07.2006, p. 23) which expressly extended protection to the self-employed (Article 6). Under this act, unequal treatment of a woman (including one who is self-employed) on the grounds of pregnancy or maternity constitutes direct discrimination based on sex. Furthermore, the Directive provides that a woman on maternity leave is entitled, after her leave ends, to return to her job or to an equivalent post on terms and conditions no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (Article 15) (Lewandowicz-Machnikowska, Górnicz-Mulcahy 2019, point 18.3.4; Florek 1996, 179). In addition, the act grants both self-employed mothers and fathers the right to take parental leave in order to reconcile family and working life more effectively. The directive demands that parents, including those who are self-employed, be guaranteed full equality in their working lives, which involves, in particular, granting fathers adequate rights to exercise their parental functions.

4.5. Protection of the self-employed with regard to the right to rest

The right to rest is one of the key rights granted to a working person (Florek, Seweryński 1988, 200). It became an important demand of many labour movements as early as the nineteenth century, indicating at the time the great need to reduce working hours. A number of these demands, including those for reducing working hours and granting holiday privileges, have found their reflection in international and national legislation. The right to rest is also very important from

[62] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

the point of view of maintaining productivity and safety in the workplace. It has long been known that if a worker is tired, they pose a greater risk to themselves and others. Therefore, the aim should be that every working person (including the self-employed) has the right to rest in order to recuperate. Adequate rest consists not only of the right to holidays, but also of daily and weekly rest as well as restrictions on maximum working hours (see more: Góral 2011, 179).

The UDHR contains provisions concerning the right to rest of self-employed persons. Article 24 guarantees everyone the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Florek, Seweryński 1988, 203). The authors of the act use the expression "everyone", which means that the right should not be restricted to employees only: it is addressed to all working people, irrespective of the legal basis on which they provide work. Moreover, it should be noted that Article 24 UDHR covers several aspects related to rest. It namely not only guarantees holidays with pay, but also prescribes that "reasonable limitation of working hours" be introduced.

Regulations concerning the issue under analysis can be found in the ICESCR, as well. From the perspective of the protection of the self-employed regarding the right to rest, Article 7 ICESCR concerning the right to just and favourable working conditions is relevant (Florek, Seweryński 1988, 203). It guarantees everyone safe and healthy working conditions, rest, leisure, reasonable limitation of working hours, periodic holidays with pay, as well as remuneration for public holidays (Article 7(d)). It is worth mentioning that, as in the case of the UDHR, the ICESCR covers "everyone" within its personal scope, regardless of the legal basis for the provision of work. This approach means that, under UN documents, the right to rest is granted to the self-employed (Kędzia, Hernandez-Połczyńska 2018, point 1.1).

ILO acts likewise regulate protection in the area of the right to rest. They stipulate broadly the right to paid annual leave and prescribe limits on working time. These regulations provide for the protection of self-employed persons in certain professions. In addition, it should be noted that most of the ILO normative acts broadly define their personal scope and include various occupational groups, regardless of the legal basis for providing work (see: Rycak, Pisarczyk 2019, point 13.3).[63] Under these regulations, the right to rest is universal in nature and should be granted to any person pursuing gainful activity, regardless of the legal basis of their activity (including the self-employed) (see: Stefański 2018). The rationale for such a construction is primarily to guarantee the safety of both the person performing the work and other people who may suffer harm as a result of an error of an unrested worker. Examples include ILO solutions adopted in relation

[63] These conventions use various expressions, e.g.: persons employed (ILO Conventions No. 1 and 30), all employed persons (ILO Convention No. 132), seafarer (ILO Convention No. 146).

to: persons operating in road transport,[64] medical personnel,[65] seafarers,[66] and persons working in mines.[67] One of the most important ILO acts setting minimum standards of protection regarding the right to rest is ILO Holidays with Pay Convention (Revised), 1970 (No. 132) (http://www.mop.pl/doc/html/konwencje/k132.html (accessed: 11.03.2022)). Pursuant to Article 2 of the Convention, its provisions apply to "all employed persons" (see more: Babińska-Górecka 2020, point. 17.1.2).[68] Thus, it does not specify the form under which a worker would be entitled to the rights contained therein. On this basis, it can be assumed that the Convention covers in its personal scope self-employed persons performing

[64] See ILO Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67), http://www.mop.pl/doc/html/konwencje/k067.html (accessed: 11.03.2022). The Convention stipulates that the working hours of self-employed persons and their family members engaged in road transport work should not exceed eight hours per day and forty-eight hours per week. Moreover, the act regulates adequate daily and weekly rest periods for self-employed persons performing work in road transport. The Convention was revised by ILO Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), http://www.mop.pl/doc/html/konwencje/k153.html (accessed: 11.03.2022), which not only upheld the above regulations, but also introduced several other protective guarantees for self-employed persons in road transport. Undoubtedly, the aim of the acts mentioned above was to improve working conditions as well as to increase the level of safety both for those working in this transport and for other road users. It was thus recognized that a driver, regardless of the legal basis for their work, should be guaranteed a multi-faceted right to rest.

[65] See ILO Nursing Personnel Convention, 1977 (No. 149), http://www.mop.pl/doc/html/konwencje/k149.html (accessed: 11.03.2022). Article 1 of this act is relevant from this point of view. It defines the term "nursing personnel" and includes all categories of persons providing nursing care or services. This approach supports the inclusion of the self-employed in the category of persons entitled to benefit from the guarantees stipulated in this Convention. According to its Article 6, nursing personnel will enjoy conditions at least equivalent to those enjoyed by other workers in the country concerned. This means that self-employed persons providing nursing care or services are covered by regulations concerning: hours of work, including regulation and compensation of overtime, inconvenient hours, and shift work (Article 6(a)); weekly rest (Article 6(b)); paid annual holidays (Article 6(c)); and educational leave (Article 6(d)).

[66] See ILO Seafarers' Annual Leave with Pay Convention, 1976 (No. 146), http://www.mop.pl/doc/html/konwencje/k146.html (accessed: 11.03.2022). Under Article 3, every seafarer is entitled to annual leave with pay of a specified minimum length (of no less than 30 calendar days for one year of service). The personal scope includes all persons who are employed as seafarers. This means that the rights under the Convention are granted to self-employed seafarers, too.

[67] See ILO Hours of Work (Coal Mines) Convention (Revised), 1935 (No. 46), http://www.mop.pl/doc/html/konwencje/k046ang.html (accessed: 11.03.2022), which has guaranteed certain rights regarding leave to not only employees, but also other persons who provide work underground. Under Article 2 of this act, a worker is any person occupied underground performing any work, as well as any person employed directly or indirectly in the extraction of coal. It follows that, under this Convention, the right to maximum working time standards and to a minimum weekly rest is granted to a miner regardless of the legal basis for the work. It can therefore be seen that the protection in the above regard is extended to all persons working underground, even if they are self-employed.

[68] With the exception of seafarers, who are covered by a separate regulation in this respect, namely Seafarers' Annual Leave with Pay Convention, 1976 (No. 146).

paid work for a specific counterparty. In its Article 3, the Convention entitles every person covered by it to a minimum period of paid annual holiday. The holiday should in no case be less than three working weeks for one year of service (Florek, Seweryński 1988, 210; Rycak, Pisarczyk 2019, point 13.11). Furthermore, Article 12 of the Convention prohibits the possibility of relinquishing the right to the minimum annual holiday with pay or forgoing such holiday in exchange for compensation.

The rationale for extending the right to rest to the self-employed can also be found in the provisions of the ESC. Article 2 of this act, which regulates the right to just conditions of work, obliges states to: provide for reasonable daily and weekly working hours and to reduce them as productivity increases; provide for public holidays with pay; and provide for a minimum of four weeks' annual holiday with pay (Florek, Seweryński 1988, 203 and 208; see more: Stefański 2020, point 15.2; Nowak 2018, point 3.1.2). Given the preceding considerations regarding the personal scope of the ESC, it must be concluded that the self-employed are covered by the guarantees of Article 2 of the ESC, provided that they meet the conditions laid down by law (different views are expressed in: Zwolińska 2019, 55).

Few provisions guaranteeing the right to rest for working persons can be found in primary EU legislation (Babińska-Górecka 2020a, point 17). Article 158 TFEU (ex Article 142 TEC) stipulates that "Member States shall endeavour to maintain the existing equivalence between paid holiday schemes". This is a rather laconic provision, which expresses the demand to maintain the institution of paid holiday in all EU Member States, without specifying any other rules. The regulation is only programmatic in nature and confers no specific rights on working persons (Mitrus 2020, art. 33 KPP). However, we can find protective guarantees regarding the right to rest in the provisions of the CFR. Pursuant to its Article 31(2), "every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave". The right to rest under the CFR is understood broadly, as it is interpreted in the context of dignity and the protection of human life and health (Mitrus 2020, art. 33 KPP). Moreover, according to A. Sobczyk, work should be adapted to the physical characteristics of a human being (Sobczyk 2005, 53). Such an approach to this issue determines that the right to rest under the CFR covers persons who pursue gainful activity on their own account for another party (Mitrus 2013, 16–30).[69] This is additionally determined by the broad definition of the concept of "worker" under EU legislation, as mentioned earlier.

The rationale for protecting the self-employed with regard to the right to rest can also be derived from the provisions of the EPSR. Article 9 of this document

[69] A different view is expressed by L. Mitrus, who claims that the right to holiday is a right related to providing work under an employment relationship.

refers to the principle of work-life balance. It prescribes the introduction of leave, flexible working arrangements, and access to care services. When analysing the EPSR, it is important to note that its drafters began to recognize the dynamically changing socio-economic realities. This is why it calls for flexibility on the one hand and for the protection of all workers on the other, including with regard to holiday and maximum working hours standards. In my opinion, the content and objectives of the EPSR clearly show that the guarantees arising from this document extend to people working outside of an employment relationship, including to the self-employed.

An important piece of secondary EU law in the context of the issue under consideration is Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9) which repealed Directive 93/104/EC.[70] It guarantees the right to rest in four main areas, namely: breaks from work during the working day, daily and weekly rest periods, and annual leave (Babińska-Górecka 2020, point 17.1.1.2). Furthermore, the Directive introduces certain rules on night work and on the length of rest for certain occupational groups.[71] In my view, self-employed workers are likewise covered by the scope of this act if they personally carry out work for another party. This follows not only from the definition of the term "worker" under EU legislation, but also from the wording of the Preamble. It states that the rationale for the Directive was to guarantee the protection of life and health of workers, which is universal and covers every human being.

4.6. Protection of the self-employed in the area of collective rights

Freedom of association belongs to the canon of fundamental human rights (Florek, Seweryński 1988, 118; Piątkowski 2019, point 26). This demonstrates its significance, its fundamental nature, and the functions it performs in society (Kuczma 2014, 312). It is primary and inalienable. It applies to every human being, including, above all, so-called "working people", as shown by an analysis of international and EU law. The right of association is fundamental in shaping the legal status of many workers. It should be noted that very often the collective action of people with converging professional interests enables certain categories of workers to obtain a certain level of protection in particular areas. The broad personal scope of the freedom of association indicates that these guarantees are extended to workers other than employees, including those who are self-employed. It appears that the self-employed have common professional interests that can be

[70] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993, p. 18, as amended.

[71] This includes: persons working on board offshore fishing vessels, persons working en route, and persons working on offshore equipment.

protected collectively, which justifies granting them protection in the area under consideration. The aim of those relations is first and foremost to protect the rights and interests of the employees and the self-employed.

UN acts expressly grant the self-employed freedom of association. According to Article 20(1) of the UDHR, "everyone has the right to freedom of peaceful assembly and association". This provision is very general and does not directly address issues related to the exercise of professional work (Piątkowski 2019, point 26). It merely stipulates that everyone has an unlimited right to belong to various social groups, including professional ones. It is only Article 23 UDHR that contains rules related to the pursuit of gainful activity. Section 4 of the said article provides that "everyone has the right to form and to join trade unions for the protection of his interests". It is noteworthy that the above mentioned guarantees are enjoyed by "everyone". However, the scope is limited by the objective of protecting professional interests (Tomaszewska 2014, point 7.5). This means that the right under analysis is granted to anyone who unites to protect their economic and social rights related to the provision of work (Grygiel-Kaleta 2015, 42). Article 23(4) UDHR does not determine that the freedom of association is to be enjoyed by workers only. This leads to the conclusion that, on the basis of this document, self-employed persons associating to protect their interests are also covered by these guarantees.

Freedom of association[72] for the self-employed is anchored also in the ICESCR. This act regulates the issue more extensively than the UDHR. Its Article 8(1)(a) provides for the right of everyone to form and join trade unions to promote and protect their economic and social interests. This right may be restricted only by law and only for important reasons, such as guaranteeing public order or protecting the rights and freedoms of others. Freedom of association under the ICESCR, as under the UDHR, is granted to anyone who associates in order to protect their interests. This includes self-employed persons (Duraj 2018, point 2). Subsequent subsections of Article 8(1) ICESCR include the rights of trade unions to, among others, establish and join federations and confederations (Article 8(1)(b)) and to freely exercise their activities (Article 8(1)(c)). Then, Article 8(1)(d) ICESCR prescribes that states introduce the right to strike. It should be noted that the wording of this provision is not conclusive as to whether this right is available to everyone, indicating only that it must be in accordance with the legislation of the country concerned. It is therefore the exclusive competence of the signatory states to shape this right. Despite this, no country is entitled to take legislative steps or to apply the law in a way that would violate the guarantees provided for in the Convention (Article 8(3) ICESCR). Another act adopted in 1966 in addition to the ICESCR was the ICCPR (Journal of Laws of 1977, No. 38, item 167.) which similarly stipulates protection of the self-employed in terms of

[72] In other words, the right to associate in trade unions. See more in: Florek (2010a, 69).

collective rights. Under Article 22(1) of this act, "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". It should be noted that the ICCPR, like the UN acts mentioned above, grants the right to associate to everyone, regardless of the legal basis for the provision of work (Piątkowski 2019, point 26). This means that, on the basis of this document, the right to form and join trade unions applies also to self-employed persons.

Other documents of considerable importance in setting standards for the protection of working people regarding collective rights are ILO instruments. It is stated already in the introduction to the Constitution of this organization adopted on 10 May 1944 (http://www.mop.pl/html/miedzynarodowe_standardy/konstytucja_mop.html (accessed: 17.02.2022)) that the recognition of freedom of association leads to the building of peace and universal harmony through the establishment of fair working conditions contributing to the implementation of the principle of social justice. The key ILO legal instrument relating to the issue under consideration is the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (http://www.mop.pl/doc/html/konwencje/k087.html (accessed: 17.02.2022)). Journal of Laws of 1958, No. 29, item 125; see: Florek, Seweryński 1988, 123). Due to its universal nature and timelessness, this document is fundamental for setting minimum standards of protection in the field of collective rights, as explicitly confirmed by the ILO Governing Body (Grygiel-Kaleta 2012, 287). The cited ILO Convention is characterized by its broad personal scope. Under its Article 2, "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation". The category of persons covered by the provisions of this act therefore includes various types of people who provide work, even the non-profit ones (see more: Musiała 2016). Such an approach supports the view that the Convention applies also to the self-employed and grants them all the rights it stipulates (Duraj 2018, point 2; Tomaszewska 2014, point 7.5). Consequently, the existence of an employment relationship is not a criterion determining the possibility of exercising freedom of association, as widely emphasized in subject literature (Hajn 2010, 178; Servais 2017, 215). This thesis was confirmed by the position of the ILO Committee on Freedom of Association of 6 September 2010,[73] which recognized that the right to freedom of association consisting in the ability to establish and join trade unions is enjoyed also by workers other than employees, including those working under civil law contracts. Then, the "Digest of decisions and principles of the Freedom of Association Committee of the Governing Body

[73] http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2328810:NO (accessed: 17.02.2022).

of the ILO" (Geneva 2006) was issued in 2012.[74] This document likewise shows that freedom of association is available to all workers, regardless of the legal basis for their work.[75] The same was confirmed by the Committee on Freedom of Association in Case No. 2888 against Poland (in response to a complaint by NSZZ "Solidarność"), obliging the Polish authorities to take all measures to ensure that all working people, including those providing work under civil law contracts and as self-employed, have the right to form and join trade union organizations of their own choice (Tomaszewska 2014, point 7.5).[76]

Another act that can be classified as one of ILO instruments relating to collective rights is the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (http://www.mop.pl/doc/html/konwencje/k098.html (accessed: 17.02.2022)). This act protects workers against any discrimination aimed at violating freedom of association in the field of work (see more: Florek, Seweryński 1988, 135–137). The provisions of the Convention guarantee protection against discrimination on grounds of trade union membership at every stage (see more: Walczak 2004, 10–11). This includes both making the employment of a worker subject to the condition that they will not join a union or will relinquish trade union membership, as well as dismissing them or otherwise prejudicing them because of their trade union membership or any participation in trade union activities (Article 1(2)(a) and (b) of the Convention). It is noteworthy that, as in the case of ILO Convention No. 87, the self-employed have been included in the personal scope of the act. In other words, persons who pursue gainful activity on their own account have the right not to be discriminated against on grounds of trade union membership. To reinforce the above guarantees, the ILO introduced protection for trade unionists and trade union members (see more: Kurzynoga 2019, point 30.3).[77]

Similarly, acts of the CoE broadly include the right to form and join trade union organizations (Duraj 2018, point 2). Under Article 11(1) ECHR, "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". The above provision applies also to self-employed persons who wish to form or join a trade union to protect their interests. A restriction of this right

[74] The first Polish translation of ILO's study on trade union freedom http://www.solidarnosc.org.pl/edukacja/oswiata/attachments/1300_Przeglad_MOP.pdf (accessed: 17.02.2022).

[75] With the exception of military and police officers.

[76] See Reports of the Committee on Freedom of Association (GB.313/INS/9), complaint against Poland (Case No. 2888, items 1066–1087) available at http://www.ilo.org. See also Freedom of Association, Compilation of decisions of the Committee on Freedom of Association, International Labour Office, 2018, section 388 [in:] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf (accessed: 17.02.2022).

[77] See ILO Convention No. 135, Journal of Laws of 1977, No. 39, item 178 and ILO Recommendation No. 143.

may only be dictated by the interests of national or public security, the prevention of disorder and crime, the protection of health and morals, or the protection of the rights and freedoms of others (Article 11(2) of the Convention). It follows that while the right to form and join trade unions under the ECHR is not absolute, no one may be unduly deprived of this right (see: Garlicki 2011, 651–711).[78] This approach fully supports the granting of collective rights to the self-employed.

The ESC likewise contains provisions on the right to organize and bargain (Nowik 2020, point 25.1.2). Article 5 of the act provides for the right to organize consisting in "ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations" (see more: Blanpain, Matey 1993, 281–282). To this end, it obliged the states signing the ESC to ensure that they do not impair freedom of association when creating or applying law. Then, Article 6 ESC grants an effective right to collective bargaining and emphasizes that states committing to the Charter are obliged to promote joint consultation between workers and employers and to recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike. Similarly to ILO Convention No. 87, the ESC takes a broad view of the concept of worker, which includes the right to take collective action in cases of conflict of interest, including the right to strike (Duraj 2018, point 2). This means that the rights guaranteed by its provisions apply to the self-employed, as well.

Primary EU law likewise protects the collective interests of the self-employed (Piątkowski 2019a, art. 1; Nowik 2020, point 25.1.2). Pursuant to Article 153(5) TFEU, the right of association and the right to strike and impose lockout do not fall within the legislative competence of the European Parliament and the Council (Cudowski 2014, 269). However, this does not mean that EU law omits to address the issue of collective rights in any way. The EU often refers to various provisions of international law, and in particular to acts of the CoE, which contain norms on the above-mentioned issues. Significant regulations in the area of freedom of association can be found primarily in the CFR (Piątkowski 2019a, art. 1). Article 12 of the Charter guarantees everyone "the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests". Next, Article 28 regulates matters related to the right of collective bargaining and action. Under this provision, "workers and employers" (in a broad sense) (Kocher 2017, 1382; Heuschmid 2017, 171) or their respective organizations "have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective

[78] See section 3.5 of the statement of reasons of judgment of the Constitutional Tribunal of 02.06.2015, K 1/13, OTK 2015, No. 6, item 80.

action to defend their interests, including strike action". The broad personal scope of freedom of association under the CFR, which extends to the self-employed, and the lack of reference of these guarantees to EU or national law indicating their autonomous nature, (see more: Sanetra 2010, 4–12) enhance the standard of protection in the area under analysis.

It has been debated recently in the context of EU law whether collective agreements entered into by the self-employed may breach the prohibition of unfair competition, given the broad personal scope of freedom of association. Under Article 101 TFEU, "the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…)". Taking the quoted provision *prima facie* into account, therefore, one would have to conclude that collective agreements concluded between self-employed workers may infringe Article 101 TFEU. It was ruled in case C-413/13 (Judgment of the CJEU, 04/12/2014, C-413/13, FNV Kunsten Informatie en Media v Staat der Nederlanden, ZOTSiS 2014, No. 12, item I-2411) that

> on a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are "false self-employed", in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

This would imply that collective agreements of the self-employed do not infringe Article 101 TFEU under the condition that we were dealing with bogus self-employed persons only. Accordingly, the European Commission adopted Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons in 2022 (2022/C 374/02) (OJ C 374 of 2022, p. 2). In line with the Guidelines, solo self-employed workers were considered to be in a situation similar to employees and, therefore, their collective agreements did not infringe Article 101 TFEU, regardless of whether they met the criteria to be considered as bogus self-employed. Furthermore, the European Commission indicated in the document that solo self-employed persons who provide services exclusively or mainly to a single counterparty are likely to be in a situation of economic dependence on that counterparty,[79] with the result that they do not determine their actions on the

[79] According to the European Commission, a solo self-employed person is in a situation of economic dependence when they earn, on average, at least 50% of their total work-related income from a single contractor, over a period of either one or two years.

market independently and are largely dependent on the counterparty, forming an integral part of its business and thus an economic unit with that counterparty. In the Commission's view, such a situation entails that collective agreements on working conditions concluded between solo self-employed persons should fall outside the scope of Article 101 TFEU. Similarly, solo self-employed persons who perform the same or similar tasks as employees of the same counterparty are in a situation comparable to that of employees. According to the Commission, such persons provide their services under the direction of the counterparty and do not bear the commercial risks of the counterparty's activity or enjoy sufficient independence as regards the performance of the business activity concerned. Consequently, collective agreements on working conditions between a counterparty and solo self-employed persons who perform the same or similar tasks as employees of the same counterparty fall outside the scope of Article 101 TFEU. The emergence of platform economy and the provision of work through digital platforms has created a new reality for some solo self-employed persons, who are in a comparable situation to that of workers in relation to the digital platforms through or for which they provide work. Solo self-employed workers may be dependent on digital platforms, especially as regards reaching their clients, and may often be faced with job offers that are non-negotiable or that allow only limited negotiation of working conditions, including pay. In light of the above, the European Commission considered that collective agreements between solo self-employed workers and gig economy platforms concerning working conditions likewise fall outside the scope of Article 101 TFEU. In addition, the Commission found that in some cases, solo self-employed persons who are not in a situation comparable to that of employees nevertheless find it difficult to influence their working conditions because they are in a weak bargaining position vis-à-vis their counterparty(s). The existence of such an imbalance is presumed in the following situations. The first is where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties who represent an entire sector or industry. The second is where solo self-employed workers negotiate or conclude collective agreements with a counterparty with an annual aggregate turnover or annual balance sheet total in excess of EUR 2 million or with a workforce of at least ten employees, or with several counterparties that together exceed one of these thresholds. The Commission decided that collective agreements concluded by the self-employed in the above situations do not violate Article 101 TFEU.

With regard to the collective rights of the self-employed, it is also worth referring to the provisions of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, cited above. Pursuant to Article 4 of this act, collective bargaining on wage-setting should be promoted, supported, and encouraged. Moreover, the Directive requires that, in Member States with a collective bargaining coverage rate under 80%, a framework of enabling conditions for

collective bargaining be provided, either by law after consulting the social partners or by agreement with them, and that an action plan be drawn up to promote it. The purpose of these actions is to increase collective bargaining coverage in the Member States and to facilitate the exercise of collective bargaining rights on wages.

5. MECHANISMS TO COMBAT BOGUS SELF-EMPLOYMENT UNDER INTERNATIONAL AND EU LAW STANDARDS AS A MEANS TO IMPROVE WORKING CONDITIONS

Self-employment for the purpose of circumventing the law is a consequence of the limited scope of protection for self-employed workers. Bogus self-employment occurs when a person is declared – in order to avoid certain legal or tax obligations – as self-employed, even though the work they perform meets the conditions characteristic of an employment relationship. When establishing the existence of an employment relationship, account should be taken of the facts demonstrating the actual performance of work and not the way the parties describe their relationship.[80] The main reason for this practice is to reduce the broadly defined labour costs and public law burdens, including social security costs and taxes associated with the employment of workers under an employment relationship. Difficulties in assessing this situation are caused also by the increasing blurring of the boundaries between the employment relationship and self-employment. Countering this negative phenomenon should therefore be seen as a complement to the legal protection model for the self-employed and as a means of improving their condition. Both international and EU as well as national legislatures have in recent years introduced a number of legal regulations aimed at eliminating or at least clearly limiting bogus self-employment. These efforts notwithstanding, however, the scale of the problem remains considerable. This means that the existing legal solutions are not effective in combating bogus self-employment.

Because of the difficulties in ascertaining whether an employment relationship exists when the rights and obligations of the parties involved are not clear, or when attempts have been made to conceal the employment relationship, or if there are deficiencies or limitations in the legislation, its interpretation, or application, the ILO – at its ninety-fifth session, on 31 May 2006 – decided to adopt the Employment Relationship Recommendation, 2006 (No. 198). Pursuant to the provisions of this document, states should provide guidance to employers and workers in order to properly establish the existence of an employment relationship

[80] This definition is set out in the preamble to Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union and in the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021) 762 final).

and distinguish between employed and self-employed persons, and are tasked with effectively combating the disguised employment relationship.[81] The ILO considers this to be crucial, as such a situation has the effect of depriving workers of the protection they deserve. This is why the Recommendation proposes several mechanisms to combat bogus self-employment. First, it authorizes a wide range of actions to establish the existence of an employment relationship. Second, it prescribes the introduction of a legal presumption that an employment relationship exists when one or more of the specified indicators are present, which will be analysed in greater detail later. Third, it recommends enacting legislation, after prior consultation with the most representative employers' and workers' organizations, under which workers possessing certain characteristics should automatically, or by virtue of the fact that they are working in a certain sector, be considered as employed or self-employed. In addition, the Recommendation stipulates that consideration be given to explicitly defining the conditions to be applied to determine the existence of an employment relationship, such as, for example, subordination or dependence. According to the Recommendation, indicators of the existence of an employment relationship may also be the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials, and machinery by the party requesting the work. Other indicators may also be the periodic payment of remuneration or the absence of financial risk on the part of the worker. In addition, the Employment Relationship Recommendation prescribes ongoing monitoring of this state of affairs and the collection of any data that may contribute to reducing the incidence of this phenomenon in the future.

The problem of the use of self-employment in conditions characteristic of an employment relationship was also highlighted by the European Economic and Social Committee (an EU advisory body), which issued an Opinion on the abuse of the status of self-employed in 2013. (opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (OJ C 161, 6.06.2013, p. 14)). When articulating its position, the Committee noted that a number of European countries had attempted to clarify legal distinctions and to develop a detailed definition of "employment relationship" on the basis of various criteria. According to the Committee, an employment relationship is

[81] According to the Recommendation, a disguised employment relationship may involve the use of another form of contractual arrangements concealing the true legal status, bearing in mind that a disguised employment relationship occurs when the employer does not treat a person as an employee by concealing their true legal status as an employee in order to reduce labour costs.

characterized by the performance of work in return for remuneration, with any profits arising from this paid work belonging to the client. Another important indicator is the fact that the work is performed under the control of another party. Moreover, it is material when remuneration is the worker's sole – or main – source of income and when they bear no economic risk. For this reason, the Committee considered that credible legislation and a definition of bogus self-employment would be helpful for the genuine self-employed. By contrast, sham self-employment should be combated by improving the registration of work and monitoring the real position on the labour market. In the opinion of the Committee, the economic dependence on the client (which is often the former employer) indicates the continuation of the employment relationship. Furthermore, the Committee identified eight criteria that may reveal an employment relationship between the parties.[82]

The EU has also recently addressed the problem of bogus self-employment. This can be seen, among others, from the provisions of the preamble to Directive 2022/2041 cited above, which not only define this negative phenomenon, but also justify with it the introduction of certain protective guarantees for self-employed workers. Similar theses can be found in the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work (COM(2021) 762 final) (https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021PC0762). The European Commission noted that as many as nine out of ten platforms currently operating in the EU classify those working through them as self-employed, leaving them particularly vulnerable to poor working conditions and insufficient access to social protection. In addition, it has been established that due to this misclassification, self-employed persons cannot enjoy the rights and protections to which they would be entitled as employees. These rights include the right to a minimum wage, working time regulations, occupational safety and health protection, equal pay between men and women, and the right to paid

[82] According to the Opinion, when considering the employment status of a person who is nominally self-employed and is prima facie not considered as an employee, it shall (can) be presumed that there is an employment relationship and that the person for whom the service is provided is the employer if at least five of the following criteria are satisfied in relation to the person performing the work: they depend on one single person for whom the service is provided for at least 75% of his income over a period of one year; they depend on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out; they perform the work using equipment, tools, or materials provided by the person for whom the service is provided; they are subject to a working time schedule or minimum work periods established by the person for whom the service is provided; they cannot sub-contract their work to other individuals to substitute themselves when carrying out work; they are integrated in the structure of the production process, the work organization, or the company's or other organization's hierarchy; their activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and they carry out similar tasks to existing employees, or, in the case when work is outsourced, they perform tasks similar to those formerly undertaken by employees.

leave, as well as improved access to social protection against accidents at work, unemployment, sickness, and old age. Therefore, Article 3 of the Proposal obliges the Member States to have in place appropriate procedures to verify and ensure the correct determination of the employment status of persons performing platform work, so as to allow persons that are possibly misclassified as self-employed (or any other status) to ascertain whether they should be considered to be in an employment relationship – in line with national definitions – and, if so, to be reclassified as workers. In the opinion of the document's authors, this will ensure that false self-employed have the possibility to obtain access to working conditions laid down in Union or national law in line with their correct employment status. Moreover, the provision clarifies that the correct determination of the employment status should be based on the principle of the primacy of facts, i.e. guided primarily by the facts relating to the actual performance of work and the remuneration. When ascertaining the employment status of a person, the use of algorithms in platform work and not the way in which the relationship is defined in the contract should be taken into account. Where an employment relationship exists, the procedures in place should also clearly identify who is to assume the obligations of the employer. Two proposed provisions are relevant here from the point of view of mechanisms to combat bogus self-employment. Article 4 of the proposed act introduces – similarly to ILO Employment Relationship Recommendation, 2006 (No. 198) – the institution of legal presumption. According to the provision, an employment relationship exists between the digital labour platform and a person performing platform work, if the digital labour platform controls certain elements of the performance of work. Member States are required to establish a framework to ensure that the legal presumption applies in all relevant administrative and legal proceedings and that enforcement authorities, such as labour inspectorates or social protection bodies, can also rely on that presumption. Furthermore, the article defines criteria that indicate that the digital labour platform controls the performance of work. The presumption must be applied if at least three criteria are met. These criteria are the following:

a) the digital labour platform sets upper limits for the level of remuneration;
b) the digital labour platform requires the person performing platform work to respect specific rules with regard to appearance, conduct towards the recipient of the service, or performance of the work;
c) the digital labour platform supervises the performance of work, including by electronic means;
d) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to choose their working hours or periods of absence;
e) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to accept or to refuse tasks;

f) the digital labour platform restricts the freedom to organize one's work, including through sanctions, by limiting the worker's discretion to use subcontractors or substitutes;
g) the digital labour platform restricts the possibility to build a client base or to perform work for any third party.

Moreover, Member States are required to ensure effective implementation of the legal presumption through supporting measures, including: disseminating information to the public, developing guidance, and strengthening controls and field inspections, which are essential to ensure legal certainty and transparency for all parties involved (Article 4b of the Proposal). Moreover, the act stipulates that the legal presumption should not have retroactive effects, i.e. should not apply to factual situations before the transposition deadline of the Directive. Under Article 4a(2) of the Proposal, the Member States may grant competent national administrative bodies a discretion not to apply the presumption when: a) those authorities are verifying compliance with or enforcing relevant legislation on their own initiative, and b) it is manifest that the person performing platform work is not a platform worker. Then, Article 4a(3) of the proposed act ensures the possibility to rebut the legal presumption in relevant legal and administrative proceedings, i.e. to prove that the contractual relationship at stake is in fact not an "employment relationship" as defined by the law, collective agreements, or practice in force in the Member State in question, with consideration to the case-law of the CJEU. It prescribes that the burden of proof that there is no employment relationship will be on the digital labour platform. The drafters of the Directive expect the above provisions to benefit both the false and the genuine self-employed working through digital labour platforms. According to the draft, those who, as a result of correct determination of their employment status, will be recognized as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages, and access to training opportunities – and gain access to social protection according to national rules. Conversely, genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence as a result of digital labour platforms adapting their practices to avoid any risk of reclassification of the worker's status. Regardless of the optimism presented by the proposal's proponents, it should be noted that the above concept of presumption of an employment relationship has been criticized in labour law doctrine for years. Moreover, such a construction is opposed by employers' organizations (including, above all, representatives of the Polish Confederation Lewiatan),[83] which take the view that the introduction of the presumption of an employment relationship in the proposed form will have far-reaching negative consequences for the labour

[83] See: https://docplayer.pl/224832057-Stanowisko-konfederacji-lewiatan-do-projektu--dyrektywy-w-sprawie-poprawy-warunkow-pracy-platformowej-com-2021-762-final.html.

market and the economy. The opponents of this concept believe that it is the result of an archaic approach to the existing economic conditions and a failure to see the heterogeneity of the market and the inherent risks (Gersdorf 2019, 35–41). Moreover, the introduction of the presumption of the existence of an employment relationship even contradicts Polish constitutional principles: freedom of economic activity (Article 20 of the Polish Constitution), freedom to choose and to pursue their occupation (Article 65(1) of the Polish Constitution), freedom (Article 31(3) of the Polish Constitution), and equality before the law (Article 32 of the Polish Constitution). In addition, this construction would excessively interfere with the principle of freedom of contract, which, after all, applies in many European countries. In my view, the introduction of a presumption of the existence of an employment relationship would be a bad solution. It would generate a number of legal problems resulting from serious interference with the aforementioned constitutional principles underlying the functioning of many EU countries. In addition, it should be pointed out that the adoption of such a concept could consequently lead to a paralysis of the judiciary in many countries due to the increase in the number of cases in this area. Moreover, all this could result in a flight from platform employment and the resulting development of shadow economy. Therefore, the introduction of effective mechanisms to combat bogus self-employment should be seen as a complement to the legal model for the protection of the self-employed. Consequently, it is necessary to consider what measures are needed to increase the effectiveness of the mechanisms already in place. I believe that the scale of this negative phenomenon can be reduced by consistently complying with the current legislation in this area and developing clear guidelines for establishing the relevant legal relationship. In addition, granting certain guarantees to the self-employed and defining appropriate criteria for the right to this protection will effectively discourage "employers" from resorting to bogus self-employment. This is vital, as curbing this pathology could lead to a situation in which a certain proportion of those currently operating as self-employed would have an established employment relationship and be able to benefit from the full range of protection as employees. The remaining self-employed would only be entitled to a limited standard of protection, which I feel would be appropriate.

6. CONCLUSION

This chapter considers self-employment under international and EU law. The analysis of this issue leads to the following conclusions. Firstly, there is no comprehensive (model) approach to self-employment under international and EU law. The recent regulations adopted by the EU, which are cited in this chapter, confirm this conclusion. These acts focus only on selected protective

guarantees. Moreover, it is often the case that these regulations – albeit adopted at short intervals – are inconsistent with each other and address self-employment in different ways. In addition, international and EU rules on self-employment are fragmented. Rarely do they explicitly refer to this category of working persons. Most often, the self-employed are covered by protective standards that, at international level, are guaranteed to all working people, regardless of the basis on which they provide work (right to protection of life and health, protection of remuneration for work, protection in the area of non-discrimination and equal treatment, right to rest, protection in terms of collective rights). International law places more emphasis on the need to protect those working outside an employment relationship (including the self-employed) than EU law, which grants protection mainly to employees. It should be noted that Union law focuses primarily on the differences between employment based on an employment relationship and self-employment, and consequently singles out these concepts to grant specific protective guarantees. Secondly, there is no uniform definition of self-employment under international and EU law. The term is construed in various ways, which results in numerous interpretations as well as statistical problems, particularly in the context of establishing a standard of protection for this group of working people. Attempts so far to define the term in international and EU law have focused exclusively on defining the characteristics of the employee and the self-employed. As I mentioned earlier, EU jurisprudence in particular explores the differences between these categories. Several lists of the aforementioned characteristics have been developed over the years. According to them, a self-employed person is first and foremost an individual who performs work (services) outside the subordination and authority of another person and is free to determine their own working conditions, time, and place of work. The European Commission and the EESC call for a harmonized definition of self-employment to be used in the EU and in the individual Member States in order to guarantee adequate legal protection, particularly as the concept of "bogus self-employment" is defined in the preambles to some EU legislation. Thirdly, the protective standards regulated in a number of international and EU instruments cover all "working people", using the term in a broad sense ("workers" or "travailleurs"). This justifies granting the self-employed a range of rights in areas such as health and life, remuneration for work, non-discrimination and equal treatment, parenthood, leisure, and collective rights. Fourthly, the above discussion has confirmed that self-employment is currently a very popular form of paid work and may effectively continue to reduce the role of the traditional employment relationship in the future, as can be seen, for example, in the development of work provided through digital platforms. Therefore, taking into account the growing scale of self-employment as well as the growing awareness of the rank and importance of fundamental human rights under international and EU law regulations, the authorities of individual states should grant appropriate protective guarantees to this group of working persons.

An effective mechanism to combat bogus self-employment, by which many people are currently deprived of protection in the field of professional work, will likewise play an important role in this area.

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SELF-EMPLOYMENT IN UK LAW

Abstract. The United Kingdom has noted a rapid increase in the number of self-employed persons in the last forty years. This has prompted a return to the debate on the regulation of this category of workers. What are the key characteristics of the self-employed? Are they covered by labour law and social security regulations? This chapter answers these questions by looking at the legal framework applicable to the self-employed in the UK. In section 2, the author characterizes the main tendencies regarding self-employed activity in the United Kingdom as presented in a report of the Office of National Statistics for 2020. In sections 3 and 4, she analyses the definition and the legal framework that guarantee protection applicable to the self-employed. The author places particular emphasis on the tri-partite character of the British legal system in individual employment law, which includes certain categories of self-employed in the British definition of worker. Finally, section 5 is devoted to the ever more popular phenomenon of "bogus self-employment" and the legal mechanisms designed to combat it.

Keywords: self-employment, employment status, United Kingdom, legal framework, social security, tax law.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA ZJEDNOCZONEGO KRÓLESTWA

Streszczenie. Przez ostatnie czterdzieści lat Zjednoczone Królestwo odnotowało gwałtowny wzrost liczby samozatrudnionych. Spowodowało to powrót do debaty nad uregulowaniami dotyczącymi tej kategorii wykonawców pracy. Jakie są główne cechy charakterystyczne samozatrudnionych? Czy podlegają oni prawu pracy i przepisom o zabezpieczeniu społecznym? Niniejszy rozdział odpowiada na powyższe pytania, analizując ramy prawne mające zastosowanie do samozatrudnionych w Wielkiej Brytanii. Autorka w punkcie 2 charakteryzuje główne tendencje w zakresie samozatrudnienia w Zjednoczonym Królestwie, które zostały przedstawione w raporcie brytyjskiego Głównego Urzędu Statystycznego (*Office of National Statistics* – ONS) za 2020 rok. W punktach 3 i 4 analizuje definicję i ramy prawne gwarantujące ochronę, która ma zastosowanie do samozatrud-

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nionych. Autorka szczególny nacisk kładzie na trójpodział brytyjskiego systemu prawnego w indywidualnym prawie pracy, które włącza pewne kategorie samozatrudnionych do definicji „pracownika" (*worker*) obowiązującej w Zjednoczonym Królestwie. Na koniec w punkcie 5 przedstawione zostało coraz powszechniejsze zjawisko „fikcyjnego samozatrudnienia" oraz mechanizmy prawne służące do jego zwalczania.

Słowa kluczowe: samozatrudnienie, status zatrudnienia, Zjednoczone Królestwo, ramy prawne, zabezpieczenie społeczne, prawo podatkowe.

1. INTRODUCTION

The UK labour market has witnessed a sharp rise in the number of people in self-employment over the last four decades. While the self-employed represented just 6.6% of the British workforce in 1979 (Gootschall, Kroos 2003), this number had more than doubled by 2020 (15.3%). In the last quarter of 2019, there were more than 5 million self-employed people in Great Britain,[1] up from 3.2 million in 2000 (ONS 2020a). One of the key drivers of the increase in self-employment has been the growing importance of the service sector. Recent market structural trends like the globalisation and digitalisation of the British economy, the emphasis on numerical flexibility through franchising and outsourcing, and the advent of platform work have transformed the British labour landscape, precipitating a 'boom' in self-employment (Prassl 2018; Schulze Buschoff, Schmidt 2009). Commenting on the increasing importance of this category, former Prime Minister David Cameron characterised the self-employed as the "lifeblood of the UK economy" (Borghi, Mori, Semenza 2018, 414).

The 'renaissance' of self-employment (IZA 2013, 19) has sparked debates over the legal definition of this category of workers. Definitions in this context are particularly important, not just as a matter of nomenclature or semantics, but because they form the "vehicle for the delivery of rights and entitlements" (Davidov, Langille 2006, 4). The classification status of a person determines their legal rights and obligations under employment, tax, and social security law. As a general rule, while employed persons are protected under employment legislation, the same is not true for the self-employed. The latter are not entitled to basic labour rights such as protection from unfair dismissal, nor are they entitled to statutory sick pay, maternity rights, statutory redundancy pay, rest breaks, paid holiday and others. At the same time, the self-employed enjoy a basic level of social protection and are subject to favourable tax legislation that allows them to keep a greater part of their income.

The aim of this chapter is to outline the legal regulation of self-employment in the UK. Section 2 analyses the main trends in self-employment, as they appear in the 2020 Report of the Office of National Statistics (ONS 2020b). Section 3 examines

[1] For the purposes of this chapter, the terms 'UK' and 'Great Britain' are used interchangeably.

the legal definitions of self-employment in British labour, social security, and tax law. Particular emphasis is paid to the tripartite structure of the UK legal system in employment law that includes certain categories of self-employed persons in the UK 'worker' definition. Section 4 analyses the rights and responsibilities of the self-employed under British employment, social security and tax law. Finally, Section 5 looks into the rising phenomenon of 'sham self-employment' and describes the legal mechanisms that have been adopted to combat it.

2. TRENDS IN SELF-EMPLOYMENT

The self-employed are a largely diverse and heterogeneous group, consisting of different categories of working people who display very different characteristics (Blanchflower 2000). Relying on the most recent report of the ONS (ONS 2020b), this section analyses the main demographical and entrepreneurial characteristics of the self-employed in the UK.

2.1. Types of self-employment

First, a distinction needs to be drawn between those of the self-employed who themselves employ employees ('self-employed employers') and those who work for themselves ('solo self-employed' or 'own-account workers'). As Earle and Sakova write (Earle, Sakova 2000, 580):

> (…) it is useful to distinguish self-employed employers from own-account workers, those who work alone or with the cooperation only of unpaid family helpers, because the former represent clear cases of genuine entrepreneurship: they are creating jobs for others, implying that they have had some success in their business, that they have been able to hire capital and other inputs to work with their employees, and that they are most likely engaged in self-employment voluntarily. (…) By contrast, the status of own-account workers is much less clear: although some of them might be successful entrepreneurs, others might instead be displaced workers from declining firms and sectors, forced to engage in whatever activity necessary to ensure their survival.

In the UK, the increase in self-employment has been almost entirely driven by the second category, namely 'solo self-employment'. In fact, the UK displays one of the highest numbers and levels of growth of solo self-employment among all OECD countries, ranking ninth in the table of OECD countries with the highest number of solo self-employed among their population (OECD 2021; Giupponi, Xu 2020). In 2019, for instance, the solo self-employed represented 92.7% of all the self-employed in the UK. Out of 4,973,000 self-employed people, only 365,000 reported having personnel (7.3%). The majority of those who employed others took on only one or two employees (98,000 and 79,000 respectively), with only 9,000 self-employed people reporting having more than 10 staff members.

Further distinctions can be drawn within the 'solo self-employed' category. The self-employed with no staff operate under various business forms. The majority of the solo self-employed work for themselves (68%). Nearly 19% report running their own business, with a further 14.3% stating that they are the sole director of their own limited company. Freelancers make up 12.3% of the total self-employed population, followed by partners (10.6%), sub-contractors (10.2%) and agency workers who represent only 3.3% of all persons in self-employment.

2.2. Gender

Self-employment is more prevalent among men than women. Self-employed men make up two thirds (66.5%) of the self-employed population (3,307,000 individuals) while women account for the remaining third (33.5% or 1,667,000 individuals). This gender divide is not present among employees, where both sexes are equally represented (men account for 50.2% of all employees, while women make up the rest).

2.3. Age

The self-employed are, on average, older than employees. Almost 10% of the self-employed are aged 65 years or over, compared to only 2.7% of employees. Self-employment is more popular among those who are 45 to 54 years of age (1,317,000 persons) and those who are between 55 and 64 years old (1,103,000 persons). Combined, these two categories make up half of the entire self-employed population (48.7%). By contrast, employed persons in these age groups account for only 38.1% of all employees. The smallest group are those aged 16 to 24 years, which make up only 4% of all the self-employed.

2.4. Occupations

In terms of their occupational profile, the self-employed cover a wide range of industries. While most of them are engaged in traditional sectors like construction, transport, agriculture, and manufacturing (Pedersini, Coletto 2010; Meager 1991), the self-employed can now also be found in the so-called 'new services sectors' such as the health, education, and financial services (Diane 2016; Böheim, Ulrike Mühlberger 2009; Schulze Buschoff, Schmidt 2009). In 2019, the majority of self-employed workers in the UK were engaged in the following sectors:

1. Banking and finance (1,177,000 persons).
2. Construction (942,000 persons).
3. Public admin, education and health (678,000 persons).
4. Distribution, hotels and restaurants (568,000 persons).
5. Transport and communication (544,000 persons).

2.5. Geographical distribution

While the self-employed are found in all geographical areas of the UK, there are marked regional variations in self-employment rates. The areas with the highest proportion of self-employed people among their working resident population are Cornwall (21.5%), West London (20.3%), and Surrey and East and West Sussex (19.6%). By contrast, the areas that have the lowest numbers of self-employed are West Central and North East Scotland (9.9% and 11.7%, respectively) and South Yorkshire (11.3%).

2.6. Ethnicity

In the UK, self-employment levels differ among the various ethnic groups. While the self-employed represent 15.3% of the total workforce, this percentage rises for those with Pakistani or Bangladeshi ethnic origin. One in four people in the Pakistani ethnic group (24.9%) and one in five in the Bangladeshi ethnic group (19.1%) report being self-employed. Of those, almost half are engaged in the transport and communication sectors (45%). This number is exceptionally high considering that only 11% of the rest of the self-employed workforce is occupied in these fields. Lower rates of self-employment are encountered among those from white (15.2%), black (11.2%) and Chinese (13.4%) ethnic backgrounds.

Overall, the self-employed in the UK are a diverse group that encompasses people who display markedly different entrepreneurial and demographical characteristics. The vast majority of the British self-employed do not employ others but work for themselves. Compared to their employed counterparts, the self-employed are more likely to be male, older, and immigrants who are based in London and South East England.

3. LEGAL DEFINITIONS

In the UK, there is not a common definition of 'self-employment' for all areas of law. While convergent definitions have progressively been adopted for tax and social security purposes (Casey, Creigh 1998), a different conceptualisation exists for labour law. Hence, a person can be treated as 'self-employed' for tax and social security purposes and as a 'worker' under UK employment law. This section examines the legal concept of 'self-employment' as it has been developed in UK employment law and social security and tax law.

3.1. Employment law

In UK employment law, a statutory definition of 'self-employment' does not exist. Instead, the 'self-employed' are treated as a residual category that is identified by reference to 'employees': those who are not working under a contract

of employment are 'self-employed' (*argumentio a contriario*). The UK framework finds its origins in the historic divide between 'masters' and 'servants'. According to this conceptualisation, an individual is either a dependent 'employee' engaged under a 'contract *of* service' or an independent 'self-employed person' who works under a 'contract *for* services' (Freedland 1995). The criteria for making the distinction have not been laid down in legislation but have been developed by the courts through case law. Over the years, four criteria have emerged as relevant for the assessment: (i) control; (ii) integration; (iii) business reality and; (iv) mutuality of obligation. To ascertain the presence of these criteria, the courts rely on a matrix of indicators such as: the duty to obey orders, discretion on working hours and place of work, supervision, disciplinary or grievance procedures, inclusion in occupational benefit schemes, method of payment, ability to hire others or use substitutes, provision of equipment, assumption of business risks, duration of contract, regularity of employment, right to refuse work and others (Deakin 2020). No single element is determinative for the assessment. Instead, the courts look at all of the facts of the case and reach a decision based on law and the reality of the situation.[2] Individuals displaying characteristics that are traditional to an archetypical employment relationship are classified as 'employees'. Those who are not are deemed 'self-employed'.

Even though the UK system has retained the original distinction between 'employees' and 'self-employed persons', it has evolved to include an intermediate category of working persons, namely 'workers'. In the 1970s, the strict binary divide between 'employment' and 'self-employment' was challenged by the introduction of employment equality and anti-discrimination acts which broadened their scope of protection to include certain categories of dependent self-employed workers. The Equal Pay Act 1970, the Sex Discrimination Act 1975, and the Race Relations Act 1976 introduced the category of 'employed persons' which covered individuals with "contracts personally to execute any work or labour" (Fredman 2011; Freedland 2003).[3] Relying on this idea of personal work contracts, the Employment Rights Act (ERA) 1996 established the in-between category of 'worker'. According to Section 230(3) ERA, a 'worker' is "an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) any contract of employment (in other words an 'employee'), or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried out by the individual." From the statutory definition, it follows that individuals will be

[2] *Autoclenz Ltd. v. Belcher* [2010] IRLR 70; [2011] UKSC 31, [2011] IRLR 820.

[3] Similar conceptions were also introduced earlier in the Trade Disputes Act 1906 and the Employment Protection (Consolidation) Act 1978.

'workers' if they are employees (limb (a)) or they satisfy the following cumulative limb (b) criteria:

(i) They work under a contract. The contract does not have to be written; oral or implied contracts count as well. It suffices that there is a minimum expectation that there will be work available for which the person will be remunerated (exchange of work for wages).[4]

(ii) They have to personally supply the services. If they have the right to hire employees or use substitutes, they will not be considered 'workers'. Courts, however, will disregard substitution clauses if they have been inserted into the contract with the intention of preventing a finding of 'employment' (Davies 2009).[5]

(iii) They are not in business for their own account.[6]

(iv) They are not in a position of selling a service to a client or a customer.

(v) They are in a relationship of 'subordination' vis-à-vis the principal, meaning that they are under his control or supervision.[7]

Since ERA 1996, the same 'worker' definition has been used in other instruments such as the Trade Union and Labour Relations Act 1992 (Section 296(1)(b)), the National Minimum Wage Act 1998 (Section 54(3)), and the Working Time Regulations 1998 (Section 2). A similar conception has also been adopted for the purposes of the Equality Act 2010. As Section 83(2)(a) states, the Equality Act covers every person who is engaged under "a contract of employment, a contract of apprenticeship or a *contract personally to do work*" (emphasis added). Even though Section 83(4) refers to the persons engaged under one of these contracts as 'employees', case law has confirmed that the category of 'employee' under the Equality Act 2010 is, in fact, identical to that of 'worker' under the ERA 1996 (Freedland, Prassl 2017, 16; Barnard, Blackham 2015).[8]

Overall, a tripartite structure has emerged under which one can be an 'employee', a 'worker' or a 'self-employed person'. Those who are genuinely in business on their own account will continue to be treated like 'self-employed persons' and will be excluded from labour protection (see below). Those, however, of the self-employed that provide personal services to a principal while being under its control or supervision will be classified as 'workers' and will be afforded a level of employment protection (see Section 4 below).

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[4] *Cotswold Developments Construction Ltd. v. Williams* [2006] IRLR 181.

[5] *Autoclenz* (n 2); *Tilson v. Alstom Transport* [2011] IRLR 169; *Protectacoat Firthglow v. Szilagyi* [2009] IRLR 365; *Redrow Homes (Yorkshire) Ltd. v. Buckborough* [2009] IRLR 34; *Redrow Homes (Yorkshire) Ltd* [2004] IRLR 720. For an analysis, see Section 5 on 'sham self-employment' below.

[6] *James v Redcats (Brands) Ltd.* [2007] IRLR 296.

[7] *Jivraj v. Hashwani* [2011] UKSC 40, [2011] IRLR 827; *Windle v. Secretary of State for Justice* [2016] IRLR 628.

[8] *Clyde & Co LLP & Anor v. Bates van Winklehof* [2014] UKSC 32, [2014] ICR 730; *Pimlico Plumbers Ltd & Anor v. Smith* [2018] UKSC 29; [2017] ICR 657, [2017] EWCA Civ 51.

3.2. Social security and tax law

Unlike employment law, the UK social security and tax law systems have not developed a tri-partite taxonomy for the classification of working persons. The UK tax and social security frameworks remain firmly structured around the binary divide between 'employment' and 'self-employment'. As far as social security and tax provisions are concerned, an individual is either a dependent 'employee' or an independent 'self-employed' person. The same individual, however, can be both employed and self-employed in relation to different engagements (Freedman 2001, 41). While certain differences exist between the tax and social security frameworks, since the 1990s a conscious effort has been made to align the two fields to reduce compliance and administrative costs (Freedman, Chamberlain 1997; Sandler 1993). Nowadays, the concepts of 'employee' and 'self-employed' used in the two areas of tax and social security are largely similar in that persons who are treated in a certain way for tax purposes are usually treated in the same manner for National Insurance (NI) purposes (Casey, Creigh 1998).

In tax and social security law, there are no statutory definitions or tests for distinguishing between 'employed' and 'self-employed' people. Section 4 of the Income Tax (Earnings & Pensions) Act (ITERA) 2003 stipulates that the term 'employment' includes "any employment under a contract of service, any employment under a contract of apprenticeship, and any employment in the service of the Crown." No further explanations are provided. With regard to National Insurance Contributions (NICs), the Social Security Contributions and Benefits Act (SSCBA) 1992 distinguishes between 'employed earners' and 'self-employed earners' using the following definitions (Section 2(1)):

(a) An 'employed earner' is "a person who is gainfully employed in Great Britain under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E" while

(b) A 'self-employed earner' is "a person who is gainfully employed in Great Britain otherwise than in an employed earner's employment (whether or not he is also employed in such employment)."

Section 122(1) of the SSCBA clarifies that the term 'employment' includes "any trade, business, profession, office or vocation" while the term 'contract of service' includes "any contract of service or apprenticeship whether written or oral and whether express or implied." Undoubtedly, these definitions are somewhat circular and provide little help in distinguishing between 'employed' and 'self-employed' persons (Seely 2016).

The criteria used to classify individuals have been developed through case law. While there is not one standard test for determining the status of a person, the following *indicia* have been found to be relevant for the assessment: working on one's own account, assumption of financial risks, control over the working

activities, ability to hire substitutes, ability to turn down work assignments, provision of tools or equipment, exclusivity of the relationship, and others.[9] The decision is a mixed question of law and fact and it is highly fact sensitive. As Lord Justice Nolan said in *Lorimer* (agreeing with the views expressed by Mummery J.),

> [i]n order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative, appreciation of the whole. (…) Not all details are of equal importance in any given situation. The details may also vary in importance from one situation to another.[10]

Self-employed persons are responsible for determining their own status and concomitant responsibilities for tax and social security purposes. To help individuals make the assessment, the HM Revenue and Customs (HMRC) Department has created an online tool which individuals can use to check their employment status and calculate their tax and NICs. It has also published the Employment Status Manual (EMS) which codifies the case law in the area of tax and social security law, providing examples of when working people can be found to be 'in business for their own account'.

In an effort to combat tax evasion, HMRC introduced, in 2000, the 'off-payroll' working rules. Also known as 'IR35', the off-payroll working rules apply to individuals who provide personal services through intermediaries (i.e., through their own limited company, through an agency, or other employment businesses). Up until now, the responsibility for determining the status of the individual lay with the intermediary organisation. From 6 April 2021, however, the IR35 rules changed: all public authorities and medium and large-sized clients are responsible for deciding the employment status of the individuals they engage through intermediaries. The decision and the reasons behind it should be clearly described in the Status Determination Statement (SDS) which will be passed on to the workers and the intermediary organisation. The latter will remain responsible for determining the status of persons who are engaged (through their company) in small-sized businesses in the private sector.

[9] *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173; *Hall (HM Inspector of Taxes) v. Lorimer* [1994] 1 WLR 209, [1994] ICR 218; [1993] EWCA Civ 25.

[10] *Lorimer* (n 9).

4. REGULATORY FRAMEWORK

4.1. Employment law

Self-employment arrangements are considered to be subject to civil and commercial law and not to employment law (Buschoff, Schmidt 2009, 154). In the UK, this means the common law rules on contract. The self-employed do not have the employment rights afforded by statute to employees but the rights and responsibilities set out in the contract they have agreed with the customer or client. More particularly, the self-employed do not enjoy the following rights which are given only to those classified as 'employees' (i.e. those with a contract of employment):

(i) protection from unfair dismissal,
(ii) statutory sick pay,
(iii) statutory maternity and paternity leave and pay,
(iv) statutory redundancy pay,
(v) national minimum wage,
(vi) rest breaks, paid holiday, and limits on night work,
(vii) protection against unauthorised deductions from pay.

At the same time, the self-employed have some rights and responsibilities under the Health and Safety at Work etc. Act 1974.[11] As Section 3 stipulates,

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(2) It shall be the duty of every self-employed person [who conducts an undertaking of a prescribed description] to conduct [the undertaking] in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety.

(2A) A description of undertaking included in regulations under subsection (2) may be framed by reference to –

(a) the type of activities carried out by the undertaking, where those activities are carried out or any other feature of the undertaking;

(b) whether persons who may be affected by the conduct of the undertaking, other than the self-employed person (or his employees), may thereby be exposed to risks to their health or safety.

From the above, it follows that health and safety laws do not apply to the self-employed who (i) work for themselves; (ii) do not employ others; (iii) do not

[11] The Health and Safety at Work Act was amended in 2015, following the recommendations of the Löfstedt report which called for deregulation in the area of health and safety.

work in a specified field or activity and; (iv) their work does not put others at risk. The solo self-employed, however, who work at the premises of their principal are afforded health and safety protection.

The self-employed are also protected from discrimination when hired by a public institution (i.e. public school) or a private organisation that performs public functions. This is because all public authorities have a 'public sector equality duty' to: (a) eliminate unlawful discrimination; (b) advance equality of opportunity between people who share a protected characteristic and those who do not and; (c) encourage and foster good relations between people who share a protected characteristic and those who do not (Equality Act 2010, s. 149). This duty applies to the treatment of all persons with a protected characteristic (the protected characteristics are: age, marriage or civil partnership, race, sex, disability, gender assignment, religion or faith, pregnancy or maternity, and sexual orientation), regardless of their employment status.

A greater level of employment protection is afforded to those self-employed who are classified as 'workers'. Solo self-employed persons who are not in business on their own account but work under the control of a principal (that is, 'workers'), are entitled to the following rights (employees enjoy these rights too because they are covered under limb 'a' of the worker's definition considered above):

(i) protection against unlawful deductions from wages (Wages Act 1986),

(ii) protection of health and safety (Health and Safety at Work etc. Act 1974),

(iii) national minimum wage (National Minimum Wage Act 1998),

(iv) statutory minimum level of paid holiday (Working Time Regulations 1998, reg. 13),

(v) statutory minimum length of rest breaks (Working Time Regulations 1998, reg. 12),

(vi) right not to work more than 48 hours on average per week (Working Time Regulations 1998),

(vii) statutory sick pay (Social Security Contributions and Benefits Act 1992, s. 151),

(viii) right not to be treated less favourably if they work part-time (The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg. 5),

(ix) right to be automatically enrolled in a pension scheme (Pensions Act 2008, s. 3),

(x) right not to be discriminated against and to equal pay (Equality Act 2010, s. 13 and 66, respectively). Dependent self-employed persons who qualify as 'workers' are entitled to protection against unlawful discrimination if they are refused work on the basis of a protected characteristic. Furthermore, persons with disabilities have the right to ask their employer to make 'reasonable adjustments' to accommodate their disability.

(xi) Protection against whistleblowing (Public Interest Disclosure Act 1998, s. 2). It has been adjudicated that the members of a Limited Liability Partnership

(LLP) classify as 'workers' for the purposes of protection against retaliatory action for reporting wrongdoing in the workplace.[12] LLP members who are dismissed for reporting unlawful activity can claim unlimited damages.

Overall, unlike genuine self-employed persons who are widely excluded from employment protection, the dependent, solo self-employed workers who are not in business for their own account ('workers') enjoy a certain level of protection. 'Workers' are entitled to many of the same rights afforded to 'employees' (IZA 2013; Böheim, Mühlberger 2009). At the same time, they do not have certain core employee entitlements such as minimum notice periods, the right of protection against unfair dismissal, the right to request flexible working, the right to statutory redundancy pay, the right to request time off for emergencies and others. The Employment Relations Act 1999 confers powers to the Secretary of State to expand the level of protection afforded to employees to other categories of working persons who do not currently benefit from employment rights. This power, however, has never been used.

4.2. Social security and tax law

The British social security system finds its origins in the Beveridge Report of 1942 (Cmnd. 6404). Published in the midst of World War II, it set the foundations of the UK 'Welfare State', proposing widespread reforms such as the expansion of the National Insurance system and the creation of the National Health Service (Timmins 1995; Hills, Ditch, Glennerster 1994). The universal welfare system that was established on the basis of the recommendations of the Beveridge Report came under attack in the 1980s by Conservative governments which placed greater emphasis on 'enterprise culture' and on the individual's responsibility to care for themselves (Meager, Bates 2001). Relying on the idea of 'economic citizenship' (Lister 1990), the Thatcher administration stripped away a large part of the social safety net, "dismantling in effect the Welfare State and the principles of social insurance that underpinned it" (Boden 2005, 3). While subsequent Labour governments have adopted protective social security measures to provide a level of coverage to those in need, the British social security system has arguably not returned to its post-war Welfare State foundations (Boden 2005, 18).

I. Contributions

The British social security system is funded by tax revenues and National Insurance Contributions (NICs) paid by employers, employees and the self-employed. The contributions are used to support the healthcare system and to pay for social security benefits such as state pensions and tax credits. While the financial burdens of the social security mechanism are, in principle, collectively

[12] *Bates van Winklehof* (n 8).

shared by both employees and the self-employed, the rate of their contributions differ. Employees pay income tax and primary Class 1 NICs under Schedule E on the payments from their work. These are automatically deducted from their wages under Pay As Your Earn (PAYE). Their employer is also liable to pay secondary Class 1 NICs on the employee's earnings. The self-employed, by contrast, are not taxed on their monthly income but on the annual profits from their commercial activities (Schedule D). They also pay Class 2 and Class 4 NICs depending on their profits (individuals whose profits exceed £8,632 pay additional Class 4 NICs). The biggest issue that arises, in this context, concerns the calculation of earnings. While employee income is largely transparent and hence, easily calculated for tax and social security purposes, the same is not true for the earnings of the self-employed. These are not automatically calculated and deducted through PAYE but it is up to the self-employed to determine and declare their taxable profits to HMRC.

The solo self-employed and those who employ others can further take advantage of favourable tax provisions for Limited Liability Companies (Ltd). Employers prefer to hire the self-employed who provide their services through a company because this allows them to cut costs: they do not have to provide them with employment rights or pay secondary Class 1 NICs (as they do for employees). It is not an uncommon phenomenon, for instance, for people working under permanent employment contracts to be asked to set up a Limited Company as the "legal vehicle for the supply of their services" (Davies 2010, 311; McGregor, Sproull 1991). Individuals also often prefer this method because it allows them to save a greater part of their income by paying themselves dividends. Since 2018, the non-taxable dividends allowance is £2,000. After that, incorporated persons are taxed according to their Income Tax band. The basic rate on dividends over the allowance is set at 7.5%, with the higher and additional rates climbing to 32.5% and 38.1%, respectively. Individuals running a Private Limited Company (Ltd) or a Limited Liability Partnership (LLP) will also have to pay corporation tax on business profits at 19%. In general, the self-employed are subject to favourable fiscal legislation, paying taxes and NICs at a lower rate than their employed counterparts (HMRC 2015; Boden 2005).

II. Entitlements

Besides being able to benefit from advantageous tax and NICs arrangements, the self-employed enjoy many of the same social welfare benefits afforded to employees. More particularly, the self-employed are entitled to:

(a) Free healthcare

The British National Health Service (NHS) is publicly-funded by general taxation supplemented by NICs. It is universal in that it provides comprehensive and free (at the point of delivery) health services to all UK residents, including the self-employed. Individuals who transition from self-employment to dependent employment (and *vice versa*) do not have to pay additional taxes, make alternative arrangements or change healthcare systems; they are already covered by the NHS (Schulze Buschoff, Schmidt 2009, 154)

(b) State pension and pension credit

Just like employees, the self-employed are entitled to a basic State Pension. Under the previous regime, employees were entitled to Additional State Pension (also known as 'State Second Pension') which was based on their earnings as well as the NICs (Class 1) they paid or were credited with. In 2016, the UK government introduced a new flat-rate State Pension which operates under new rules. The new State Pension is based entirely on a person's NI record. Persons who have paid NICs for 35 years can get up to £175.20 a week (for the tax year 2020/2021), a sum which comes to approximately £9,000 per year. Employees can get more than the maximum amount if they have built up entitlements to the Additional State Pension under the old regime. Individuals unable to show a 35-year NI record will get less than the full amount.

The self-employed are also entitled to Pension Credit, a benefit provided to those who have reached the state pension age and are on a low income. The Pension Credit consists of two parts: (i) the Guarantee Credit and (ii) the Savings Credit. The Guarantee Credit tops up a (self-employed) person's income by £173.75 a week if they are single and by £265.20 if they are married or in a civil partnership. The Savings Credit, on the other hand, is available only to those who have reached State Pension age after 6 April 2016 and have made some provision towards their retirement by saving or by contributing into a pension other than the basic State Pension. The additional income provided by the Savings Credit can be up to £13.97 a week for single persons and £15.62 for married couples and civil partners.

Overall, while the self-employed are entitled to basic State Pension and Pension Credit, the amounts that these provide are not enough to support them in old age. Unlike employees who are automatically enrolled into a pension scheme (Pensions Act 2003, s. 3) and who have an employer who makes contributions on their behalf, the self-employed largely have to make their own arrangements for older life. They can, for instance, subscribe to a stakeholder or an occupational pension plan and receive tax relief on the amounts they invest thereof. However, this will not be feasible for all of the self-employed. Many self-employed have a low and irregular income that makes it difficult for them to show a 35-year NI

record, let alone invest in personal pension plans. Research shows that 67% of the self-employed are concerned about being able to make ends meet in older life (Lima-Matthews 2018) while just 31% save into a pension plan (Money Advice Service 2020).

(c) Tax allowances and credits

The self-employed are entitled to the same tax free personal allowance as employees which, for the year 2020–2021, was set at £12,750. Furthermore, the self-employed have access to many of the same tax credits as employees. The term 'tax credit' is rather misleading. As Boden writes, 'tax credits' are "social security benefits that are targeted at people who are in work and who, because of their circumstances, might be regarded as being on a low income" (Boden 2005, 12). Tax credits are meant to provide a basic safety net to all (including the self-employed) against disruptions to earnings by supplementing their monthly income. The main benefit available to the self-employed is Universal Credit.

Universal Credit (UC) was a major part of the UK government's Welfare Reform policy. Introduced in 2013 in an attempt to simplify the welfare system, it rolled six means-tested benefits and tax credits ((i) Income-Based Job Seeker's Allowance; (ii) Income Related Employment and Support Allowance; (iii) Income Support; (iv) Working Tax Credit; (v) Child Tax Credit and; (vi) Housing Benefit) into a single monthly payment. To be eligible for UC, applicants must live in the UK and must be (cumulatively): (i) under the State Pension age; (ii) on a low income or out of work and; (iii) have £16,000 or less in savings (between them and their partner). Those eligible receive a standard allowance of £409.89 a month if they are over 25 and single, and £594.04 a month if they are a couple (for both).

Additional help is available to individuals (including the self-employed) who:

i. Have children. More precisely, individuals who have children can get an extra monthly amount of £281.25 for their first child and £235.83 for the second child. Additional elements are paid for disabled (£128.25) and severely disabled (£400.29) children.

ii. Have a disability or a health condition that prevents them from working. Unlike employees who are entitled to sick pay, the self-employed do not have statutory protection against illness. The self-employed who have a health condition or a disability that affects their working activity can apply for UC and get an extra £341.92 a month. Furthermore, the self-employed who have a health condition or a disability that limits their ability to work and who have paid enough NICs (or have accumulated enough NI credits) in the 2 years before the year of their claim, can also apply for a 'New Style' Employment and Support Allowance ('new style ESA'). This is a contributory benefit that consists of a fortnightly payment that can be claimed on its own or at the same time as UC. Finally, extra financial support

is provided (in the context of UC) to those who care for a severely disabled person for at least 35 hours a week (additional £162.92 per month).

iii. Need help with housing costs. There is no standard amount provided to those who need help with covering their rent and service charges. The amount paid depends on age and circumstances. Those who own a house might also be eligible to apply for a loan to help with their interest payments or mortgage.

In general, the amount of UC a person receives depends on their particular circumstances. These are assessed every month to determine and adjust the level of supplementary income provided. Benefit caps also apply to limit the total amount of credit a person can receive. On top of UC, self-employed women are entitled to Maternity Allowance. Those who have paid Class 2 NICs for at least 13 of the 66 weeks before the child is due will get £151.20 a week or 90% of their average weekly earnings (whichever is less) for 39 weeks. Self-employed women, however, who have not paid enough NICs will only get £27 a week for 39 or 14 weeks (depending on other eligibility criteria). Overall, the self-employed are enrolled in and deal with the social security system in a similar way to employees, being entitled to many of the same social protections (Schulze Buschoff, Schmidt 2009, 154; IZA 2013).

4.3. Other measures for the self-employed

Over the last few years, the UK government has launched several initiatives to support entrepreneurism and the self-employed. In 2011, it introduced the New Enterprise Allowance to help unemployed persons transition to self-employment. The programme is available to everyone over 18 years of age that receives a: (a) Jobseeker's Allowance; (b) Employment and Support Allowance; or (c) UC without being in employment, education, or training. Those who enter the programme are assigned a business mentor who provides them with guidance and support while they develop a business plan and for the first six months of the operation of the business. Once a claimant has demonstrated that they have a viable business plan, they receive financial aid which consists of £65 a week for the first 13 weeks and £33 a week for the following 13 weeks. Depending on other factors, persons might also be eligible to apply for a start-up loan, if the business requires it. The financial support removes the collateral constraints that small businesses face and reduces the income risk associated with entering self-employment (Cowling, Mitchell 1997). In 2017, the UK government broadened the eligibility criteria of the New Enterprise Allowance scheme to include not just those who are unemployed but also those who have an existing business and receive UC because their earnings fall below the minimum income floor. These people have to attend a Link Up: Start Up (LUSU) workshop before they get access to financial support and a mentor.

Moreover, in 2012, the UK Department for Business, Innovation and Skills (BIS) launched the Start Up Loans scheme to help entrepreneurs set up businesses

in all UK industries and sectors. The scheme provides financial help and mentoring to individuals who want to start or grow their business but are unable to borrow from mainstream lenders. Everyone who: (a) is over 18 years of age; (b) lives in the UK and; (c) has a UK-based business that has been operating for less than 2 years or plans to start one, can apply for a loan. Unlike traditional business loans that are unsecured, these loans are backed by the government. There is no early repayment fee or application fee. Individuals can borrow between £500 and £25,000 which they have to repay over a period of 1–5 years at a fixed interest rate of 6% per annum.

In addition to the New Enterprise Allowance and Start Up Loans schemes, the UK government has launched several other initiatives to support entrepreneurism such as the Annual Investment Allowance, Capital Allowance, Entrepreneurs' Relief, Seed Enterprise Investment Scheme, the Arts Council Grant Scheme, the Design Council Spark, Innovate UK innovation vouchers and support grants (GOV.UK 2021). Finally, in the face of the coronavirus pandemic, the UK government has adopted a variety of measures to mitigate the economic impact of the lockdowns on businesses and the self-employed. The Coronavirus Job Retention Scheme (CJRS) has been introduced to help employers retain and pay their personnel in the midst of the pandemic ('furloughing'), while the Self-Employment Income-Support Scheme (SEISS) has been put in place to provide financial support to the solo self-employed. As of December 2020, £14.5 billion worth of payments have been made to supplement the income of the self-employed. Finally, enhancements have been made to the UC scheme to ease the eligibility criteria and provide support to a larger part of the population.

Overall, the status of self-employment in the UK comes with certain advantages. The self-employed pay, in principle, lower levels of taxes and NICs than employees, have access to free healthcare and basic state pension, get subsidies to help finance their business, and enjoy many of the same tax credits and allowances as employees. However, this image of protection can be misleading. As Boden writes, "although self-employed people ostensibly receive largely similar social insurance protection in the UK, the reality of the situation is that they may still be exposed to a different range of risks" (Boden 2005, 22). The self-employed who work on their own account do not enjoy protection from unfair dismissal, whistleblowing, unfair deductions from pay and discrimination in the private sector. They also do not have basic employment rights such as the right to sick pay, maternity leave and pay, redundancy pay, rest breaks, paid holiday, and national minimum wage. Only a certain proportion of them, those who are dependent upon a principal and not genuinely in business for their own account, enjoy some employment protection. At the same time, the financial support they get through tax credits and allowances is not enough to guarantee that they will not fall into poverty. The self-employed have little protection against disruption to earnings due to unemployment, sickness, and old age. While UC was introduced to simplify

and modernise the social security system, it has arguably left many self-employed people worse off (Millar, Bennett 2017; Dwyer, Wright 2014; Gillies et al. 2013). Finally, the low level of state pension presupposes that the self-employed save into occupational or stakeholder pension plans, something which is particularly difficult given their often low and irregular incomes. Hence, even though the self-employed have certain advantages over employees (in that they pay less taxes and NICs), they enjoy a lower level of social protection.

5. SHAM SELF-EMPLOYMENT

The term 'sham self-employment' describes the situation where a person is deliberately (mis)classified (by themselves or by the employer) as 'self-employed' to avoid tax, NICs, and employment responsibilities. The bogus self-employed do not display the characteristics typically associated with entrepreneurship such as decision-making power regarding the business, financial autonomy and responsibility, and the accumulation of assets (EWCS 2013; Shane 2003). Instead, they are in a similar position to employees, being economically dependent upon, and subordinate to, a principal. For this reason, it is said that the arrangement disguises a true employment relationship.

In the UK, the phenomenon of 'sham self-employment' has been on the rise, attracting the attention of politicians and government officials. In a question asked during the Budget debate on 15 March 2017, the Chancellor recognised that "there is a problem of bogus self-employment" (UK Parliament Written Questions, Answers and Statements 2017). As he said, "there is a problem of individuals being advised by high street accountants that they can save tax by restructuring the way they work. We do believe that people should have choices, and we do believe that there should be a diversity of ways of working in the economy – we just do not believe that that should be driven by unfair tax advantages." In research conducted for the Union of Construction Allied Trades and Technicians (UCATT), Harvey found that 30% of all persons working in the British construction industry in 2008 were 'false self-employed' (Harvey, Behling 2008). Based on this figure, Harvey estimated that tax evasion through 'bogus self-employment' costs the Exchequer around £1.7 billion per year. Similar numbers have also been reported by Jamie Elliott. In his 2012 Report for UCATT, *The Great Payroll Scandal*, Elliott calculated the revenue loss at £2 billion per year (Elliott 2012). More modest numbers have been reported recently by the Citizens Advice Bureau (CAB). After conducting in-depth interviews with 491 self-employed, the charity found that 1 in 10 persons in self-employment are wrongly classified. As they noted in their report, there are about 460,000 bogus self-employed persons in the UK, costing the Exchequer £341 million per year (Citizens Advice 2015).

In an effort to combat bogus self-employment, the UK government issued, in 2000, the off-payroll working rules ('IR 35') for persons providing services through intermediaries (see above). As the legislation prescribes, the self-employed who are in a similar position to employees will be considered 'employed for tax purposes'. Furthermore, the Finance Act 2014 stipulates that agencies have to pay NICs and submit quarterly electronic returns for any payments made to workers without deducting PAYE contributions. HMRC uses the information provided by the returns to tackle false self-employment through intermediaries (Heyes, Hastings 2017, 19). The legislation was expected to extend coverage to 200,000 self-employed persons (Heyes, Hastings 2017).

Arguably, the courts have been the most active actors in combatting bogus self-employment. In the *Mitchell*[13] and *Dhillon*[14] cases, the UK tribunals did not hesitate to expose the bogus nature of the self-employment arrangements in question and to re-classify the individuals as 'employees' for the purposes of tax law. As the court held in *Dhillon* (paying particular emphasis to the fact that the employer had asked for legal advice on how to structure the agreements to avoid a finding of 'employment'),

> the picture here is of a business-savvy appellant which entered into detailed written agreements to provide delivery services for its customers (…) and built up a network of men to drive its lorries. (…) The drivers were (…) essentially "day labourers" engaged on terms that were unwritten, uncomplicated and non-negotiable. This was the manner in which the appellant chose to run its business and control its main cost (apart from the lorries themselves). Short term though the engagements were, it is our perception, stepping back and looking at the whole picture, that "master and servant" (while somewhat outdated phrases today) is an apt description of the relationship between the appellant and its drivers. Mr Dhillon, the managing partner of the appellant, was, in our perception, very much the 'boss' in this relationship; and it is this, combined with the near-total absence of evidence that the drivers were running their own businesses, that leads us to decide that the drivers were employees of the appellant rather than self-employed contractors.[15]

Similar judgements have also been delivered in the employment law context. Courts have been increasingly reluctant to give effect to substitution clauses or clauses that deny any obligation to provide or to accept work, when these have been inserted into a contract with the sole intent of circumventing employment legislation (Fredman, Du Toit 2019; Bogg 2012; Davies 2009). As it was held in *Uber*, courts "can disregard the terms of any contract created by the employer in so far as it seeks to characterise the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particularly artificial way."[16] When the terms of the contract "do not reflect

[13] *Mitchell & Another v. HMRC* [2011] UKFTT 172 (TC) (15 March 2011).

[14] *RS Dhillon and GP Dhillon Partnership v. HMRC* [2017] UKFTT 17 (TC) (3 January 2017).

[15] Ibid, paras 88–89.

[16] *Uber B.V. (UBV) and others v. Aslam* [2018] EWCA Civ 2748, para 54.

the reality of what is occurring on the ground,"[17] the courts may disregard them "to prevent form undermining substance."[18] In making the assessment, particular attention should be paid to the relative bargaining power of the parties when deciding the terms of the agreement. As the Supreme Court *Uber* judgement read (reiterating the words of Lord Clark in *Autoclenz*),

> (…) the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.[19]

Overall, the recent Supreme Court decision in *Uber* solidified what had become apparent in earlier judgements, namely the shift away from the 'contract approach' to a 'purposive approach' to the law, according to which emphasis should be paid to the reality of the working relationship. Bogus solo self-employed persons who are found to be under the control and supervision of their principal will be re-classified as 'workers' for the purposes of UK employment law and will be given a level of employment protection.[20]

6. CONCLUSION

Recent market structural trends like the globalisation and digitalisation of the modern world and the shift towards franchising and outsourcing have left many British workers standing uncomfortably in the 'grey area' between employment and self-employment. As the number of solo self-employed increases, the need has arisen to re-examine the main characteristics and legal framework applicable to this category of workers. This chapter has analysed the legal regulation of self-employment in the UK. As has been shown, while the self-employed enjoy certain fiscal advantages, they are not adequately protected from disruption to earnings due to sickness, unemployment or old age. The majority of the self-employed are not entitled to labour protection, with only a small number (those who are subordinate to a principal and do not work for their own account) being able to enjoy some core employment rights. At the same time, the level of social insurance afforded to the self-employed through state pension and tax credits is not enough to guarantee that they will not fall into poverty if they retire or become unemployed. Hence, many of the self-employed have to make their own

[17] Ibid, para 66.

[18] *Consistent Group Ltd. v. Kalwak* [2007] UKEAT 0535, para 59.

[19] *Uber B.V. (UBV) and others v. Aslam and others* [2021] UKSC 5 reiterating Lord Clarke in *Autoclenz* (n 2), para 35.

[20] *Uber B.V. (UBV) and others v. Aslam and others* [2021] UKSC 5, [2018] EWCA Civ 2748; *Dewhurst v. Citysprint UK Ltd* ET/2202512/2016 (5 January 2017); *Pimlico* (n 8); *Autoclenz* (n 2).

provision to mitigate the financial and labour market risks that their status entails. The situation is even more precarious for those who are bogusly self-employed. Many persons that are in a similar position to employees are wrongly classified by their employers as 'self-employed' in order to avoid employment, tax and NICs legislation. This deliberate misclassification of persons creates worker insecurity and costs the Exchequer millions in lost funds. As Boden suggests, it may be that the UK needs to address the outcome or impact of its insurance and employment law policies on self-employed people, rather than the input side alone (Boden 2005, 22).

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SELF-EMPLOYMENT IN GERMANY AND AUSTRIA

Abstract. The objective of the chapter is to analyse legal regulations concerning self-employed activity in force in Germany and Austria. First and foremost, the author presents the scale of self-employment in the relevant countries and the sources of its legal regulation. He goes on to characterize the definition of a self-employed person and the categories of workers that fall within its scope. Furthermore, the author analyses the scope of protection guaranteed by German and Austrian legislation to the gainfully self-employed under individual and collective labour law. The last part of the chapter is devoted to the phenomenon of "bogus self-employment" and the legal mechanisms designed to combat it.

Keywords: self-employment, employment relationship, German law, Austrian law, economic dependence, bogus self-employment.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA NIEMIECKIEGO I AUSTRIACKIEGO

Streszczenie. Celem rozdziału jest analiza regulacji prawnych dotyczących samozatrudnienia w Niemczech i Austrii. Na wstępie autor prezentuje skalę wykorzystania tej formy aktywności zarobkowej we wskazanych krajach oraz źródła jej regulacji prawnej. W dalszej części charakteryzuje definicję osoby samozatrudnionej oraz kategorie wykonawców, które mieszczą się w zakresie tego pojęcia. Autor analizuje również zakres ochrony gwarantowanej przez ustawodawcę niemieckiego i austriackiego osobom pracującym zarobkowo na własny rachunek na gruncie indywidualnego i zbiorowego prawa pracy. W końcowej części rozdziału przedstawione zostało zjawisko „fikcyjnego samozatrudnienia" oraz mechanizmy prawne służące do jego zwalczania.

Słowa kluczowe: samozatrudnienie, stosunek pracy, prawo niemieckie, prawo austriackie, zależność ekonomiczna, samozatrudnienie fikcyjne.

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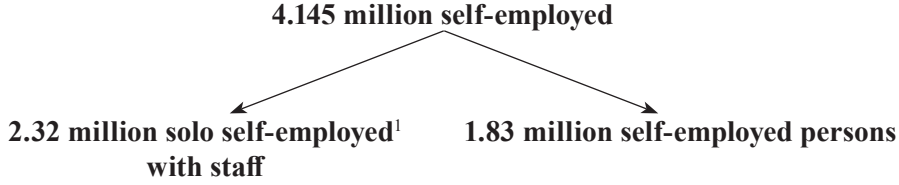
PART I – SELF-EMPLOYMENT IN GERMANY

1. THE SCALE OF SELF-EMPLOYMENT

1.1. The proportion of self-employed in relation to employed persons

The share of self-employed in the working population in Germany has remained unchanged for many years at around 10% (Brenke, Breznoska 2016, 9, 14). In 2016, there were 4.145 million self-employed in Germany. They can be broken down into the solo self-employed and self-employed with staff.



This is considerably less than the EU average and, more importantly, much less than in Poland. Where there have been fluctuations, they have ranged between 10% and 12%. The proportion of women rose from 33% to 37% between 2000 and 2011. The strong increase in the number of solo self-employed has resulted in particular from state subsidies (so-called Ich-AGs) and liberalisation of the law on crafts.

1.2. Reasons for choosing self-employment

The reasons for choosing to become self-employed originate with the employee, as well as from the legal environment and economic situation.[2] Some people do not enjoy working in a company environment. They want to make their own decisions and do not want to take orders from someone else, or be trapped in a foreign organisation (Institut 2018, 15). Others have entrepreneurial ambitions and expect to make more money than they do as employees. How many people decide to become self-employed also depends on the legal environment. When Germany provided subsidies for so-called Ich-AGs a few years ago, the number of self-employed increased (Brenke, Breznoska 2016, 13). The risk of self-employment was reduced thanks to the receipt of a monthly subsidy.

1.3. Empirical research

The legal framework is also important in that tightening of labour law leads companies to switch to other forms of employment relationships, increasingly

[1] See Brenke, Breznoska (2016, 13).

[2] Regarding iPros, see Leighton and Brown (2013, 20, 39 f.).

to self-employment. *General economic development* means that a growing number of people expect to achieve success by becoming entrepreneurs. Thus, the number of self-employed people also reflects the economic development of a country. In 2016, approximately 13% of men and 7% of women were self-employed (Bonin, Krause-Pilatus, Rinne 2018, 15). In Germany, the number of self-employed is highest at the highest qualification level. Self-employment is also high risk because of the nature of entrepreneurial activity. After one year, between 50 and 60% of self-employed give up their self-employment status. In comparison with employees, there is a wide range of income levels.

1.4. Solo self-employed

1.4.1. Occupational groups

Among self-employed persons, solo self-employed persons form a separate category (see 4.3.). They can be divided into those who work mainly for one client or for several clients, and by whether they work full or part time (Uffmann 2019, 360, 362). Solo self-employed are not evenly distributed across all occupations (Brenke, Breznoska 2016, 10, 35; 320 f.). Rather, they are found in particular in the following occupational groups:

– extracurricular teaching;
– education and social work;
– creative and media professions, etc.

Solo self-employed are largely employed on a *part-time* basis. The share of solo self-employed in the number of employed persons increases with vocational training – 92% are men and 8% women (Brenke, Breznoska 2016, 77 f.). The median monthly income of solo self-employed is the same as that of employees. In contrast, the median income for self-employed with employees is 1.75 times that of employees. Within the group of solo self-employed, there is a significant difference between those with a high school diploma and others. Otherwise, the results by gender, economic activity and regional distribution are essentially the same.

1.4.2. IT specialists

IT specialists, estimated at 100,000, are a special group among the solo self-employed (Brenke, Breznoska 2016, 23; Bonin, Krause-Pilatus, Rinne 2018, 9, 28; Uffmann 2019, 360–361). Members of this group have been among the top earners for years (Institut 2018, 25). More than 80% are entitled to a statutory pension (Institut 2018, 26). An English study refers to them as "independent professionals" (iPros).[3] They represented 0.8% of employees in Germany in the 2004–2013 study period.[4]

[3] Definition of iPros: Leighton and Brown (2013, 8, 65).

[4] For the situation in Germany, see Leighton and Brown (2013, 70, 72, 75, 78, 81, 85, 87, 89).

1.5. Statistical uncertainty

All statistical statements are subject to the uncertainty associated with the lack of agreement on the definition of an employee (see 6.4.). In any case, it is necessary to operationalise the boundaries in legal precedents and literature, because, in general, vague terms are used that are open to different interpretations (Dietrich 1996, 40 ff., 59 ff.)[5] making valid empirical research difficult. A second issue comes from the fact that no distinction is made between an individual's primary and secondary job,[6] although the amount of protection is different.[7]

2. LEGAL SOURCES OF SELF-EMPLOYMENT REGULATIONS

The legal basis for the right of self-employed persons derives from EU law, the constitution and ordinary law.

2.1. Union law

Union law comprises in particular economic law and a large part of labour law, with the exception of the areas mentioned in Article 153(5) TFEU. Union legislation is partly enacted by means of regulations, but predominantly by means of directives. Insofar as Union law does not refer to the law of the Member States with regard to the concept of employee, the CJEU forms its own definition by way of "autonomous definition" (Henssler, Pant 2019, 321, 325; Wank 2017a, 235 ff.), which is then binding for all Member States. In essence, the unhelpful Lawrie-Blum formula applies, according to which an employment relationship exists if "a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration".[8] Incidentally, the CJEU's definition in this case deviates considerably from the concept of employee that is widespread in Germany and also includes civil servants, soldiers and judges (Temming 2016, 158 ff.; Wank 2018a, 327, 337 f.). The CJEU increasingly uses the very broad concept of employee in the law on the free movement of persons as a basis for all labour law directives, although these pursue quite different purposes.[9] If a directive serves to concretise a fundamental right, the CJEU

[5] Concerning operationalising according to the basic definition; similarly Dietrich and Patzina (2017, 30 ff.; BAG model, alternative model, BAG-plus model: 34, 41 ff., 59 ff., 76 f.).

[6] Different from this, Wank (1997, 24 ff.).

[7] Referring to short-time occupation and part-time occupation with regard to the definition of an employee: Wank (1988, 183 ff., 205 ff.).

[8] CJEU 3.07.1986 case C-66/85 NJW 1987, 1138; a recent case referring the matter to the CJEU Watford Employment Tribunal (UK) case 692/19; see Holthusen (2020, 218 ff.).

[9] Critical Henssler and Pant (2019, 321, 325); Junker (2016, 184, 191 ff.); Wank (2018, 21, 29); for a contrary opinion, Sagan (2007, 3, 6 f.).

does not feel bound, even by the explicit reference to the concept of workers of the Member States, but rather develops its own "semi-autonomous" (Brose 2020, 13.22) concept of worker in free creation of law (Junker 2016, 184, 192 f.; Temming 2016, 158 ff.; Wank 2016, 143; Wank 2018c, 327 ff.; Wank 2018b, 21 ff.). A description of national law on the concept of employee is incomplete without taking Union law into account. The idiosyncratic interpretation of the CJEU leads to a split legal situation: insofar as German law is based on EU law, the CJEU's concept of employee applies. If this is not the case, the German concept remains unchanged (Boemke 2018, 1; Preis, Sagan 2013, 26 ff.).

Though EU law refers to the law of the Member States with regard to the concept of employee, this law applies in principle. Only if a Member State abusively excludes certain groups of persons from the definition of employee can the CJEU include them in the definition of employee by way of *abuse control* (Wank 2018b, 21, 22, 26). Moreover, the CJEU is often not satisfied with abuse control, but invokes *effet utile* to invent its own concept of employee, for which it lacks the basis of legitimacy (Wank 2018b, 21, 26 f.).

To transpose Union law into German law, the German legislature can either create its own laws for the groups of persons not covered by the German concept of employee, which correspond to those for employees, as is predominantly done in civil service law; or it can use the concept of "Beschäftigter" in labour law, which then expressly includes civil servants and others (see 3.5.); or in a special law, by virtue of an interpretation in conformity with Union law, civil servants and others are also included in the concept of employee.

2.2. The constitution

In the constitution, the right to independent professional practice is guaranteed in Article 12 GG. The Federal Constitutional Court takes Article 12 of the "Basic Law" (GG) as a uniform fundamental right that refers both to the choice and exercise of a profession (BverfG, BVerfGE 87, 316). According to this, Article 12 of the Basic Law applies to everyone and to all professions. Thus, the entire range of self-employed activity is covered. Constitutional law does not require a separate definition of an employee (Wank 2017a, 240 f.).

2.3. Ordinary law

Legal bases are also found in ordinary law (in contrast to constitutional law) in various labour laws, which distinguish self-employed persons from employees, as well as in commercial and general civil law.

2.3.1. Cartel law

In the field of commercial law, special mention should be made of cartel law, which also helps small-scale self-employment businesses to the extent that it prohibits the exercise of abusive market power (Deinert 2015, para. 45 ff.). In addition, commercial law contains a wealth of regulations for individual professionals such as lawyers, architects, brokers, doctors, etc.

2.3.2. General civil law

Apart from that, the regulations of general civil law apply to the self-employed exercise of certain professions. The basis for this is the constitutionally guaranteed freedom of contract, Article 2. 1 of the Basic Law (BVerfG, BVerfGE 65: 210; BVerfGE 95: 303). The BGB contains special regulations for a whole range of professions, each of which is based on a specific type of contract. These include a purchase contract (sec. 433 BGB), contract of service (sec. 611 BGB), contract for work (sec. 631 BGB), etc. In addition to the special regulations, the general and special law of obligations applies to all these contracts. It is always applied if no special regulation for this type of contract is provided by law.

The legal basis in practice usually consists of general terms and conditions. They are not state law and therefore not mandatory, but of great practical importance. When consulting the content of general terms and conditions in sec. 305–310 BGB, a distinction is made between terms and conditions that are applied to a consumer and those terms and conditions that apply to the self-employed. In the second case, legal control does not apply because, according to the model of the law of obligations, the self-employed are responsible for themselves. There is a lower threshold for judicial review than in the case of general terms and conditions if a contractual regulation is immoral and violates sec. 138 para. 1 BGB.

With regard to the protection of self-employed persons, a distinction must be made between protection with regard to the contractual relationship, quasi-employment law protection and social security law protection. A more detailed discussion of this issue can be found below under 5.

2.3.3. Pseudo-employees

In addition to the definition of employee/self-employed persons, the definition of pseudo-employees is added as a subgroup of self-employed persons. They are mentioned in a number of labour laws; it is questionable whether and to what extent other laws are applicable by analogy (Schubert 2004). The Federal Act on work at home[10] should also be mentioned here, which contains separate regulations for a certain group of self-employed persons (Preis 2020, 330 HAG).

[10] https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=42205&p_lang=en

2.3.4. Social security law

In addition to general civil law and labour law, social security law must also be taken into account. Protection against adverse life events can be achieved either through labour law (e.g. continued payment of wages by the employer in case of illness) or through social insurance law (e.g. sickness benefits from the health insurance fund) (Wank 1988, 336 ff.). In principle, self-employed persons are not included in the statutory social security system in Germany (Becker 2018, 307 ff.; Maier, Wolfgarten, Wolfle 2018, 259 ff.); however, there are efforts to include them in the pension insurance system (see 5.3.).

3. DEFINITION OF SELF-EMPLOYED

3.1. The self-employed as an equivalent to the employee

Whether an employed person is covered by the law on self-employed persons or by the law on employed persons depends on the definition of an employee. Thus the self-employed person as a concept stands in opposition to that of the employee. Neither German nor Austrian law, nor for that matter the legal systems of other countries, offers a legal definition of self-employment. Whether or not self-employed persons can be correctly recorded therefore depends on whether *the employee is correctly defined* in contrast to the self-employed.

An exception is made in sec. 84 para. 1 sentence 3 HGB: "Self-employed persons are those who are essentially free to organise their activities and determine their working hours".[11] From a legislative point of view, it is incomprehensible that this rule was retained even after the creation of sec. 611 a BGB. According to this, it appears that there is a general definition in sec. 611 a BGB, which is derived from the inversion of the characteristics in sec. 611 a BGB, and a special provision for commercial agents. This was not intended, however. The provision was taken over as sentence 3 in sec. 611 a BGB, but with a different wording: "Not bound by instructions". This is misleading because according to sentences 1 and 2, personal dependence and foreign control are to be taken into account, which is not mentioned in sec. 84 HGB. The provision should be deleted and replaced by sec. 611 a BGB, including for commercial agents (Wank 2017a, 140, 147 f.).

Thus, whether self-employed persons can be correctly defined depends on whether the employee is defined correctly in contrast to the self-employed. In Germany, until 2017, this definition was based on the *case-law of the BAG* and literature on labour law. However, this case-law had some deficiencies.[12] It was not

[11] See Preis (2021, § 611 a BGB, para. 34); Wank (1988, 257 ff.).

[12] Compilation of contrasting concepts in Erren (2015, 269 ff.); Wank (1988, 23 ff.); Wank (2017b, 243 ff.).

clear to what extent the aspects used in the case-law should be characteristics or circumstantial evidence, nor was the relationship of the individual characteristics or circumstantial evidence and their weighting in relation to each other clear. With the exception of a few judgements, which showed the connection between the concept of employee and the legal consequences attached to it in the field of labour law instead of in the field of self-employment law, there is still no teleological concept in the case-law. This is questionable considering the principle of equality in Article 3.1 of the Basic Law, because on the basis of this, application of the definition is partly arbitrary, for example, with regard to the teaching profession.

The same is largely true of labour law doctrine. Until recently, the predominant opinion referred to what the Reichsarbeitsgericht and Alfred Hueck allegedly said decades ago (and what is reproduced in misquotations, see Wank 1988, 29). without addressing the meaning or purpose of the definition.[13] Since sec. 611 a BGB came into force, this rule has been used as a basis without any in-depth examination of the deficiencies in the regulation. In any case, the view that the existence of a legal definition precludes interpretation, in particular a teleological interpretation, and existing characteristics should be applied formally and without any connection to the purpose of the law, is incorrect (Preis 2018, 817). Instead, the vague terms in sec. 611 a BGB require us to perceive Art. 3.1 of the German Constitution as a teleological interpretation.

Pseudo-employees are a subgroup of self-employed persons (see 4.2.).

3.2. Sec. 611 a BGB

In 2017, sec. 611 a BGB came into force, which contains a legal definition of an employee. The provision reads as follows:

> Section 611 a Employment Contract. (1) 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. The right to issue instructions may relate to the content, performance, time and place of work. Anyone who is not essentially free to organise his activity and determine his working hours is bound by instructions. The degree of personal dependence also rests on the nature of the activity in question. An overall assessment of all circumstances must be made in order to determine whether an employment contract exists. If the actual performance of the contractual relationship shows that it is an employment relationship, the designation in the contract is irrelevant.
> (2) The employer is obliged to pay the agreed remuneration.

The provision contains a lot of legislative errors and ambiguities; a transfer to the legal systems in other countries cannot be recommended.

[13] Compare the great number of authors referring to a teleological definition, including economic dependence; see below 3.7.2.

3.2.1. Contract of service, employment contract and other contracts

The BGB now states:
Division 8 Particular types of obligations
Title 8 Service Contract and Similar Contracts
Subtitle 1. Service Contract
The order is as follows:
Section 611: Typical contractual duties in a service contract
Section 611 a: Employment contract

This system is not suitable for the task at hand (Wank 2017a, 140 f.). According to a systematic interpretation of the law, contract of service is the generic term, i.e. a service contract in the broader sense. The service contract in the narrower sense and employment contract are sub-concepts. In reality, however, the employment contract is not (only) a sub-category of the contract of service, but an independent type of contract, which can be contrasted with all independently exercised contracts in section 8 of the BGB Special Part. Thus, for example, a treatment contract concluded by a self-employed person (sec. 630a–630h BGB) is also a contract of service which must be distinguished from the employment contract. The opposing term is not the person that performs a contract of service, but the self-employed person in general. It is also difficult to differentiate between the contract for work and services (Greiner 2015, 218; empirical on the contract for work and service: Brenke and Breznoska 2016; Arntz et al. 2017) and temporary work (Wank 2021, sec. 1 AÜG, para. 19).

3.2.2. Repetition of the characteristics of contract of service and employment contract

If the employment contract is regarded as a subset of the contract of service, then those characteristics which apply equally to the contract of service and the employment contract must be "placed before the parentheses". The definition of the employment contract may then only contain those characteristics which distinguish the employment contract from the contract of service. A repetition of the characteristics in the contract of service and the employment contract is only justified and useful if the employment contract is defined as an independent contract category and not as a sub-category of the contract of service. In this respect, the regulation in sec. 611 and 611 a BGB with its *superfluous repetitions* has failed (Wank 2017a, 140, 143).

Both types of contract are *contractual* and not public law arrangements. The reference to the private-law nature of both contracts, which is customary in case-law and literature, is unnecessary. Both contracts concern the performance of services. Sec. 611 BGB says: "a person who promises services" and "services of any type may be the subject matter of service contracts", and sec. 611 a BGB says: "the employee is obliged to perform work in the service of another…". Both sections state that the person to whom services are rendered is obliged to pay

the agreed remuneration. The repetition of "private contract", "services" and "remuneration" in sec. 611 a BGB is therefore superfluous and misguiding.

3.2.3. Dictionary of synonyms

If one wanted to infer from sec. 611 a of the Civil Code how the service provided by a person performing a contract of service differs from that of an employee, the new provision does not offer any specific characteristic for this, but rather three parallel characteristics, namely "personally dependent",[14] "subject to instructions" (Boemke 1998, 285, 301 ff., Maties 2020, § 611 a BGB, para. 95 ff.; Preis 2021, § 611 a BGB, para. 35 ff.) and "determined by others" (Preis 2021, § 611 a BGB, para. 41 ff.). How they relate to each other is unclear and in any case cannot be inferred from the text of the provision.[15] The fact that a dictionary of synonyms is offered in a law instead of a characteristic is based on the fact that the legislature did not create its own legal definition, but copied formulations from the BAG's guiding principles. Of course, a court is free in its choice of words and can offer several expressions in the hope of somehow conveying the proper meaning. In contrast, a legislator should express themselves clearly.

(a) The literature deals benevolently with this misguided legislation in such a way that it reads a meaning into the unstructured wording. According to legal doctrine, *personal dependence* is a generic term. The sub-concepts are therefore the *obliged [to carry out] instructions* and *external control or integration*.

In case-law and the literature, "personal dependence" is often understood to mean that "economic dependence" is not important. This is as correct as it is banal, if one understands economic dependence in the same way as representatives of the ontological concept, as if it depended on one's own assets and also included suppliers. None of the numerous authors who have attempted a teleological definition of the concept holds this view.[16] Instead, it is appropriate (Wank 2017a, 140, 145, 152) to focus on the possibility of taking entrepreneurial decisions (BSG 18.11.2015, BSGE 120, 99; Wank 2017b, 293 ff.) on one's own account (Wank 2017b, 289 f.). The generic term "personally dependent" is superfluous and therefore misleading, since everything that matters is expressed in terms of *binding instructions* and *external control or integration*.[17]

(b) With regard to *binding instructions*, sec. 611 a para. 1 sentence 2 BGB states that they may relate to the content, performance, time and place of the activity, while sentence 3 immediately afterwards reduces the binding instructions to "free organisation of one's activity" and "determination of one's working time".

[14] Critical: Preis (2021, § 611 a BGB, para. 32: "has no independent material content"); Richardi (2009, § 16, para. 20); Schliemann (1997, 322, 324); Uffmann (2012, 1, 35); Wank (1988, 12).

[15] Referring to the law before the statute, Wank (2017a, 248 f.).

[16] References in Erren (2015, 269 ff.); Wank (2017b, 299 ff.); Wank (2017a, 140, 144 ff., 151).

[17] Referring to superfluous sentences in general, Wank (2020b, § 4 para. 68 f.).

The truly important statement – that it is not a matter of issuing any instructions, but *business instructions* (Wank 2016, 143, 161) – is omitted, as is the statement that the *possibility of issuing instructions* as provided for in the contract is already sufficient (Wank 2017b, 389 ff.).

If an instruction may *equally be given to a self-employed person* and to an employee, the difference depends on the intensity of the instruction – if there is no room for independent entrepreneurial decisions, the formal situation of a self-employed person is not sufficient to make them self-employed.

Particularly in the case of *liberal professions*, the concept of a "employee not bound by instructions" is recognised in case-law and the literature. According to the BSG, this is characterised by "functional, service-oriented participation in the work process" (E.g. BSG 4.06.2009; NZA 2019, 1583, 4.6.; NZS 2019, 785). This is an employee who lacks the decisive characteristic and is nevertheless an employee (Preis 2021, § 611 a BGB, para. 65 f.). This shows that binding instructions must be understood differently than according to the prevailing opinion and that to be an employee cannot only depend on binding instructions.

If the instruction is based on constraints related to work performance or *legal requirements*, this applies equally to employees and self-employed persons and does not contribute to the definition.[18] Moreover, digitisation means that many instructions in the usual form are no longer needed (Brose 2017, 7, 11; Deinert 2017, 65, 67; Günther, Böglmüller 2015, 1025, 1028; Wank 2018c, 61 ff.).

(c) Foreign control can be understood as integration (Preis 2021, § 611 a BGB, para. 4: sub-term of subordination under orders; Wank 2017b, 282; Wank 2017a, 140, 143 f., 150); into a foreign organisation (Fischels 2019a, 273 f.; Preis 2021, § 611 a BGB, para. 41; Schneider 2018, § 18, para. 32 ff.; Wank 2017a, 140, 143, 151). It is not clear what else might be meant by this (Deinert 2017, 65, 67; Preis 2018, 817, 824; Wank 2017a, 140, 142; opposite Hromadka 2018, 1583, 1585; Thüsing 2018, § 611 a BGB, para. 8: tautology). While the characteristic of integration was recognised for decades in case-law and throughout the literature, the BAG has abandoned it in more recent judgements without justification or has read it into the binding directives (critical: Uffmann 1989, 360, 366). It has been correctly retained in sec. 1 para. 1 sentence 2 AÜG. If it had been correctly formulated, sec. 611 a BGB should have read: "work subject to instructions within the framework of integration into the organisation of the contracting party".

3.2.4. Content, performance, time and place of work (sec. 611 a paragraph 1, sentence 2 BGB)

Section 611 a of the German Civil Code lists four areas in para. 1, sentence 2 to which instructions may refer.

[18] Therefore incorrect, BSG 4.06.2019; NZA 2019, 1583; critical Wank (2020, 110, 114).

(a) A very important characteristic, which has always been classified as very important in case-law and the literature, is whether the employee can organise their working time independently or whether it is imposed (Preis 2021, § 611 a BGB, para. 35 f.; Wank 2017b, 269 ff.). However, time management can be understood to mean many things (Wank 2017b, 270; empirical Dietrich, Patzina 2017, 45 ff.):

– classification of daily working time;
– classification of weekly working time;
– allocation of time for work results to be submitted over a longer period of time;
– start time;
– workday;
– breaks and vacation time.

For all the characteristics mentioned, including time, the first question to be asked is always whether there are *constraints based on the type of work* or whether there are other ways of organising work (Wank 2017a, 140, 147). For example, a teacher employed as a self-employed person cannot decide independently when they want to teach lessons at school; the school must draw up a weekly schedule for teaching a class. In differentiating between the employed and self-employed, it is important to know whether the teacher can influence the timetable, for example, if they only want to teach on Mondays and Tuesdays. However, employed teachers (e.g. part-time) can also be allowed to influence the schedule.[19]

(b) The place of work is also an important distinguishing characteristic (Wank 2017b, 266 ff.; empirical Dietrich, Patzina 2017, 48 ff., 67). Here, too, location determinations must be excluded from consideration due to constraints. For example, a self-employed craftsman can only carry out certain construction work while on site. A music teacher, on the other hand, can choose whether the music lessons take place at their home or that of the client. This freedom of choice speaks for self-employment.

(c) Section 611a of the German Civil Code (BGB) also gives instructions regarding the content and performance of the activity. This duplication is misleading. It overlooks the fact that a distinction must be made in the employment relationship between the employment contract itself, on the one hand, and the performance of the contract on the other. The nature of the work is determined by the contract. Any instruction by the employer is only permissible to the extent that it is within the scope of the employment contract (Wank, 2020, 4 ff.). There is room for instructions only insofar as they concern the performance of the contract. Performance refers to the place and time of work, but only to the nature insofar as the manner of work performance is regulated by instructions (Wank 2017a, 140, 146; empirical Dietrich, Patzina 2017, 61 ff.).

[19] Referring to music teachers BAG 14.03.2018, AP BGB § 611, Lehrer, Dozenten no. 193.

3.2.5. Nature of the work and overall view of all circumstances

According to sec. 611 a para. 1, sentences 4 and 5 of the German Civil Code (BGB), what matters in all this is the *specific nature of the activity* (Wank 2017a, 140, 148; as concerns branches of activity Fischels 2019a, 229; Preis 2021, § 611 a BGB, para. 55 ff.; Wank 2017b, 373 ff.) and the overall consideration of all circumstances. Both can be mentioned in judicial texts, but have no place in a legal definition. The special characteristic of continental European legal definitions compared with those in the "Allgemeines Landrecht" for the Prussian states or in the Anglo-American legal system is that they feature the most abstract definitions possible, which cover a wide range of individual cases. It is therefore natural that the significance of the decisive characteristics and indications in the concept of employee vary according to the type of activity. In this respect, it goes without saying that an overall view is very important (Preis 2021, § 611 a BGB, para. 46; Wank 2017a, 140, 149).

However, the wording "overall view of all circumstances"[20] suggests erroneously that the law is based on the typological method (see 3.2.7.). Nonetheless, it can also be understood as a (superfluous) indication that individual elements of the term may be more or less strong and that an overall assessment must always be made (Preis 2020, § 611 a BGB, para. 46; Fischels 2019a, 113; Wank 2020b, § 11, para. 98).

3.2.6. Contract content and actual implementation

If the actual implementation of the contract contradicts the designation in the contract, i.e. if, from an objective point of view, an employment contract is present contrary to a designation as a contract of service, then according to sec. 611 a, para. 1, sentence 6 BGB, what is actually carried out applies (Schwarze 2020, 38; Wank 2017a, 140, 149 f.; Wank 2017b, 257 ff.).

3.2.7. Class concept and "Typus"

Although sec. 611 a BGB mentions individual prerequisites for the elements of a case in accordance with a class concept,[21] the view that the employee is a *typus* concept still holds in part.[22] That would mean: Any subsequent, even dispensable (Fischels 2019a, 80 ff.) characteristics can be used in any number

[20] In general on this wording Fischels (2019, 95 ff, with critic: 103 ff.).

[21] Regarding the class concept, see Fischels (2019, 434 ff.); Puppe (2019, 54 ff.); Wank (1985, 8, 123 ff.).

[22] BAG AP BGB § 611 Abhängigkeit no. 34; representative Deinert (2015, para. 22); critic of the concept of *typus* Preis (2021, § 611 a BGB, para. 53; "outdated"); Fischels (2019a, 30 ff.); Wank (2017b, 260); Wank (1988, 23 ff.); Rüthers et al. (2018, para. 930 ff.).

with any content and weight.[23] On the contrary, the only correct approach is based on legal prerequisites and can be concretised by sub-concepts and indications (Wank 2017b, 253 ff.; see the scheme in Wank 2020c, 110, 118 and below g) bb).

Indications can also take into account the amount of remuneration, for example, as is done in some BSG judgements.[24] In this respect, but only in this respect, can one speak of a *typus*. However, to retain accuracy, there must also be a connection between all sub-characteristics and circumstantial evidence, and the aims of the law.

3.2.8. Retrospective definition

All new problems with the concept of employee were excluded from the creation of sec. 611 a BGB. Nothing is found on external managing directors, although this is urgently needed according to CJEU case-law. It also omits the issue of crowdworkers and other new forms of employment (critic: Preis 2018, 817, 818; Sagan 2020, 3, 8; Wank 2017a, 140, 153; Wank 2017b, 349 ff.).

3.3. Other legal bases for employment

In many cases, employees provide services for another person without this being based on an employment contract or any other contract under private law. This applies, for example, to: officials (Maties 2020, § 611 a BGB, para. 34 ff.; Preis 2020, § 611 a BGB, para. 132 ff.; Schneider 2018, § 18, para. 58 f.), soldiers, judges (Maties 2020, § 611 a BGB, para. 39; Preis 2021, § 611 a BGB, para. 132),[25] family helpers (Maties 2020, § 611 a BGB, para. 44 ff.; Preis 2021, § 611 a BGB, para. 137 ff.; Schneider 2018, § 18, para. 65), and prisoners (Preis 2020, § 611 a BGB, para. 136; Schneider 2018, § 18, para. 60). While for some of these groups of persons it is clear both under Union and German law that they do not have the status of employees (e.g. prisoners, family members), for others there is a divergence between the case-law of the CJEU and German law (e.g. civil servants, judges, soldiers, external managers of limited liability companies), which leads to split application of the law (Temming 2016, 158; Wank 2018a, 327, 336).

3.4. Different concepts of employee and the concept of "Beschäftigter"

Some labour laws are not only applicable to employees, but also to other groups of people, such as pseudo-employees and civil servants. In this case, the law uses the generic term "Beschäftigter" (Forst 2014, 157; Maties 2014, 323, 325 f.; Richardi 2010, 1101; Wank 2017b, 226 ff.). This does not change the concept of employee.

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[23] Against an employee *typus* Wank (2017 b, 251 f.).

[24] BSG NZS 2017, 664.

[25] Different in EU law, see para. 18 and CJEU 1.3.2012 NZA 2012, 313 – O'Brien.

3.5. Other areas of law

Employees must be distinguished from self-employed persons not only in employment law but also in a number of other legal areas. These include employment law, social security law and tax law. In practice, this means that the employer has to pay social security contributions to the social insurance agency on the basis of the employment contract (both the employer's contribution and, in their capacity as a payee, the employee's own social security contributions). The same applies to the wage tax payable by the employee: the employee is the obligor and the employer is obliged to pay the tax office. Although a consistent definition should apply in this respect, social security law and tax law each use a separate concept of the employee.

The individual branches of social security are linked to the term "Beschäftigter". This is misleading because the social insurance law concept of the "Beschäftigter" is partly different from the labour law concept. In labour law, the term "Beschäftigter" is used in some laws and includes both employees according to the general concept of employee and some additional groups of persons who are also subject to labour law (see above) (Richardi 2010, 1101, 1102; Wank 2017b, 226).

The concept of Beschäftigter is defined in sec. 7, para. 1 SGB IV: "Beschäftigung ("employment") is non-independent work, especially in an employment relationship. Indicators of "Beschäftigung" are an activity carried out according to instructions and integration into the work organisation of the party issuing the instructions".

The idea that the concept of Beschäftigter in social security law should be determined independently can be found widely in case-law and the literature.[26] There are differences between social security law and labour law, e.g. with regard to the fact that in social security law not only the welfare of the parties is at stake, but all of those who are affected by social security law.[27] It is preferable, however, in principle, to adopt the concept of employee in labour law (Kunz 2020, § 4, para. 2, 29). Even if there are justified deviations, it is not necessary to postulate a new concept of employee, but certain special rules of social security law can be established for individual cases (Wank 2020c, 110, 111).

In sec. 1, para. 1, sentence 1 of the Lohnsteuer-Durchführungsverordnung (Wage Tax Implementing Regulation), tax law defines employees as "persons who are or were employed in the public or private sector and who receive remuneration from this employment relationship or a previous employment relationship". According to para. 2, sentence 2, this depends on whether "the active person is under the direction of the employer in the performance of his or her business

[26] Regarding the relationship between the concept of employee in employment law and in social security law, Preis (2000, 914); Wank (2017c, 110 ff.); Wilke (2009).

[27] Recently, BSG 4.06.2019 NZA 2019, 1583 = NJW 2019, 3020.

will or is obliged to follow the employer's instructions in the employer's business organisation", i.e. whether he or she is bound by instructions and/or integrated.

3.6. Competition in legal fields

Sometimes the concept of employee is used for the same person by two legal fields, e.g. labour law and company law (Maties 2020, § 611 a BGB, para. 48 ff.), where only one legal concept can apply to an applicable area of law. Thus, according to the CJEU, external directors of private limited companies are employees, whereas the BGH and the BAG regard them as self-employed.[28] This instance of competition between legal areas[29] must be decided according to the fact that the more relevant legal area takes precedence, but the particularities of the other legal area must be taken into account (Wank 2018b, 21, 27; Wank, Maties 2017, 353 ff.).

3.7. The definition of self-employed persons in the literature

Two different approaches to the definition of employee and thus self-employed can be found in the literature.

3.7.1. Prevailing opinion

The definition of the prevailing opinion is based on a misquotation of a statement by Alfred Hueck. According to this statement, an employee is someone who, on the basis of a contract under private law, is obliged to carry out externally determined work in personal dependence in the service of another person (representative: Zöllner et al. 2015, § 5 para. 1).

In this view, the opposing concept to an employee in the present context is someone who works on the basis of a contract of service.

3.7.2. Teleological definition

According to another opinion, the definition is not appropriate for two reasons. First, it is an ontological definition (Fischels 2019a, 27 f.; Wank 1985, 143 ff.). One defines according to outward appearance without inquiring into the meaning and purpose of the law and thus the characteristics. In contrast, a teleological definition is the only one permissible methodologically, i.e. a definition that establishes a connection between the term and the legal consequences connected with it (Fischels 2019a, 28 ff.; Wank 2020b, § 8 para. 16 ff.). This can only be achieved if specific economic dependence under labour law is either included in

[28] CJEU 11.11.2010 case C-232/09 NJW 2011, 2343 – Danosa; comment in Wank (2017b, 313 ff.).

[29] In general Jansen (1999, 41 ff.); Kramer (2016, 120); Larenz (1991, 269 f.); Wank (2020b, § 5 para., 185 ff.).

the definition as an additional characteristic or if the existing characteristics are understood teleologically in the sense that this specific expression of an economic dependence is taken into account.[30]

The opposite of the concept of employee is that of the self-employed person, who provides services for another person. The definition must be based on the meaning of this dual model of gainful employment and the different legal consequences attached to it (Wank 1998, 82 ff., 117 ff.). Anyone who freely chooses an entrepreneurial risk,[31] alongside opportunities and risks related to the respective contractual relationship, i.e. who has the opportunity to make entrepreneurial decisions on their own account, does not need the specific protection of labour law, but is subject to the law of the self-employed.

This is not, as some authors allege, a deviating concept that is impermissible in view of sec. 611 a BGB (Preis 2021, § 611 a BGB, para. 54, mixing aims of the law, terms, sub-terms and indications); rather, the purely formal formulation of sec. 611 a BGB – like any other legal concept – must be interpreted with regard to the underlying protective purposes of labour law, i.e. the teleological orientation of all terms, sub-terms and indications must be oriented towards the protective purposes of labour law (Preis 2021, § 611 a BGB, para. 54 – in opposition to para. 3).

A teleological definition also indicates that the employee should not only be distinguished from the employee, but also from other self-employed persons, such as contractors (Deinert 2017, 65 ff.; Henssler 2017, 65, 89 ff.; Wank 2021, § 1 AÜG, para. 18), as well as agency workers (Deinert 2017, 65, 69 ff.; Wank 2021, § 1 AÜG, para. 19).

When analysing whether self-employment or employee status exists, the following test scheme can be used (Wank 2020c, 110, 116 f.):

(1) guiding principle: need for protection
the person employed:
– lacks, e.g. a fair option between employee status and self-employed status,
– cannot make business decisions on their own account;
(2) characteristics:
(a) binding instructions,
(b) integration;
(3) sub-characteristics:
(a) instructions concerning:
– time,
– place,
– nature of the activity;

[30] As regards the aims of employment law, see Maties (2020, § 611 a BGB, para. 989 f.); Preis (2021, § 611 a BGB, para. 8); Wank (1988, 56 ff.); Willemsen (2019, 757, 758 ff., 766 ff.).

[31] CJEU NZA 2015, 55; as regards rulings of the BAG, see Wank (2017b, 295 f.); BSG BSGE 111, 257; BSG NZA 2019, 1583; Wank (2017a, 140, 152).

(4) indications of a specific need for protection under labour law:
– performance for only one (or essentially only one) contracting party,
– work without employees;
(5) irrelevant evidence:
– requirements based on the nature of things,
– the code of ethics,
– external appearance, e.g. the client logo.

3.8. Conclusions for the present survey

The question of how employees and self-employed persons are to be differentiated has not yet been satisfactorily clarified anywhere (Wank 2019, 131, 138). Even the legal definition in sec. 611 a BGB has not changed this. A teleological interpretation depends on what is regarded as the protective purpose of the labour law – all terms, sub-terms and indications of the definition must be geared toward the protective purposes. For example, an empirical study in 1996 compared three models: the BAG model (guiding concept: personal dependence), the alternative model (guiding concept: entrepreneurial risk) and the model of social insurance authorities (guiding concept: compulsory insurance and contributions) (Dietrich 1996, 2). In a follow-up study, the BAG model, the alternative model and the BAG-Plus model were also examined separately (Dietrich Patzina 2017, 86; see below 6, part one).

Neither the CJEU′s definition of an employee nor the definition in sec. 611 a BGB comply with elementary methodologic requirements. They refer to appearances instead of the aim of employment law. Moreover, they lack the *differentia specifica* between employee and self-employed (see 6.1.). A teleological definition should be worded as follows:

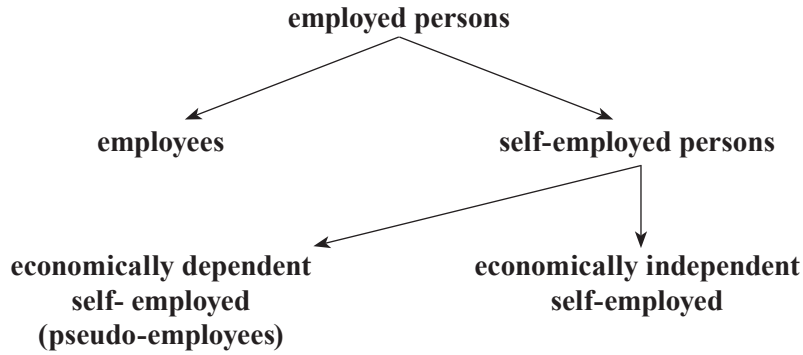
> An employee is a person who, based on private law, is employed to provide services to another party according to its instructions and integrated in its organisation. Bound by instructions means, according to constraints resulting from the employment contract, the inability of the employed person to make independent entrepreneurial decisions concerning the nature, time and place of work. Circumstantial evidence for the lack of independent entrepreneurial decisions is the fact that the employed person is in a contractual relationship with only one entity and cannot hire their own staff or make their own decisions about how work is organised (Wank 2008, 191).

4. CATEGORIES OF SELF-EMPLOYED

4.1. Employees and pseudo-employees (pseudo-employees, dependent self-employed, dependent contractors)

If one distinguishes employees from self-employed persons, one must also consider pseudo-employees (Wank 2017b, 321 ff.; regarding EU law, Pottschmidt 2006). If you look at the legal systems of a number of countries, you will see that most of them do not recognise the special category of pseudo-employee. In order to provide legal coverage for this group of persons, some either expand the term "employee" ("employees in the sense of the law are also…") or choose a description that fits pseudo-employees without using this term.

Pseudo-employees can be classified in two ways. One way is to distinguish three types of employees, namely employees, pseudo-employees and self-employed.[32] The BAG and some German authors take this as a basis, but usually contradict each other because their concrete statements are based on the second, accurate classification, which is mentioned below. In fact, there are only two groups of employees, namely employees and self-employed persons (Wank, 2019, § 12 a TVG, para. 7 f.). The self-employed are then subdivided into two sub-groups: "economically independent self-employed" and "economically dependent self-employed or pseudo-employees".



4.2. Pseudo-employees[33]

There is no general legal definition of a "pseudo-employee" (Neuvians 2002, 49 ff.). The legal definition in sec. 12 a TVG is decisive for collective bargaining law, but cannot be generalised (Wank 2019, § 12 a TVG, para. 69 ff.). Apart from that, there are some laws that not only refer to the employee, but

[32] BAG 20.09.2000 AP BGB § 611 Rundfunk no. 31; Rebhahn (2009, 236 ff.).

[33] References with Schneider (2018, § 21); comparison of laws in Rebhahn (2009, 236 ff.).

to pseudo-employee status.[34] If we accept that employment law protects employees, then the scope of protection provided by these provisions is small (Däubler 2014, 81, 84).

The characteristic feature of a pseudo-employee is economic dependence in all the laws that are related to this term. This results in particular from the fact that such a person works either only or essentially only for one client.[35] Contrary to the opinion of the BAG,[36] this does not depend on the employed individual's assets, but only on the income from the activity in question (Schneider 2018, § 21, para. 10; Wank 1988, 134 ff., 241).

From the point of view of legal policy, the question arises as to whether the need for special protection is an additional prerequisite: income below a certain income level or attaining most of one's total income from the special service (Bayreuther 2018, 49, 54 ff.). Furthermore, we must also ask whether that protection should apply only to solo self-employed persons or to all pseudo-employees (Bayreuther 2018, 49, 58 ff.).

The second characteristic mentioned in sec. 12 a TVG, which is also often used elsewhere, the "need for social protection", is meaningless and should be replaced by other characteristics and indications which are typical for employee status (Schneider 2018, § 21, para. 12). On the other hand, the absence of entrepreneurial opportunities is as decisive as in the case of employees.[37]

4.3. Solo self-employed

Within the group of self-employed persons, a distinction is often made between solo self-employed persons and other self-employed persons (e.g. Bayreuther 2018, 50 ff., 58 f.; Deinert 2015; Fischels 2019b, 208; Uffmann 2019, 360; Wutte 2019, 180). Solo self-employed is not a legal category (Uffmann 2019, 360). It may be appropriate for sociological research to highlight this group, though legally speaking, this is doubtful. The mere fact that someone does not employ any staff does not mean that this person is in need of protection as a self-employed person. Perhaps they operate on the market without a permanent establishment or employees. Similarly to employees, however, only those who are economically dependent in a way comparable to an employee are in need of protection. This manifests above all in dependence on only one contractual or only a few contractual partners (Deinert 2015, para. 11). It would therefore make sense for the law to concentrate on those who are similar to employees.

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[34] These statutes are named in Bayreuther (2018, 25); Schneider (2018, § 21, para. 6); (Wank 2019, § 12 a TVG, para. 12, 14).

[35] Compare sec. 12 a TVG; see Bayreuther (2018, 50 ff.); Hromadka (1997, 1249, 1253); Schneider (2018, § 21, para. 9, 14 f.); Wank (1988, 240).

[36] BAG AP ZPO § 850 h no. 18.

[37] BAG AP § 611 Arbeitnehmerähnliche no. 12.

Only 10.5% of solo self-employed have only one client, while 69.7% have between two and nine clients. Economic dependence, in the sense that the employee receives more than 75% of their income from this activity, is only the case of 8.54% of the solo- self-employed (Uffmann 2019, 360). However, the legal situation lags behind the current developments. There are different approaches to determining how to adapt the legal situation to new forms of employment,[38] e.g. by expanding home worker law (Deinert 2018, 359 ff.; Preis 2017, 173 ff.; Preis 2018, 817, 825), broadening the concept of employee (Bayreuther 2015, 18 ff.) or the concept of pseudo-employee (Bayreuther 2015, 25 ff.).

4.4. Distinguishing from similar forms of organisation

There are alternative forms of employment to self-employment, including:

– a framework contract (unlimited employment contract, but for seasonal work);[39]

– a framework agreement (contains working conditions for subsequent fixed-term contracts);[40]

– a series of fixed-term employment contracts (Wank 2018, § 103, para. 140 ff.);

– an employment contract, on-call work (cf. sec. 12 TzBfG) (Preis 2021, § 12 TzBfG);

– a zero hour contract (Bieder 2015, 388; Böttcher 2020).

An ice cream parlour, swimming area or ski school are only open during a certain season. The operator may conclude a framework agreement with employees as a permanent contract of employment and limit the assignments to the season in question.[41] If an employer does not wish to conclude an employment contract of indefinite duration with immediate effect, they may also simply lay down the conditions for future contracts in a framework agreement. During the season, a fixed-term contract is then concluded under these conditions.

Short-term employment is also possible in the form of fixed-term contracts. Here, however, the case-law of the CJEU[42] and the BAG[43] on abuse of rights must be observed, especially if the job is permanent. Finally, it is also possible to establish on-call work in the employment contract (sec. 12 TzBfG). An unlimited employment contract involves the assignment of work according to the employer's needs.

[38] Different proposals in Bayreuther (2015, 18 ff.); Uffmann (2019, 360, 361).

[39] BAG 19.11.2019 AP TzBfG § 14 no. 184 with comment by Wietfeld; comment by Henssler and Krülls, (2020a).

[40] For Austria, see Löschnigg (2017, 4/023).

[41] BAG 19.11.2019 AP TzBfG § 14 Nr. 184.

[42] EuGH 26.01.2012 AP RL 99/70/EG no. 9 = NZA 2012, 135 – Kücük.

[43] BAG 8.07.2012 AP TzBfG § 14 no. 99 = NZA 2012, 1315.

All of the above-mentioned forms of employment create a different legal relationship than the one that exists with a pseudo-employee. Individuals engaged on the basis of these forms are employees, whereas the pseudo-employee is self-employed.

4.5. The home worker

While the law applying to home workers enjoyed only a shadowy existence for a long time, the discussion has been reinvigorated, especially following a recent BAG ruling.[44] According to this ruling, the law also covers qualified salaried employment based on the legal definition of a home worker in the Federal Act on work at home (HAG). Some labour law provisions are applicable to this category of work contractors, such as sec. 5, subsection 1, sentence 2, ArbGG, sec. 12 BUrlG and sec. 10 EFZG. A decisive role is played by remuneration security, according to sec. 17–22 of the Federal Act on work at home. It is true that collective agreements can be concluded, but in practice this does not happen. Instead, there is a remuneration regulation by the homework committee (sec. 19 HAG). However, this regulation cannot be generalised in view of the very different types of homework (Bayreuther 2015, 23 ff; opposite: Krause 2016, B 106; Däubler, Heuschmid 2016, § 1 TVG, para. 832).

4.6. Two-way and triangular relationships

For both the self-employed (Uffmann 2019, 360, 362) and employees, there are cases where someone works only with one other person, and others where the employee is in direct contact with the client (Dietrich, Patzina 2017, 122 ff.; Wank 2017b, 335 ff.). Depending on this, these situations create particular problems with demarcation (Bayreuther 2015, 59 f.; Kunz 2020, § 4 Solo-Selbständige, para. 87 ff.).

4.7. A Sector-specific definition of the employee?

Basically, a good legal definition must be able to cover the most diverse professions in the same way. In this respect, sec. 611 a, subsection 1, sentence 4 BGB refers to the "peculiarity of the respective activity", even if this is legally unsuccessful. In contrast, the BAG has in some judgements given the impression that there are different concepts of an employee depending on the sector, which differ from the general concept of employee. This approach is unacceptable (Preis 2021, § 611 a BGB, para. 63; Wank 2017b, 393). In the case of educational professions, for example, the BAG bases its judgements on criteria that cannot be justified teleologically (Preis 2021, § 611 a BGB, para. 88; Wank 2006, 5 ff; Wank 2017b, 373).

[44] BAG NZA 2016, 1453.

4.8. Competition between legal fields

In some cases, employee status is doubtful because the employee is simultaneously covered by another area of law. This is the case, for example, with persons whose legal relationship is simultaneously governed by labour and company law.

4.9. The platform economy

A workable legal definition should not only cover existing cases but also new groups of employees, in particular crowdwork.[45] The platform can act either as a mere mediator or as a contractual partner of the crowdworker (Fuhlrott, Oltmanns 2020, 958, 959; Uffmann 2019, 360, 362; Wank 2017b, 354 ff.). The employee status of the crowdworker is usually negated.[46] Discussion is also underway on the subject of whether crowdworkers who only work for one platform and derive their livelihood from it are pseudo-employees (Burazeri 2019, 289, 291; Däubler, Klebe 2015, 103; Schubert 2018, 200, 204; Husemann, Wietfeld 2015, 27, 44) or also home workers (Fitting 2020, § 5 BetrVG, para. 311). Special regulations in civil law are also considered (Klebe 2016, 277, 279; Wank 2017b, 357). Finally, protection can also be achieved under collective law (Bayreuther 2015, 66 ff.). Meanwhile, the BAG ruled that crowdworkers may be employees.[47] The Ministry of Labour and Social Affairs (BMAS) presented the paper "Faire Arbeit in der Plattformökonomie" with proposals for more protection for those working via online platforms on 27 November 2020.

5. LEGAL PROTECTION OF THE SELF-EMPLOYED

As explained above, a distinction must be made between protection with regard to the drafting of contracts, i.e. with regard to commercial and civil law, on the one hand, and protection similar to that under labour and social security law on the other. In this second respect, it is a matter of protecting the employee against occupational and adverse life events.[48]

[45] References in Bayreuther (2015, 16); international survey at Waas (2017).

[46] LAG München, 4.12.2019 NJW 2020: 1014 = NZA 2020: 316; Fuhlrott and Oltmanns (2020, 958); Schubert (2020, 248); Bayreuther (2020, 241); Bourazeri (2019, 741); Preis (2021, § 611 a BGB, para. 59); see also Däubler and Klebe (2015, 1032, 1035); Schubert (2018, 741, 744); as regards Uber, see Bayreuther (2015, 61 f.); as regards California, see information RdA (2019, 383).

[47] BAG, 28.07.2020 – 1 ABR 18/19, overruling LAG München of 4 December 2019.

[48] Compilation of possible ways of protection and as legal policy in Deinert (2015, 27 ff.).

5.1. Individual labour law (employment law)

5.1.1. The self-employed – general observations

In terms of individual labour law, occupational health and safety, as a special area of labour law, is of primary importance. This concerns health and safety at work. It is not surprising that some of the relevant provisions of labour law are also applicable to self-employed persons, in particular to pseudo-employees. Thus, with regard to sec. 618 BGB, it makes no difference whether an employee has an accident at home because of a defective staircase or a solo self-employed painter employed to provide services.

Labour protection law also includes working time law and holiday law. In this respect, employees are protected, but self-employed persons are not, even if they only work for one client. In such a situation, the relevant rights can only be granted to them under a civil law contract. In anti-discrimination law, too, pseudo-employee rights must be included (Wank 2009, 1049 ff.).

Another area concerns the so-called "sozialer Arbeitsschutz" (personal group-related social work protection), i.e. the protection of special groups of persons, such as maternity protection and, due to the uncertain legal situation, the protection of a single parent. In this respect, too, there is a lack of protection for the self-employed.

Of particular importance is the protection of self-employed persons with regard to remuneration (Bayreuther 2015, 28 ff.; Bayreuther 2020, 99, 100 ff.). Under German law, it is impossible to set a minimum wage in the same way as for employees (Bayreuther 2015, 35 ff.). In particular, the expenses would then also have to be taken into account (Bayreuther 2015, 37). At best, a claim to appropriate remuneration could be considered, cf. sec. 89 b, 90 a HGB, sec. 32 UrhG (Bayreuther 2015, 38 ff.), or fees tailored to the profession in question, such as for architects (Bayreuther 2015, 42 ff.). A clause that leaves it up to the client to decide whether to accept the service would also have to be eliminated from business transactions (Wank 2017b, 358; opposite Bayreuther 2015, 47).

The law of termination contains only notice periods for the self-employed (sec. 621 BGB, sec. 649 BGB), but no requirements as to content. Legal protection would only be conceivable for the solo self-employed (Bayreuther 2015, 46 ff.).

5.1.2. Pseudo-employees

Contrary to widespread arguments in Germany advocating for a narrow definition of an employee, the classification of an employee as a pseudo-employee does not mean a significantly higher level of protection (Bayreuther 2015, 25 ff.; Wank 1988, 235 ff., 243 ff.).

5.1.3. Home work

Even though the Federal Act on work at home has now been extended to cover office work, a permanent business relationship is required for a home work relationship (Bayreuther 2015, 20). Incidentally, the homework committee model cannot be generalised (Bayreuther 2015, 21 ff.).

5.2. Collective labour law

Protection of the self-employed can be achieved not only through individual labour law but also through collective labour law. Such protection is not foreseen by the works constitution law. Although the Works Constitution Act does not only cover employees of the enterprise, but also temporary workers who have an employment relationship with the employment agency (Linsenmaier, Kiel 2014, 135; Wank 2021, § 14, para. 2 ff.), it does not cover self-employed persons with the exception of home workers who work only for one enterprise (sec. 5, para. 1, sentence 2 BetrVG).

The situation is different in collective labour law, in the area of collective bargaining law. In essence, collective bargaining law is the law which grants power to employees who are not powerful enough as individuals, but together have the possibility of industrial action. According to the constitution, as well as case-law and literature, there is generally no comparable right for self-employed persons. However, the situation is different in the case of pseudo-employee rights because sec. 12 a TVG gives them the opportunity to form associations and conclude collective agreements.[49] This also leads to freedom of industrial action, which does not violate cartel law (Bayreuther 2015, 88 ff.; Bayreuther 2019, 4 ff.). In addition, other forms of collective agreements are also being considered for the self-employed (Bayreuther 2015, 72 ff., 77 ff.).

5.3. Social security law

In addition to protection under private law, Germany also offers protection under social security law. This covers certain adverse life events, namely: disease, the need for care, maternity, age and unemployment. Since labour law makes a sharp distinction between employees and self-employed persons and since social security law is fundamentally linked to employee status (see sec. 7, para. 1 SGB IV), coverage of these risks by social security law for self-employed persons would be ruled out. However, there are exceptions in German social security law (Deinert 2015, para. 131 ff.).

Only the groups listed in sec. 2, sentence 1 of the German Social Code Book VI (SGB VI), such as self-employed teachers, artists, etc., are subject

[49] CJEU 4.12.2014 C-413/13 FNV Kunsten NZA 2015: 55; Bayreuther (2015, 71 ff.); Wank (2019, § 12 a TVG, para. 46 ff., 122 ff.)

to compulsory pension insurance. The duty of provision of this benefit exists with regard to illness and healthcare, but only for farmers, artists and journalists (sec. 5, para 1, no. 3 and 4 of SGB V; sec. 20, para 1, sentence 2, no. 3 and 4 of SGB XI). Other self-employed can take out voluntary insurance (sec. 9 SGB V; sec. 26, para 1, sentence 1 SGB XI). Only farmers, etc. are insured against accidents at work and occupational diseases (sec. 2, para 1, no. 5 a, 6, 7, 9 SGB VII). Coverage under unemployment insurance is possible by application (sec. 28 a., para 1, sentence 1, no. 2 SGB III).

As far as the need for protection of pseudo-employee or solo self-employed persons is concerned, in reality completely different groups can be identified. Uffmann distinguishes between "precarious", "pragmatics" and "professionals" (Uffmann 2019, 360, 361). Professionals can earn twice as much as the standard wage, have sufficient financial reserves and adequate retirement security.

Since self-employed persons generally bear the full burden of social security contributions, they are often overburdened, especially in the start-up phase (Leonhardt 2020b, 207 f.). The COVID-19 epidemic shows that a social security system for the self-employed is necessary.

5.4. Areas of protection

With regard to the protection of economically dependent self-employed persons, the focus should be on pseudo-employees rather than on solo self-employed persons. Several areas of protection must be distinguished:

a) In individual labour law, the first area includes safe working conditions and anti-discrimination provisions, which are also to be extended to employees.

b) The second area can also include special issues related to pseudo-employees, such as: working hours, holiday, protection of special groups, protection of remuneration, protection against dismissal. Protection under labour law must be accompanied by protection under social security law. Access to the labour courts should also be open, see sec. 5 ArbGG. In collective labour law, pseudo-employees must have the opportunity to establish a counterweight to a powerful market counterparty.

c) In the third area, special regulations can be created for certain forms of activity.

5.5. Administrative and criminal law

Labour law is predominantly part of civil law. The self-employed individual is therefore dependent on law enforcement under civil law and civil procedural law. However, control is also partly incumbent on administrative authorities, e.g. through supervisory authorities for health and safety law and agency work ("Gewerbeaufsichtsämter"). Some regulations are reinforced by criminal law.

5.6. Considerations on reform

The German government has presented a White Paper with regard to planned reforms.[50] According to this paper, self-employed persons should be covered by statutory pension insurance.[51] The income situation should be improved by encouraging the conclusion of collective agreements (Kunz 2020, § 4 Solo-Selbständige, para. 7). There are corresponding passages in the coalition agreement of 2018.[52] Some of the plans were implemented by the "Act on the Reduction of Contributions to the Statutory Pension Insurance Scheme".[53] On 27 November 2020, the BMAS presented the paper "Faire Arbeitsbedingungen in der Plattformökonomie", proposing that platform workers should be included in the social security system and regulation providing a less complicated way of controlling their contracts. In the literature, comprehensive proposals for the protection of economically dependent self-employed persons have been presented (Bayreuther 2015; Deinert 2015).

In the social security system, *de lege ferenda*, the involvement of clients similar to that of the social security contribution for artists (sec. 23 ff. KSVG) is taken into consideration. In contrast, state subsidies, as in Austria, would be a better solution (Leonhardt 2020b, 207, 209 f.).

6. THE SCALE OF SHAM SELF-EMPLOYMENT

Given the discrepancy between the term and the actual situation, a distinction must be made between two cases, sham business and sham self-employment. The case of fictitious transactions concerns situations where the parties agree that an employment relationship exists, although in reality a self-employed activity is being carried out, usually due to advantages with respect to social security, taxes or bankruptcy.[54] In the case of bogus self-employment (or sham self-employment), on the other hand, the client is unilaterally interested in employing the other person as a self-employed person, while in reality there is an employment relationship. We will only address the latter case. The extent to which bogus self-employment exists depends on legal and economic conditions.

[50] Weißbuch Arbeiten 4.0. 2016.

[51] See also Waltermann (2010, 162, 167).

[52] Agreement on a coalition of 12.03.2018 between CDU/CSU/SPD; see Kunz (2020, § 4 Solo--Selbständige, para. 8)

[53] BGBl. I of 11.12.2018: 2387 ff.

[54] E.g. BAG 18.09.2014 – 6 AZR 145/13 DB 2015: 499; Benecke (2016, 270).

6.1. Legal background

In order to be able to determine the difference between employees who are clearly qualified as employees and other employees who are wrongly referred to as self-employed ("bogus self-employed") (Boemke 1998, 258 ff.; Hromadka 1997, 569 ff.; Wank 1992, 90 ff.), a factually correct and practicable definition of an employee is needed. This is lacking in Germany, Austria and most other countries (Wank 2019, 131). The existing definitions are often *meaningless*; cf. the definition of the European Court of Justice, which states that an employee is someone who works. The existing definitions are in need of *legislative improvement*, as the example of sec. 611 a BGB has shown (see above 3.2.).

Most of the definitions in legislation, case-law and doctrine have not succeeded in this respect because they do not take into account the difference between *characteristics, sub-characteristics* and *circumstantial evidence (indicators)* (Wank 2017b, 253 ff.), as well as by virtue of the fact that they do not provide *operational characteristics* in the form of indicators.[55] They do not mention or explain the *tertium comparationis*, i.e. the actual difference between employees and self-employed. The real characteristic is the impossibility of making independent entrepreneurial decisions. As long as this aspect is missing in the definition, the definition is arbitrary, since it does not grasp the real problem (see the proposal for a definition above 3.8.).

6.2. Economic background

Awarding benefits to self-employed persons rather than employees is usually more advantageous for entrepreneurs for several reasons, so entrepreneurs take advantage of this solution, even if they were considering hiring employees.[56]

6.3. Empirical social research

It is not easy to determine how many bogus self-employed people there are in Germany. There are legal reasons for this, as well as reasons based on empirical social research.

6.3.1. Legislature

The objective set for the legislature with regard to the Act amending the AÜG, namely to reduce the legal uncertainty that exists in the face of case-law that makes everything dependent on the circumstances of the individual case,[57]

[55] Transformation of legal criteria into operational criteria in Dietrich and Patzina (2017, 29 ff.).

[56] Regarding the motives of clients, Frantzioch (2008, 33 ff.); Kunz (2020, § 4 Solo-Selbständige, para. 5).

[57] BT-Drs. 18/9232: 1, 14, 15.

cannot be achieved by copying the guiding principles of this case-law literally. As has been shown (see 3. above), undefined legal terms are used without subordinate characteristics, and the relationship between the different characteristics is unclear.

Greater legal certainty can be achieved through sub-characteristics (e.g. integration = recourse to personnel of the contractual partner, recourse to material of the contractual partner, organisational integration, control), as well as through operational criteria which are used as indicators (e.g. own business premises, own customer base, etc.). Corresponding attempts to amend sec. 7 SGB IV on the basis of a commission proposal,[58] as well as the speaker's draft of sec. 611 a BGB,[59] have failed because the character of circumstantial evidence has been misjudged in case-law, literature and practice.[60] Nor is it sensible in the case of circumstantial evidence to work with a presumption (e.g. three out of five indicators), if no distinction is made between evidence based on factual constraints and selected indicators.

6.3.2. Empirical social research

In addition to the legal problems, there are problems of empirical social research. For example, the data collected are based on self-reporting, which is not always accurate and sometimes either consciously or unconsciously inaccurate.

Finally, the translation of legal criteria into empirical criteria is a problem. If the BAG refuses to provide a clear definition, a questionnaire, with a benevolent interpretation, must translate statements of jurisprudence into operational characteristics.

When working with undefined legal terms, the formulations on which a questionnaire is based vary according to the legal model. For example, in 2017, an empirical study distinguishing between a BAG model, a BAG-Plus model and an alternative model produced the following figures:[61]

With a figure of 1,107,471 main employees in the grey area between self-employed and employees (Dietrich, Patzina 2017, 84, 151):

– according to the BAG model, 510,896 self-employed, 235,000 bogus self-employed,

– according to the BAG-Plus model, 525,713 self-employed, 311,000 bogus self-employed,

– under the alternative model, 409,841 self-employed, 436,000 bogus self-employed.

The number of employees is correspondingly lower under the BAG model than under the alternative model.

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[58] Printed in Wank (2017b, 219).

[59] Printed in Wank (2017a, 140, 142).

[60] Operationalisation attempt in Fischels (2019a, 351 ff.).

[61] A comparison with the survey of 1996 in Dietrich and Patzina (2017, 153 ff.).

6.4. Clarification of facts, control and sanctions

As with all statistics on facts, everything depends on whether the facts are collected correctly, i.e. whether the rules of empirical social research are observed. This is the case in Germany. Two empirical studies commissioned by the Federal Ministry of Labour and Social Affairs have examined the question in detail and provided the appropriate answers (Dietrich 1996).[62]

A completely different question is whether cases of bogus self-employment are clarified in practice. This depends on whether employees with an unclear legal status file a complaint and whether an official inspection is carried out. It is rarely advisable to take legal action in Germany, as both the case-law and the new sec. 611 a BGB, which was created on the basis of the case-law, offer barely any legal certainty. However, at least in social security law, there is the possibility of a status determination procedure (under sec. 7a SGB IV).

It is the responsibility of tax authorities and social insurance institutions to verify whether the regulations are being observed with regard to employees. Supervision is typically carried out within the scope of a tax audit. However, given the staffing levels in German administration, the probability of a company being audited is low.

Reversing the inaccurate classification of an individual as a self-employed person leads to numerous problems.[63]

[62] See information NZA 1997: 590; Dietrich et al. (2017).

[63] BAG, 25 June 2020 – 8 AZR 145/19; Holthausen (2020, 92); Kunz (2020, § 4 Solo-Selbständige, para. 30 ff., 66 ff., 74 ff.).

PART II – SELF-EMPLOYMENT IN AUSTRIA

1. SCALE OF SELF-EMPLOYMENT

1.1. Data

The data for Austria concerning self-employment can be found in "Selbständige Erwerbstätigkeit, Modul der Arbeitskräfteerhebung 2017", ed. by Statistik Austria in 2018. The survey included all persons older than 15 years with a job. The survey included sociodemographic and labour market statistics (Wiedenhofer-Galik 2018, 31 f.).

In 2017, on average, 4.261 million persons were employed: 87.6% of them, i.e. 3.733 million, were employees, 10.9% (i.e. 465,000) were self-employed and 1.5% (62.300) were family workers. Among 10.1% self-employed, 6.3% had no employees, and 4.7% had employees. Most self-employed were men. In contrast to men, self-employed women tended to work alone (5.5%) and not with employees (2.6%). Self-employed persons started their current job later than employees, and worked longer hours. They were, on average, older than employees.

Predominantly, this professional activity takes place in the service sector (67.9%). One fifth work in agriculture and forestry. 13% of the self-employed work in the industry sector, especially those with employees. The main motive for becoming self-employed is to continue the family business (25.3%), especially in the agriculture sector (82.1%) (Wiedenhofer-Galik 2018, 21, 39 ff.). Other motives were to have more autonomy (22.9%) or to take advantage of a good opportunity (18.4%). Barriers to self-employment were mostly financial (53.2%) (Wiedenhofer-Galik 2018, 44 ff.)

1.2. Solo self-employed

In Austria, too, a distinction can be made between self-employed persons in general and solo self-employed persons (cf. Germany 4.3). If iPros (cf. Germany 1.4) bb) are also considered as a special group, one can fall back on corresponding data (Leighton, Brown 2013, 7, 73, 76, 78, 86, 88, 90).

1.3. Social security

Employees also enjoy protection under social security law in Austria. In sec. 2 of the General Social Security Act, an employee is defined as a person who, for remuneration, is employed in a legal relationship with personal and economic dependence. However, unlike in Germany, the distinction between employed and self-employed persons is not so important in Austria, because all self-employed persons are also subject to social security protection.

2. LEGAL SOURCES OF SELF-EMPLOYMENT REGULATIONS

2.1. Union law

For Union law, refer to the comments on Germany (cf. Part Germany 2.1.).

2.2. The constitution

Insofar as legislative competence in labour law is not expressly assigned to the Federation, it lies with the "Länder" (Marhold, Friedrich 2012, 3).

2.3. Ordinary law

2.3.1. Civil code

In ordinary law, the employment contract (for self-employed persons and employees) is regulated in civil law under section 1151, para. 1 of the Civil Code.

2.3.2. Social security law

Employees also enjoy protection under social security law in Austria. In section 2 of the General Social Security Act, an employee is defined as a person who, for remuneration, is employed in a legal relationship of personal and economic dependence. However, unlike in Germany, the distinction between employed and self-employed persons is not so important in Austria, because all self-employed persons are also subject to social security obligations. However, the self-employed are compulsorily insured with the Sozialversicherungsanstalt der Gewerblichen Wirtschaft (SVA), while employees are insured with the Gebietskrankenkasse (GKK; now the Austrian Health Insurance Fund). The respective GKK decides in which category an employed person is to be classified.

3. THE DEFINITION OF SELF-EMPLOYED

3.1. The constitution

The Austrian Constitution contains no specific provisions on the demarcation between employed and self-employed persons (Pelzmann 2011, 1 ff., para. 9).

3.2. Ordinary law

Austrian individual labour law is very similar to German law. This applies in particular to the concept of employee. Therefore, German case-law and

literature can always be consulted for further information. Critical voices on the characteristic "personally dependent" are unknown in Austria.

In ordinary law there is no legal definition of employee and, consequently, of a self-employed person. In Austria there is – as before sec. 611 a BGB came into force in Germany – only one legal definition of the person performing a contract of service, found in § 1151, para. 1 ABGB (Marhold, Friedrich 2012, 11). According to this definition, a person performing a contract of service is someone who offers services to another person for a certain period of time. Case-law and literature agree that this definition includes both self-employed and employees. This is based on the same systematic error as German law: the correct opposing concept to an employee is not (only) the self-employed offering a service through a contract of service, but every independent self-employed person who provides services for another person (cf. Part I Germany 3.2.1.).

3.2.1. Personal dependence

Personal dependence (as a generic term) is characteristic of the employee.[64] It is also referred to as a subordination relationship (Löschnigg 2017, 4/009; see also Preis 2020, § 611 a BGB, para. 18 referring to the CJEU; Wank 2017c, 3 ff.). Austrian courts refer to the concept of employee as a *typus* concept (cf. Part I Germany 3.2.7.). It is primarily concerned with binding instructions, related to working time (Marhold, Friedrich 2012, 84 ff.; Risak, Rebhahn 2017, 1, 4), place (Löschnigg, 2017, 4/004; Marhold, Friedrich 2012, 78 ff.) and work-related behaviour (Löschnigg, 2017, 4/004; Marhold, Friedrich 2012, 35; Tomandl 1971, 68). Austrian law also recognises an "employee not bound by instructions", who is nevertheless an employee because they are subject to the "silent authority of the employer" (Marhold, Friedrich 2012, 36) (cf. Part I Germany 3.2.3.).

According to sec. 1153 ABGB, the employee must perform their work in person, but a deviating agreement is permissible.[65] In addition to the obligation to follow instructions, the definition of the employee depends on integration, namely organisational integration. This also includes supervision by the employer (Risak, Rebhahn 2017, 1, 10). In addition to the above-mentioned characteristics, the courts also consider circumstantial evidence. This includes, for example, that the contractual partner must provide the work material. Periodic cash payments instead of payment for a work result are also typical for employees (Risak, Rebhahn 2017, 1, 11 ff.).

The fact that an entrepreneurial risk is borne is taken into account in particular when distinguishing between employees and contractors. The criterion of economic dependence is only used as an alternative (Löschnigg 2017, 4/006;

[64] Supreme Court, 29 September 1981, Ob 45/81, Arb 10.055; Löschnigg (2017, 4/004); Marhold and Friedrich (2012, 35).

[65] OGH 20.03.2015, 9 ObA 159/14 v, DRdA-infas 20145, 185; (Löschnigg 2017, 4/008).

Marhold, Friedrich 2017, 36). It is expressly mentioned in sec. 4, para. 1 BEinstG. In contrast to German case-law and literature, which largely ignore this criterion,[66] Austria emphasises that the employee does not act on their own behalf.[67]

The literature erroneously considers all criteria as mere circumstantial evidence (Marhold, Friedrich 2012, 35), whereby no distinction is made between characteristics which must be present and circumstantial evidence which may be present in individual cases. With regard to the characteristics, an overall weighing up is important (cf. Part I Germany 3.2.5.) (Löschnigg 2017, 4/012; Marhold, Friedrich 2012, 35; Tomandl 1971, 74 f.). The actual implementation is decisive (Löschnigg 2017, 4/010; Marhold, Friedrich 2012, 38).

The contract of employment must not only be differentiated from the contract of service (Löschnigg 2017, 4/015; Marhold, Friedrich 2012, 40 ff.), but also from the contract for work and services (Löschnigg 2017, 4/015; Marhold, Friedrich 2012, 39 f.). A distinction is also necessary in relation to cooperation under a partnership agreement (Löschnigg 2017, 4/038; Marhold, Friedrich 2012, 42 ff., 44 f.). *External managers of a limited company* (GmbH) are employees (Pelzmann 2011, 1 ff., para. 27).

3.2.2. Special areas of law

In addition, there are different concepts of employee for special areas of law, e.g. sec. 1, para. 2, no. 8 AZG and sec. 36, para. 2, no. 3 ArbVG (Löschnigg 2017, 4/054 ff.) have their own concept of employee (Löschnigg 2017, 4/081 ff.; Marhold, Friedrich 2012, 46; Risak, Rebhahn 2017, 1, 5). In sec. 4, para. 2 of the General Act on Social Insurance, the employee is defined as a person employed for remuneration who is personally and economically dependent. In practice, the term does not differ from the definition of "employee" used in labour law (Risak, Rebhahn 2017, 1, 4). The tax law definition of employee also corresponds to that of labour law (Risak, Rebhahn 2017, 1, 4).

3.2.3. Pseudo-employees

A large number of laws also expressly apply to pseudo-employees (cf. Part I Germany 4. a). The definition corresponds to the one used in German law: pseudo-employees are not personally or economically dependent (Löschnigg 2017, 4/147 ff.; Marhold, Friedrich 2012, 37, 53 f.; Wachter 1980, 29 ff., 103 ff.). They are considered to be in need of social protection (Wachter 1980, 75 ff.). According to sec. 51, para. 3, no. 2 ASGG, for example, pseudo-employees are treated equal to employees in the context of procedural law (Löschnigg 2017, 4/148; Pelzmann 2011, 1 ff., para. 24). Some other labour laws, concerning agency work, employee

[66] In contrast Wank (2017b, 262 ff., 289 ff.).

[67] OGH 2.10.1956, 4 Ob 108/56, SozM I A/e, 174; Löschnigg (2017, 4/013).

liability and anti-discrimination, are also applicable to pseudo-employees (Löschnigg 2017, 4/148; Risak, Rebhahn 2017, 1, 20). Economic dependence is understood first and foremost as activity on behalf of only one or a limited number of clients. The absence of a permanent establishment and the long duration of employment are also mentioned in case-law (Löschnigg 2017, 4/152; Wachter 1980, 40 f.). Social security law and tax assessment are of no significance (Wachter 1980, 47 ff., 173 ff.). Wachter argues strongly in favour of a *typus* (Wachter 1980, 109 ff.).

3.2.4. Home workers

Home workers are not employees (Löschnigg 2017, 4/154 ff.; Marhold, Friedrich 2012, 37 f.), but governed by the law on home work (Risak, Rebhan 2017, 1, 21). Furthermore, civil servants (Marhold, Friedrich 2012, 34; Risak, Rebhahn 2017, 1, 3), persons in family employment (Löschnigg 2017, 4/042; Marhold, Friedrich 2012, 45; Risak, Rebhahn 2017, 1, 3) and prisoners (Löschnigg 2017, 4/057; Marhold, Friedrich 2012, 34) are not employees.

3.2.5. Competition between various fields of law

There is competition between various fields of law, especially with regard to company law (Löschnigg 2017, 4/037; as regards members of the board 4/165 ff.; Marhold, Friedrich 2012, 42 f.).

3.3. The definition of self-employed in the literature

The literature on the concept of employee and thus implicitly on the self-employed is essentially in line with case-law. In the literature, too, personal dependence is regarded as decisive (E.g. Löschnigg 2017, 4/004). The literature also sees the employee as a *typus* (Risak, Rebhahn 2017, 1, 9).

Integration is regarded as a sub-term of binding instruction (Risak, Rebhahn 2017, 9 f.) or personal dependence (Löschnigg 2017, 4/004), part of which is control (Löschnigg 2017, 4/005; Risak, Rebhahn 2017, 1, 10 f.). The literature also regards the "silent authority of the employer" as sufficient (Löschnigg 2017, 4/004; Risak, Rebhahn 2017, 1, 10 f.). According to sec. 1153 of the Civil Code, the party must render the service in person, but this is not mandatory (Risak, Rebhahn 2017, 1, 11).

In addition to the characteristic "personally dependent", the literature also mentions circumstantial evidence (Risak, Rebhahn 2017, 1, 12 f.). In some cases, a lack of registration with the social security system and payment of income tax are incorrectly used as criteria, although these criteria only say something about the parties' assessment (restrictive: Löschnigg 2017, 4/011).

In summary, Austrian literature does not differentiate sufficiently between characteristics, sub-characteristics and circumstantial evidence, i.e. between binding instructions and integration as characteristics, instructions concerning

content, place and time of the activity and integration into the client's organisation with regard to planning, personnel and tools as sub-characteristics, or indications such as: Does the employee have only one client? Are they allowed to employ staff (e.g. Löschnigg 2017, 4/013)?

A separate approach is taken by Tomandl, which makes a distinction according to legal sphere (Tomandl 1971).

4. CATEGORIES OF SELF-EMPLOYED

Austrian law recognises the special category of the pseudo-employee (Wachter 1980; see 4 Part One a). In contrast, the category of solo self-employed does not exist legally here either (cf. Part I Germany 4.2.). New forms of contract, such as crowdwork, are not specifically regulated. Framework agreements which contain pre-agreed working conditions are possible.[68] As in Germany, the legal consequences of a pseudo-employee classification are limited.

5. LEGAL PROTECTION OF THE SELF-EMPLOYED

5.1. Individual labour law

A whole series of laws apply only to employees; in individual labour law these include, among others (Marhold, Friedrich 2012, 40 ff.), regulations on:

– continued payment of wages in case of illness according to sec. 8 AngG for employees and, in accordance with the EFZG, for wage earners (Marhold, Friedrich 2012, 209 ff.),
– protection against dismissal,
– leave in accordance with the Leave Act (Marhold, Friedrich 2012, 218 ff.),
– technical safety at work (Marhold, Friedrich 2012, 239 ff.),
– health and safety law for special groups (Marhold, Friedrich 2012, 243 ff.), for example, mothers (Marhold, Friedrich 2012, 245 ff., 391 ff., 417 ff.).

5.2. Collective labour law

In collective labour law, regulations on the right of association (Marhold, Friedrich 2012, 383 ff.) and the law on the creation of work councils (Marhold, Friedrich 2012, 513 ff.) should be mentioned. Chambers of commerce are a special feature of Austrian law (Marhold, Friedrich 2012, 409 ff.). However, not all of the possibilities offered under collective law apply to self-employed persons, including pseudo-employees.

[68] OGH 18.11.1975, 4 Ob 69/75, Arb 9422; Löschnigg (2017, 4/002, 4023).

5.3. Social security law

Protection of economically dependent self-employed persons is achieved by their full integration into the social security system (Leonhardt 2020a, 155 ff.). In particular, state subsidies for self-employed persons provide better protection than in Germany (Leonhardt 2020b, 207, 209 f.).

In Austria there are the so-called "neue Selbstständige" (new self-employed) in addition to tradesmen. These are solo self-employed persons, especially in the service sector, in artistic and teaching professions, as well as in the health and care sector. As a result, all self-employed persons are covered by compulsory insurance. Professionals are compulsorily insured under the pension insurance scheme (sec. 2, para 1, no. 1 of the GSVG). Tradespeople and new self-employed persons enjoy compulsory health insurance coverage (sec. 2, para 1, nos. 1 and 4 GSVG). Tradespeople are covered by accident insurance (sec. 8, para 1, no. 3 letter a ASVG). Self-employed persons receive not only compulsory unemployment insurance, but can take out voluntary insurance (sec. 3, para 2, 3 AlV). In addition, only in Austria is there so-called self-employment insurance under the "Betriebliche Mitarbeiter- und Selbstständigenvorsorgegesetz" (BMSVG).

6. THE SCALE OF SHAM SELF-EMPLOYMENT

As far as legal certainty is concerned, it is even less in Austria than in Germany, where sec. 611 a BGB at least provides some orientation. A lawsuit brought by an employee who believes they have been wrongly classified as self-employed is therefore fraught with great uncertainty.

In Austria, monitoring is carried out by the labour inspectorate, which is responsible for ensuring compliance with the provisions of labour, environmental and consumer law. In some federal states, it is also known as the "Amt für Arbeitsschutz" or "Staatliches Umweltamt". Supervision over technical occupational health and safety is the responsibility of the Labour Inspectorate, which inspects workplaces, work equipment and personal protective equipment.

ABBREVIATIONS

ABGB – Allgemeines Bürgerliches Gesetzbuch
AngG – Angestelltengesetz
AP – Arbeitsrechtliche Praxis
Arb – Sammlung von Entscheidungen der Gewerbegerichte und Einigungsämter
ArbGG – Arbeitsgerichtsgesetz
ArbVG – Arbeitsvertragsgesetz
ASGG – Arbeits- und Sozialversicherungsgesetz
ASVG – Allgemeines Sozialversicherungsgesetz

AuR – Arbeit und Recht
AÜG – Arbeitnehmerüberlassungsgesetz
AZG – Arbeitszeitgesetz
BAG – Bundesarbeitsgericht
BeckOGK – Beck online Großkommentar
BEinstG – Behinderteneinstellungsgesetz
BGB – Bürgerliches Gesetzbuch
BGBl. – Bundesgesetzblatt
BGH – Bundesgerichtshof
BMAS – Bundesministerium für Arbeit und Sozialordnung
BSG – Bundessozialgericht
BSGE – Entscheidungen des Bundessozialgerichts
BT-Drs. – Bundestags-Drucksache
BVerfG – Bundesverfassungsgericht
BVerfGE – Entscheidungen des Bundesverfassungsgerichts
CJEU – Court of Justice of the European Union
DB – Der Betrieb
EErgD – Epitheorissi Ergatikou Dikaiou
EFZG – Entgeltfortzahlungsgesetz
ErfK – Erfurter Kommentar zum Arbeitsrecht
EuZA – Europäische Zeitschrift für Arbeitsrecht
EuZW – Europäische Zeitschrift für Wirtschaftsrecht
GewO – Gewerbeordnung
GG – Grundgesetz
GKK – Gebietskrankenkasse
HAG – Heimarbeitsgesetz
HGB – Handelsgesetzbuch
HWK – Henssler, Willemsen, Kalb
LAG – Landesarbeitsgericht
MHdB – ArbR Münchener Handbuch zum Arbeitsrecht, 4. ed.
MüArbR – Münchener Handbuch zum Arbeitsrecht, 3. ed.
NJW – Neue Juristische Wochenschrift
NZA – Neue Zeitschrift für Arbeitsrecht
RdA – Recht der Arbeit
SGB – Sozialgesetzbuch
SozM – Sozialrechtliche Mitteilungen der Arbeiterkammer Wien
SR – Soziales Recht
SVA – Sozialversicherungsanstalt der Gewerblichen Wirtschaft
TFEU – Treaty on the Functioning of the EU
TVG – Tarifvertragsgesetz
TzBfG – Teilzeit- und Befristungsgesetz
ZESAR – Zeitschrift für europäisches Sozial- und Arbeitsrecht
ZfA – Zeitschrift für Arbeitsrecht
ZGR – Zeitschrift für Unternehmens- und Gesellschaftsrecht

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SELF-EMPLOYMENT IN SPANISH LAW

Abstract. The objective of the article is to analyse legal regulations concerning self-employed activity in force in Spain. Spain is the first EU Member State to have adopted a separate law (on 11 July 2007) to comprehensively and systemically regulate the legal status of the self-employed. The Spanish 2007 LETA act aimed to sort out the situation of the self-employed and grant them additional rights. A new category of economically dependent self-employed persons was introduced and accorded special protection. The author discusses the concept and typology of self-employment, including classic, economically dependent, and bogus self-employment. In her view, the Spanish solution of regulating self-employment in a single piece of legislation appears attractive, but the criteria introduced in the law to determine the status of economically dependent self-employed do not adequately fulfil their role in practice. Their restrictive nature, far-reaching casuistry, and the criterion of economic dependence of the self-employed, who must receive at least 75 per cent of their income from a single counterparty, which is difficult to verify objectively and relatively easy to circumvent, result in a negligible number of self-employed persons benefiting from the protective guarantees provided by LETA.

Keywords: self-employment, employment relationship, Spanish law, economic dependence, bogus self-employment.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA HISZPAŃSKIEGO

Streszczenie. Celem artykułu jest analiza regulacji prawnych dotyczących samozatrudnienia w Hiszpanii. Jest to pierwszy kraj w Unii Europejskiej, który zdecydował się na przyjęcie odrębnej ustawy z dnia 11 lipca 2007 r. normującej w sposób kompleksowy i systemowy sytuację prawną osób samozatrudnionych. Hiszpańska ustawa LETA z 2007 r. miała na celu uporządkowanie statusu samozatrudnionych i przyznanie im dodatkowych uprawnień. Stworzono nową kategorię osób samozatrudnionych ekonomicznie zależnych, której zagwarantowano szczególną ochronę. Autorka w rozdziale omawia pojęcie i typologię samozatrudnienia, w tym samozatrudnienie klasyczne, ekonomicznie zależne oraz fikcyjne. Jej zdaniem rozwiązania hiszpańskie polegające na uregulowaniu samozatrudnienia w jednym akcie prawnym wydają się atrakcyjne, jednak kryteria wprowadzone przez ustawodawcę warunkujące status samozatrudnionych ekonomicznie zależnych w praktyce nie spełniają odpowiednio swojej roli. Ich restrykcyjny charakter, daleko idąca kazuistyka oraz trudne do obiektywnej weryfikacji i stosunkowo łatwe do obejścia kryterium

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zależności ekonomicznej samozatrudnionych, którzy od jednego kontrahenta muszą osiągać co najmniej 75% swoich dochodów, skutkują tym, że liczba osób pracujących na własny rachunek korzystających z przewidzianych ustawą LETA gwarancji ochronnych jest znikoma.

Słowa kluczowe: samozatrudnienie, stosunek pracy, prawo hiszpańskie, zależność ekonomiczna, samozatrudnienie fikcyjne.

1. INTRODUCTORY REMARKS

In Spain, Act 20/2007 of 11 July – the Self-Employment Act (*Ley 20/2007, de 11 julio, del Estatuto del Trabajo Autónomo*,[1] hereafter: LETA) is in force, under which this form of gainful activity has obtained its own regulation beyond the private law framework scattered throughout the legal system (Apilluelo Martín 2018, 35–36; Martín-Artiles, Godino, Molina 2019, 117). The 2007 reform is considered "paradoxical" for at least two reasons. On the one hand, this is because it involves the regulation of self-employment under a specific employment status with characteristics often similar to those of subordinate work. On the other hand, this reform took place when self-employment was already showing a downward trend (Riesco Sanz 2016). According to the most recent data, the number of registered self-employed in Spain has been declining slightly over the last several years, from 3.1 million in 2009 to less than 3 million in 2019.[2]

A novelty and also a curiosity on a global scale was the introduction by the Spanish authorities of a new category of the so-called economically dependent self-employed (*trabajadores autónomos económicamente dependientes*, TRADE), which the bulk of legal scholars, including the author of this article, treat as a subcategory of the self-employed in its classic form.[3]

The purpose of the present article is to provide an overview of the Spanish regulation of self-employment and to answer the question of whether it can serve as a model for the Polish legislature (cf. Musiala 2010, 145 et seq.). The author will discuss the concept and typology of self-employment, including classic self-employment, economically dependent self-employment, and bogus self-employment. Then, she will focus on the common scheme covering the professional and collective rights of the self-employed. A separate section will be devoted to the occupational status of the economically dependent self-employed.

[1] *Boletín Oficial del Estado* of 12 July 2007, No. 166.

[2] INE, Spain, ine.es. Styczeń 2021. Statista 2021.

[3] For instance Beuker, Pichault and Naedenoen (2019, 144, 147, 169–171), Cherry and Aloisi (2017, 637 and 688), Samek Lodovici, Pichault and Semenza (2019, 208), as well as Davidov, Freedland and Kountouris (2015, 126–129) treat this category as a "hybrid" or an "intermediary category" between self-employed activity and subordinate work.

Self-employed in Spain 2009–2019 (in thousands)

2. THE CONCEPT AND TYPOLOGY OF SELF-EMPLOYMENT

2.1. Classic self-employment

2.1.1. Characteristics of self-employment

LETA shows the way in which a self-employed person should carry out a business or professional activity in order to fall within its scope. Article 1(1) LETA stipulates that the act applies to natural persons who regularly, personally, directly, on their own behalf, and outside the direction and control of another person carry out a business or professional activity for profit, regardless of whether they hire employees. The provision was supplemented by Act 27/2011 of 1 August on the update, adaptation, and modernization of the social security system (*Ley 27/2011, de 1 de agosto, sobre actualización, adecuación y modernización del*

sistema de Seguridad Social[4]), which enabled the implementation of full-time or part-time self-employment.[5]

2.1.2. Individuals excluded by operation of law

The scope of the act covers work performed regularly by relatives of self-employed persons who do not have the status of employees in accordance with the provisions of Article 1(3)(e) of Royal Legislative Decree 1/1995 of 24 March establishing the consolidated text of the Workers Act (*el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por Real Decreto Legislativo 1/1995, de 24 de marzo*,[6] hereafter: ET) (Article 1(1)(2) LETA).

In order to determine the personal scope of the act, attention should also be drawn to the sixth final provision of the Urgent Self-Employment Reforms Act 6/2017 of 24 October (*Ley 6/2017, de 24 de octubre, de Reformas Urgentes del Trabajo Autónomo*[7]) concerning the creation of a legal framework for the disabled children of the self-employed. This is because it amended the existing wording of the tenth additional provision of LETA relating to the social security system for family members of the self-employed worker. According to its new wording, self-employed persons may engage as employees children under the age of thirty, even if they live with them. In this case, unemployment insurance is excluded from the protective provisions granted to employed family members. The provision treats the children of self-employed persons who have reached the age of thirty but whose disability makes it difficult for them to work in the same way. Under Article 1(2) LETA, the act further applies to:

– partners in industrial general partnerships and limited partnerships (*los socios industriales de sociedades regulares colectivas y de sociedades comanditarias*);

– co-owners of property communities and partners of irregular civil partnerships[8] (*sociedades civiles irregulares*), unless their activity is limited to the ordinary administration of common property;

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[4] *Boletín Oficial del Estado* of 2 August 2011, No. 184.

[5] It is worth mentioning that in Spain, the proportion of skilled self-employed workers is slightly lower than in the case of persons working under an employment relationship (Carrasco, Ejrnæs 2012, 7).

[6] *Boletín Oficial del Estado* of 29 March 1995, No. 75 (repealed). The law currently in force is Royal Legislative Decree 2/2015 of 23 October establishing the consolidated text of the Workers Act (*Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*, hereafter: ET), *Boletín Oficial del Estado* of 24 October 2015, No. 255.

[7] *Boletín Oficial del Estado* of 25 October 2017, No. 257. More about the reforms introduced by the act in: De la Torre (2018, 118–119); Gómez Muñoz (2019, 47–48).

[8] These are companies that have been created as either property communities or civil partnerships, but have not met all the formal requirements and have not been registered in the relevant commercial register.

– persons who occupy managerial and executive positions entailing the functions of advisor or administrator, or who provide other services to a commercial company (*sociedad mercantil capitalista*) in a profitable manner, on a regular, personal, and direct basis, if they exercise actual and direct or indirect control over it;

– economically dependent self-employed persons;

– any other person who meets the requirements set out in Article 1(1) LETA.

In addition, the law explicitly introduces other categories of persons to whom it applies. Firstly, the eleventh additional provision of LETA covers self-employed persons in the transport sector who are excluded from the scope of the ordinary labour legislation under Article 1(3)(g) ET. Secondly, sales representatives who are not subject to the special employment relationship set out in Royal Decree 1438/1985 of 1 August, which regulates the special nature of the employment relationship of persons engaged in commercial operations on behalf of one or more traders without their bearing the risks (*Real Decreto 1438/1985, de 1 de agosto, por el que se regula la relación laboral de carácter especial de las personas que intervengan en operaciones mercantiles por cuenta de uno o más empresarios, sin asumir el riesgo y ventura de aquéllas*[9]), and are subject to the Agency Contract Act (*Ley 12/1992, de 27 de mayo, sobre Contrato de Agencia*[10]) are likewise considered self-employed. Thirdly, self-employed insurance agents are treated in the same way and are subject to the Insurance and Reinsurance Mediation Act 26/2006 of 17 July (*Ley 26/2006, de 17 julio, de Mediación de seguros y reaseguros*[11]). Under Royal Decree 197/2009 of 23 February developing LETA on the subject of the economically dependent self-employed person's contract and its registration and creating a state register of professional associations of the self-employed (*Real Decreto 197/2009, de 23 de febrero, por el que se desarrolla el Estatuto del Trabajo Autónomo en materia de contrato del trabajador autónomo económicamente dependiente y su registro y se crea el Registro Estatal de asociaciones profesionales de trabajadores autónomos*,[12] hereafter: RDTRADE), the legal regime established for economically dependent self-employed persons can be applied – with some modifications – to insurance agents (cf. Pérez Agulla 2016, 30–31).

2.1.3. Individuals excluded by operation of law

The above remarks should be supplemented by a list of individuals excluded from the scope of LETA. Under Spanish law, this group of individuals providing services that do not meet the conditions of Article 1(1) LETA comprises, in particular:

[9] *Boletín Oficial del Estado* of 15 August 1985, No. 195.

[10] *Boletín Oficial del Estado* of 29 May 1992, No. 129.

[11] *Boletín Oficial del Estado* of 18 July 2006, No. 170.

[12] *Boletín Oficial del Estado* of 4 March 2009, No. 54.

– employees to whom Article 1(1) ET applies;
– persons whose activities are limited exclusively to the exercise of functions as advisers or members of the administrative bodies of undertakings which take the legal form of companies, in accordance with the provisions of Article 1(3)(c) ET;
– persons in special employment relationships as referred to in Article 2 ET. These are any types of the employment relationship expressly defined by law as special, e.g.: employment relationships of senior management; domestic help; prison inmates; professional athletes; artists at public shows; people involved in commercial operations on behalf of one or more entrepreneurs without bearing the risk; workers with disabilities who provide work in assistance centres; lawyers providing services in law firms (Article 2 LETA; Apilluelo Martín 2018, 59–61; Pérez Agulla 2016, 35).

2.2. Economically dependent self-employment

2.2.1. The concept of economically dependent self-employment

The personal scope of LETA includes economically dependent self-employed persons, who, as indicated, are a subcategory of the self-employed in the classic form. Due to the special regulation, this group requires a separate discussion. According to the legal definition, economically dependent self-employed persons are those who carry out gainful economic or professional activities on a regular basis, personally, directly, and predominantly for the benefit of a natural or legal person, known as the client, on whom they are economically dependent in that they receive at least 75 per cent of their income from their work, business, or professional activities from the client (Article 11(1) LETA) (see also Célérier, Riesco-Sanz, Rolle 2017, 403; Sorge 2010, 252).

2.2.2. Characteristics of economically dependent self-employment

The above definition can be specified by referring to Article 2(1) RDTRADE. Pursuant to this provision, for the purpose of identifying an economically dependent self-employed person, the income received from the client by a self-employed person is understood to be the full income in cash or in kind derived from the self-employed person's gainful economic or professional activities. The total income received in kind will be valued at its normal market value.

For the calculation of 75 per cent of income, only the total income received by the self-employed person from business or professional activities as a result of self-employed activity carried out for all clients, including the one that is taken as a reference for the purpose of determining economically dependent self-employed status, as well as income that they may have received as an employee under an employment contract with other clients or employers or with their client is taken into account. These calculations do not cover income from capital returns or

capital gains received by self-employed persons from the management of personal assets, or income from transmission assets attributable to economic activities (paragraph 2 of Article 2(1) RDTRADE). It should be pointed out that legal scholars criticize the lack of regulation regarding the frequency of the calculation (e.g. monthly, quarterly, annually) (Pérez Agulla 2016, 37).

Moreover, it is emphasized in subject literature that if no contract has been signed to which the economically dependent self-employed person is a party, the burden of proving economic dependence lies with the person who wishes to be classified as such. It is pointed out that the proof here will be at least a certificate of the income on this account declared to the Treasury. In this way, it can be verified whether the legal requirement of economic dependence has been fulfilled in a given case. On the other hand, the person who denies the veracity of the legally declared data must prove its falsity or the existence of other income. In addition, the court may make its own assessment of the existence of other income, e.g. by taking into account the number of working hours specified in the contract, which in practice excludes the possibility of other gainful activity on one's own account or for another person (Pérez Rey 2016, 18).

Unfortunately, the situation is complicated by the fact that the Spanish legislature has established – in addition to the key condition of 75 per cent – other rather casuistic conditions that must be met cumulatively in order for a person to qualify as economically dependent self-employed (Article 11(2) LETA). Firstly, one may not be responsible for hired employees or subcontract part or all of one's activities to third parties, whether in relation to activities provided to a client on whom one is economically dependent or regarding services to other clients. This prohibition does not apply in cases where the law allows for the employment of a single employee, such as where there are risks during pregnancy and risks while breastfeeding a child under nine months of age. In such cases, however, the economically dependent self-employed person has the status of an entrepreneur under the terms of Article 1(1) ET. Secondly, one cannot carry out the activity in the same way that services are provided to the client by persons employed by the client under any form of employment. Thirdly, one must have one's own production infrastructure and materials necessary to carry out the activity, independent of the client, if they are economically relevant in the said activity. Fourthly, one must carry out one's activity according to one's own organizational criteria, without prejudice to the technical instructions received from the client. Fifthly, it is also crucial for this person to receive consideration depending on the outcome of their activity, in accordance with the contract with the client and after the latter has assumed the risk.

2.2.3. Individuals excluded from the definition of economically dependent self-employment

However, owners of commercial and industrial establishments or premises and offices as well as offices open to the public, as well as professionals who exercise their profession jointly with others in a corporate system or in any other legal form permitted by law are not considered to be economically dependent self-employed (Article 11(3) LETA).

2.3. Bogus self-employment

Bogus self-employment (*falso autónomo*) that conceals an employment relationship – from the point of view of Article 6(4) of the Spanish Civil Code (*Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil*[13]) – is considered an abuse of rights. Under this provision, acts carried out in accordance with the content of a legal rule which aim at a result prohibited by or contrary to the legal system are considered to be an abuse of rights and do not prevent the proper application of the rule sought to be avoided. Bogus self-employment has momentous consequences for the dishonest employer. Indeed, it can be qualified as a serious breach of the law under Article 7(2) of Royal Legislative Decree 5/2000 of 4 August approving the consolidated text of the Social Order Infractions and Sanctions Act (*Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social*[14]). According to this rule, a serious breach of the law is, among other things, a breach of the provisions on contractual terms, fixed-term contracts, and temporary contracts by using them to circumvent the law (see also Pérez Agulla 2016, 43). The Spanish labour inspectorate has its own methodology for carrying out inspection visits to detect bogus self-employment (De la Torre 2020, 250).

The situation of the bogus self-employed has sparked a debate in Spain on bringing them under the protective umbrella of labour law. However, the restrictive application of Article 1 ET determines that these persons do not need the intervention of the legislature to do so, as they are already genuine employees by virtue of the nature of the work they provide. For this reason, as Pérez Agulla points out, it is not possible to speak of insufficient labour or social security law regulation concerning this group, as the protection provided by these rules is fully applicable to the bogus self-employed (2016, 43).

[13] *Gaceta de Madrid* of 25 July 1889, No. 206.

[14] *Boletín Oficial del Estado* of 8 August 2000, No. 189.

3. OCCUPATIONAL RIGHTS AND COLLECTIVE RIGHTS OF THE SELF-EMPLOYED (COMMON SCHEME)

3.1. Sources of regulation of the rights of the self-employed

A "common scheme" is provided for all self-employed persons, including the economically dependent self-employed. Under Article 3(1) LETA, the occupational scheme of self-employed workers is regulated by:

– the provisions of LETA that do not conflict with the rules applicable to self-employment as well as with other supplementary provisions in force;

– common provisions on civil, commercial, or administrative contracts governing the legal relations of self-employed persons;

– agreements concluded individually on a contractual basis between the self-employed person and the client for whom the self-employed person carries out their professional activity. It is worth adding at this point that clauses laid down in an individual contract contrary to the provisions of the law are invalid;

– local and professional customs.

Importantly, the Spanish law in principle excludes self-employment from labour legislation. Under Article 3(3) LETA, by virtue of the first final provision of the ET, self-employment is not subject to labour legislation, except for those matters that are expressly provided for by law (see also Palomeque López 2004, 63).

3.2. Professional rights of the self-employed

The provisions of LETA refer to the professional rights (*derechos profesionales*) of the self-employed (Article 4). Firstly, they guarantee them the privilege of exercising the fundamental rights and public freedoms recognized in the Spanish Constitution and in international treaties and agreements ratified by Spain (Article 4(1)). Among the "fundamental individual rights" (*derechos básicos individuales*) of the self-employed, the provision points to: the right to work and the right to freely choose a profession or craft; the freedom of economic initiative and the right to free competition; and the right to intellectual property over one's works or other protected objects.

Secondly, Article 4(3) LETA lists the individual rights of self-employed persons that they enjoy "in the exercise of their professional activity" (*en el ejercicio de su actividad profesional*). These rights are:

– the right to equal treatment and non-discrimination, including on the grounds of disability;

– the right to respect for privacy;

– the right to adequate protection from sexual harassment and harassment on grounds of sex or any other personal or social grounds;

– the right to vocational training and retraining;

– the right to physical integrity and adequate protection of safety and health at work;

– the right to receive agreed consideration for the professional performance of their activities in a timely manner;

– the right to reconcile professional activities with personal and family life, including the right to suspend activities in the event of: birth of a child, joint custody of a child, risks during pregnancy, risks during breastfeeding and adoption, and care for adoption and foster care;

– the right to sufficient social assistance and benefits in the case of need in accordance with social security legislation, including the right to protection in the event of maternity (in the situations indicated above);

– the right to the individual exercise of activities arising from their professional activity;

– the right to effective judicial protection of their professional rights as well as access to out-of-court dispute resolution;

– any other rights arising from concluded contracts.

3.3. Professional duties of the self-employed

Article 5 LETA lists the fundamental professional duties (*deberes profesionales básicos*) of self-employed persons. They include duties:

– to comply with the obligations arising from concluded contracts, in accordance with their wording and with their effects, which by their nature are in accordance with the principle of good faith, custom, and the law;

– to comply with the health and safety obligations imposed by law or concluded contracts and to comply with the common standards arising from the place where the services are provided;

– to join, report on entries and de-registrations, and pay contributions to the social security system under the terms of the relevant legislation;

– to comply with fiscal and budgetary obligations under the applicable legislation;

– to comply with any other obligations arising from applicable legislation;

– to comply with the ethical standards applicable to the profession.

3.4. Contract binding the self-employed to the client

Article 7 LETA concerns the form and duration of the contract. Pursuant to this provision, contracts entered into by self-employed persons with clients for the purpose of carrying out professional activities should be in written or oral form. Either party may at any time request the other to enter into a written contract (Article 7(1)). These are civil law contracts and may be entered into for the performance of a work or a series of works as well as for the provision of one or more services, for a period of time to be determined by the parties (Article 7(2)).

3.5. Collective rights of the self-employed

3.5.1. Fundamental collective rights

Article 19 LETA concerns the fundamental collective rights (*derechos colectivos básicos*) granted to self-employed persons, ranked from the perspective of individual rights (interests) (section 1) and collective rights (interests) (section 2). The former category includes:

– the right to associate in a trade union or professional association of one's choice under the conditions set out in the relevant legislation;

– the right to associate and form, without prior authorization, specific professional associations of self-employed persons (*asociaciones profesionales específicas de trabajadores autónomos*);

– the right to take collective action to defend one's professional interests.

This means that the self-employed enjoy the fundamental right to freedom of association, but not the right to form their own trade union to defend their rights (see Pereiro Cabeza 2008, 96).

By contrast, Article 19(2) LETA grants collective rights to associations of self-employed persons. These rights are:

– the right to set up federations, confederations, or trade unions, having first fulfilled the requirements for the formation of an association, with the express consent of their competent bodies. They may also undertake cooperation with trade union organizations and business associations;

– the right to conclude professional interest agreements for economically dependent self-employed persons associated under the conditions set out in Article 13 LETA;

– the right to benefit from the defence and collective protection of the professional interests of the self-employed;

– the right to participate in non-judicial systems for the settlement of collective disputes of the self-employed, if provided for in professional interest agreements.

The rights set out in Article 19(2) LETA have been granted also to trade unions in relation to affiliated self-employed persons (section 4). An example of confederation action is the creation by the Spanish Trade Union Confederation of Workers' Commissions (*Confederación Sindical de Comisiones Obreras*, CC.OO) in Extremadura, in collaboration with the Spanish Labour Inspectorate, of an "email box" for employees and economically dependent self-employed persons to report abuse (Williams, Lapeyre 2017, 38).

3.5.2. Freedom of association in an industrial union

The activities of professional associations of the self-employed are regulated by Organic Act No. 1/2002 of 22 March regulating the right of association and its implementing regulations (*Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación*[15]) and the special provisions of LETA (section 1).[16] The task of professional associations is to defend the professional interests of the self-employed. Furthermore, they have complementary functions, including taking legal action to achieve the objective. Under no circumstances may they make profit. They enjoy independence from the public administration as well as from any other public or private entity (section 2).

Professional associations of self-employed persons must register and file their statutes with a special public office register established for this purpose with the Ministry of Employment and Social Security or with the relevant autonomous community in which the association mainly carries out its activities. Such registration is detailed and differs from the registration of trade unions, companies, or other organizations that may be subject to registration by this public office (section 3).

Cross-sectoral associations, confederations, unions, and federations of self-employed persons that are representative and more widely disseminated, at both national and regional level, under the terms of Article 21 LETA,[17] will be registered as public interest entities in accordance with the provisions of Articles 32–36 of Organic Law 1/2002 (section 4). Such professional associations may only be suspended or dissolved by a final decision of a judicial authority issued for a serious violation of the law (section 5) (for more on collective representation and social dialogue, see Martín-Artiles, Godino and Molina 2019, 120–121). As indicated above, all of the rights discussed in this article involve only the self-employed person exercising their freedom of association. However, the establishment of professional associations is not equivalent to the ability to form own trade unions.

The lack of a business partner led the Spanish Constitutional Court to deny the self-employed the right to strike (recognized in Article 28(2) of the Spanish Constitution) (judgment 11/1981 of 8 April; Moreno Vida 2017, 646). Spain still has no legislation extending the right to strike to the "classic" self-employed. However, this does not mean that economically dependent self-employed workers have no right to strike. Moreover, only the economically dependent self-employed have been granted the right to collective bargaining (see section 4.2. Professional interest agreements below).[18]

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[15] *Boletín Oficial del Estado* of 26 March 2002, No. 73.

[16] These acts are referred to by Article 20 LETA.

[17] Article 21 LETA regulates in detail the rules for determining the representativeness of associations of self-employed persons.

[18] For more on the collective labour rights of both the "classic" self-employed and the economically dependent self-employed under the Spanish Self-Employment Act, see Tyc (2021, 135–142).

3.5.3. The Self-Employment Council

Article 22 LETA refers to the Self-Employment Council (*Consejo del Trabajo Autónomo*), which was established in accordance with the stipulations of Article 42 of Organic Law 1/2002 as the government's consultative body on socio-economic and professional matters concerning the self-employed (section 1). Moreover, the aforementioned provision regulates the composition and open-ended list of the Council's functions, which include, among others, design, opinion, and reporting functions (more: Alzaga Ruiz, Lasaosa Irigoyen 2018, 363–368).

4. THE OCCUPATIONAL STATUS OF THE ECONOMICALLY DEPENDENT SELF-EMPLOYED

4.1. Conclusion of a contract binding the economically dependent self-employed to the main client

The contract for the performance of professional activity (*contrato para la realización de la actividad profesional*) between the economically dependent self-employed person and their client (referred to in subject literature as a special employment contract, Célérier, Riesco-Sanz, Rolle 2017, 404) is concluded in writing and registered with the relevant public office, the registration not being public (Article 12(1) LETA). The provision requires the economically dependent self-employed person to clearly indicate in the contract their status of financial dependence on the client as well as any changes that occur in this respect. It is permissible to maintain dependency status in relation to one client only (section 2) (Riesco Sanz, 2016).

LETA regulates the specific situation in which a self-employed person is bound by contracts with several clients, but at some point begins to meet the conditions required for economically dependent self-employment. The provision of Article 12(3) LETA specifies that if a self-employed person who has entered into a contract for the performance of professional activities or services with several clients meets the conditions set out in Article 11 LETA, the contract signed between the parties must be fully respected until it is terminated, unless the parties agree to modify it in order to adapt it to the new conditions that result from economically dependent self-employment.

In addition, the Spanish legislature has introduced a rebuttable presumption of a contract for an indefinite period of time if the contract is not in writing or its duration is not specified (section 4).

The regulations stipulate the invalidity of any clauses of an individual contract of an economically dependent self-employed person who is a member of a trade union or an association of self-employed persons, if those clauses conflict with

the provisions of a professional interest agreement (discussed below) signed by that union or association, which is applicable to that worker because they have agreed to it.

4.2. Professional interest agreements

In addition to the above-mentioned sources in Article 3(1) and (3) LETA, the professional status of economically dependent self-employed workers is regulated also through professional interest agreements (*los acuerdos de interés profesional*) (Article 3(2) LETA). They are a form of collective agreements created specifically for this category of working persons (Pereiro Cabeza 2008, 94). Such agreements are concluded between associations or unions representing economically dependent self-employed workers and the companies for which the activity is carried out. They may determine the manner, time, and place of carrying out the activity, as well as other general terms and conditions. This means that the narrowly defined material scope of the agreements in question does not coincide with the material scope of collective agreements. The latter are namely not limited to the regulation of working conditions only.

The law on self-employment stipulates that professional interest agreements should in any case take into account the restrictions and conditions set out in antitrust legislation (Article 13(1) LETA). Professional interest agreements are made in writing (section 2) and clauses contrary to the law are void (section 3).

The rule that professional interest agreements are concluded on the basis of the Civil Code proves problematic. However, as rightly pointed out by J.M. Gómez Muñoz (2017, 140), the Spanish Civil Code does not regulate any procedure for the conclusion of the agreements in question. Such ambiguities are in contrast with the rules on representativeness and legitimacy to negotiate collective agreements, which are partly applicable to professional interest agreements. The author emphasizes that we are dealing here with a hybrid negotiation procedure characterized by a convergence of civil and labour law, including trade union law.

Another problem is the effectiveness of professional interest agreements, which is limited to the signatory parties and, where applicable, to members of self-employed persons' associations or signatory trade unions, subject to their express consent (section 4). Professional interest agreements are therefore not normative; they are no sources of law. This means that they are not binding on non-signatory parties, unlike collective bargaining agreements, which are binding on all companies and workers covered by their scope (for more, see Pereiro Cabeza 2008, 94–95; Apilluelo Martín, Martínez Barroso, Sempere Navarro, Barrios Baudor 2018, 96–98).

4.3. The right to rest of the economically dependent self-employed

Under LETA, the economically dependent self-employed have gained the right to interrupt their activity for 18 working days per year, although the contract or professional interest agreements linking them with the client may provide for more favourable rules for them (Article 14(1)). In addition, the individual contract or professional interest agreement determines the weekly rest and the procedure corresponding to the granting of leave, as well as the maximum daily working time and its weekly distribution (section 2).

The performance of activities within the scope of the business for longer than the time agreed in the contract is voluntary, but the economically dependent self-employed person may not exceed the maximum working time agreed in the professional interest agreement. In the absence of a professional interest agreement, however, the extension of working time may not exceed 30 per cent of the individually agreed basic working time (section 3).

When determining the working time schedule of an economically dependent self-employed person, the aim is to ensure that they are able to reconcile personal, family, and professional life (section 4). Significantly, the Spanish provisions grant an economically dependent self-employed person who has fallen victim to gender-based violence the right to adjust their working time schedule in order to ensure the effectiveness of their protection or right to comprehensive social assistance (section 5).

4.4. Termination of a contract binding the economically dependent self-employed to the main client

Section 15(1) LETA protects the economically dependent self-employed person from arbitrary and unjustified termination of the contract by the main client. Indeed, the provision requires that a valid reason justifying the unilateral decision to terminate the contract linking the parties exist. However, the authors of the law chose to include an open list of circumstances in this provision, as clearly evidenced by Article 15(1)(h), which admits "any other lawful reason". The said list includes:

– agreement of the parties;

– reasons duly stated in the contract, unless they clearly constitute an abuse of rights;

– death, retirement, or disability incompatible with professional activity, in accordance with the relevant social security legislation;

– withdrawal from the contract by the economically dependent self-employed person with prior notice, in accordance with the applicable custom;

– will of the economically dependent self-employed person based on a serious breach of contract by the counterparty;

– will of the client based on a serious breach of contract by the counterparty, with prior notice in accordance with applicable custom;

– decision of the economically dependent self-employed person, who is forced to terminate the contract as a result of gender-based violence.

Where the contract is terminated at the will of one party due to a breach of contract by the counterparty, the terminating party is entitled to receive appropriate compensation (Article 15(2) LETA). This compensation is also due to the economically dependent self-employed person if the contract is terminated at the will of the client without due cause. If, on the other hand, the contract is terminated as a result of withdrawal by the economically dependent self-employed person with prior notice, the client may receive compensation if the withdrawal causes substantial damage that paralyses or interferes with the normal running of their business (section 3). Where the economically dependent self-employed person is the party entitled to compensation, the amount of compensation results from the individual contract or professional interest agreement. On the other hand, where the amount of compensation is not specified in the contract, it is determined taking the following into account: the remaining duration of the contract, the severity of the breach by the client, the investments and expenses anticipated by the economically dependent self-employed person in connection with the performance of the contracted professional activity, and the notice period given by the client at the date of termination of the contract (section 4).

Importantly, the courts competent to hear disputes arising from a contract between an economically dependent self-employed person and their client are the labour courts (Article 17 LETA). However, the bringing of an action insofar as it relates to the occupational status of the economically dependent self-employed person should be preceded by an attempt at conciliation or mediation before the relevant body appointed to fulfil this role. In addition, under the aforementioned professional interest agreement (Article 13 LETA), special bodies competent to settle disputes between the economically dependent self-employed worker and their client may be established. Out-of-court dispute resolution procedures in Spain are based on the principles of speed, efficiency, and gratuity (Musiala 2010, 153).

4.5. Legitimate interruptions in the professional activity of the economically dependent self-employed

Article 16(1) LETA introduces a list of due reasons for the discontinuation of activity by an economically dependent self-employed person. These reasons are:

– agreement of the parties;

– need to fulfil urgent and unforeseeable family obligations;

– serious and imminent threat to the life or health of the self-employed person;

– temporary disability, birth, adoption, guardianship for adoption, and foster care;

– risks during pregnancy and risks during breastfeeding of a child under 9 months;

– a situation of gender-based violence in order to ensure the effectiveness of the protection of the economically dependent self-employed person or their right to comprehensive social assistance;

– force majeure.

A contract or professional interest agreement may establish other legitimate reasons for the interruption of professional activity than those listed above (section 2).

5. CONCLUSION

The Spanish LETA act of 2007 aimed to sort out the situation of the self-employed and grant them special rights. A new category of economically dependent self-employed workers was created to be considered as a subcategory of the classic self-employed. On the one hand, these persons have been granted additional rights and, on the other hand, they fall under the so-called "common scheme". Indeed, all self-employed persons have been granted certain professional rights and individual rights "in the exercise of their professional activity". Moreover, self-employed persons benefit from basic collective rights ranked from the perspective of individual interests and collective interests. However, a closer analysis of Spanish legislation and case law makes it possible to conclude that, although the self-employed enjoy the right to freedom of association, they no longer have the right to form their own trade unions to defend their rights. They can only associate in professional associations. Furthermore, the classic self-employed do not enjoy the right to strike, which in turn is not excluded in the case of the economically dependent self-employed. It should be added that only this latter group of working persons has been granted the right to collective bargaining. They can conclude so-called professional interest agreements, which, however, are not binding on the non-signatory parties, unlike collective agreements, which are binding on all companies and workers covered by them. As indicated, the material scope of professional interest agreements is narrowly defined and thus does not coincide with the material scope of collective agreements.

The Spanish solution of regulating self-employment in a single piece of legislation appears attractive, but the criteria introduced in the law to determine the status of economically dependent self-employed do not adequately fulfil their role in practice. Their restrictive nature, far-reaching casuistry, and the criterion of economic dependence of the self-employed, who must receive at least 75 per cent of their income from a single counterparty, which is difficult to verify objectively and relatively easy to circumvent (through a fictitious multiplication of contractors),

in a negligible number of self-employed persons benefiting from the protective guarantees provided by LETA. In fact, the data shows that of all those who actually remain economically dependent (over 1,200,000), only a small percentage (around 10,000) have the *TRADE* status. This means that the economically dependent self-employed represent less than 0.33 per cent of all the self-employed and less than 0.05 per cent of those in employment throughout Spain (Todolí-Signes 2019, 258 and 266). These figures therefore clearly show the marginal importance of the legal regulation of the subcategory of self-employed in question.

Nevertheless, I believe that the Spanish idea to introduce a separate regulation covering the self-employed should be assessed positively. Such a comprehensive approach to the problem would allow the Polish legislature to cope with the current regulatory chaos, which consists, among others, of the dispersion of legal rules (in particular those related to the protection of life and health, anti-discrimination, and unequal treatment, protection of remuneration, parenthood, and collective rights, especially freedom of association) and numerous references to regulations concerning employees without taking into account the specific nature of the self-employed or clarifying the scope of protection. Moreover, the Polish authorities should consider constructing clearer criteria for the acquisition of the right to a guaranteed minimum hourly rate. It should be stressed that the criteria for deciding "the place and time of the performance of the commission or provision of services" by the person accepting the commission or providing the services and the fact that they are entitled only to commission-based remuneration are not satisfactory. In this respect, it is worth noting the criterion of economic dependence introduced in Spain, but also proposed in the Polish draft of the 2008 Labour Code, which indicates a permanent bond between two entities. The hourly criterion of economic dependence from the 2018 draft individual labour code likewise seems interesting. A separate problem is related to the level of protection guaranteed by law to the self-employed. As T. Duraj (2020) rightly points out, such protection cannot be equated with that of the employment relationship. The author emphasizes that the broadest protection must be guaranteed to employees, "compensating" them, as it were, for their "permanent state of dependence on (subordination to) the employer". From this point of view, it seems crucial to adapt the protection to the nature of the employment. Independent contractors (including self-employed persons), who are not under the direction of an employer issuing binding instructions, assume an increased risk and therefore their level of protection should naturally be correspondingly lower.

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SELF-EMPLOYMENT IN FRENCH AND ITALIAN LAW

Abstract. The objective of the article is to analyse legal regulations concerning self-employed activity in force in France and Italy. Given that both countries are characterized by a dualism between subordinated work and self-employment, the author looks at legal constructions that do not easily fit into this division. In addition, she places great importance on discussing the social rights of the self-employed.

Keywords: labour law, self-employment, employment relationship, Italian law, French law, economic dependence.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA FRANCUSKIEGO I WŁOSKIEGO

Streszczenie. Celem artykułu jest analiza regulacji prawnych dotyczących samozatrudnienia we Francji i we Włoszech. Biorąc pod uwagę fakt, że oba kraje charakteryzuje dualizm między pracą podporządkowaną a samozatrudnieniem, autorka przygląda się konstrukcjom prawnym, które niełatwo wpisują się w ten podział. Ponadto dużą wagę przykłada do omówienia uprawnień socjalnych osób samozatrudnionych.

Słowa kluczowe: prawo pracy, samozatrudnienie, stosunek pracy, prawo włoskie, prawo francuskie, zależność ekonomiczna.

1. INTRODUCTORY REMARKS

Labour law reforms that have been implemented by the Italian authorities since 2015 confirm and reinforce the traditional duality between subordinated work and self-employment (Rinaldi 2019, 27; Perulli 2018b, 3). This division appears to be extremely simple: self-employed activity does not involve unilateral managerial prerogatives, and if such exist, we are dealing with subordination (Razzolini 2018, 17). However, the situation is complicated by legal regulations that do not quite fit into this two-track scheme, but – in the absence of an intermediate

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category – must fit within it. Specifically, we are talking here about legal concepts called: "cooperation organized by the principal" (*collaborazioni organizzate dal committente; lavoro etero-organizzato*) and "coordinated cooperation organized by the agent" (*collaborazioni coordinate organizzate dal collaboratore*), where the "agent" is the contractor (in the context of the cooperation). It is crucial to carefully distinguish between the aforementioned types of cooperation, as different protection regimes and different acts apply to them.

As in Italy, the French legislature has not decided to introduce an intermediate category between the employee and the self-employed. In this context, problematic legal constructs include the *portage salarial* system, a new type of contract – the *contrat d'entrepreneur-salarié-associé* (CESA), and the regulation of economically dependent professionals and self-employed persons who perform work through online platforms.

The purpose of this article is to analyse in detail the self-employment regulations in force in France and Italy. In the case of the French system, it is necessary to focus on the construct of legal presumption and on the *auto-entrepreneur* regime. In addition, in view of the recent reform of French law regarding the social security regime for the self-employed, this article takes a closer look at its rules in force from 1 January 2020. The analysis of Italian law, on the other hand, requires a focus on the specific rights introduced by the law on the work of the self-employed.

2. SELF-EMPLOYMENT IN FRENCH LAW

2.1. General legal framework for self-employment

The number of self-employed workers in France is currently growing steadily, as Eurostat's 2019 figures show. There were more than 3 million in 2018, compared to 2.5 million in 2008.[1] Importantly, it is difficult to find a legal definition of the self-employed in French law (Gardes 2013, 165). For this reason, legal scholars attempt to characterize this category of workers in negative terms. Thus, it is generally pointed out that they are neither employees nor agricultural workers. Moreover, it is worth noting that in France, no intermediate category has been introduced between the self-employed (*travailleurs independants*) and employees (*travailleurs salariés*), with subordination (*lien de subordination juridique*) being

[1] See Eurostat, April 2019, eurostat.ec.europa.eu. Statista 2020. Cf. also: ILO, OECD, 2020, 4. Previously – according to available data since 1800 – France experienced a downward trend in this respect. For example, the self-employed accounted for 35.7% of the workforce in 1900, and for only 20.8% in 1970 (Wennekers et al. 2010, 8). The scope of this article does not include research on the quality of life of the self-employed in France. Interesting findings in this respect are presented in Eib and Siegert (2019).

the main criterion determining the existence of an employment relationship (Eichhorst et al. 2013, 28, 33; Bureau, Corsani, Gazier 2019, 84, 86; Union of Professional and Self-Employed Workers 2014, 14).

On the one hand, the situation in France is determined by a range of provisions that extend the scope of employee rights to non-employees. This is achieved in that such persons benefit from the institution of presumption of employment relationship or obtain the status of an assimilated employee (*assimilé salarié*). The latter is reserved for company directors who are subject to the general social insurance scheme and enjoy the same social protection as employees, with the exception of insurance against unemployment. On the other hand, under the Economy Modernization Act of 4 August 2008 (*Loi n° 2008–776 de modernisation de l'économie*[2]), a new category of individual entrepreneur – a person who carries out business activity on their own account (*auto-entrepreneur*) – was introduced (Levratto, Serverin 2015, 284 et seq.; Chauchard 2016, 954–955). This category groups together the many economically dependent self-employed, who are equated by labour legislation with the "classic" self-employed (Eichhorst et al. 2013, 33). Self-employed workers are qualified as entrepreneurs to whom a simplified version of the micro-enterprise economic regime called the micro-social régime (*régime micro-social*) (simplified social security system) applies. They are entitled to benefit from simplified tax returns and social security contributions, provided they do not exceed the annual maximum turnover. They are covered by the same insurance as other self-employed persons, but do not benefit from unemployment insurance in the event that they discontinue their activities. Self-employed entrepreneurs are private micro-entrepreneurs insofar as they undertake independently, as individuals, a self-employed activity that can be carried out as a primary or complementary activity (Célérier, Riesco-Sanz, Rolle 2017, 403; Bureau, Corsani, Gazier 2019, 86). Unfortunately, unlike the situation of those benefiting from the presumption of an employment relationship and the category of *assimilé salarié*, the work of self-employed workers is most often characterized as precarious (Bureau, Corsani, Gazier 2019, 85).

2.2. Legal presumptions and the status of the self-employed

One of the most important presumptions existing in the French Labour Code (*Code du travail*, CT) is regulated in Article L 8221–6.[3] It is worth noting the structure of these provisions, which – in negative terms – regulate the presumption of the non-existence of an employment relationship. The cited article – in Part I – provides that persons carrying on an activity to which registration (*immatriculation*) or inscription (*inscription*) applies are presumed not to be bound

[2] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000019283050/

[3] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000019285920/2008-08-06

by an employment contract with the principal (*le donneur d'ordre*). Specifically, the following categories of individuals are concerned:

1. natural persons registered in: register of companies (*registre du commerce et des sociétés*), trades register (*répertoire des métiers*), register of commercial agents (*registre des agents commerciaux*), associations for the recovery of social security contributions and for the recovery of family allowances (*des unions de recouvrement des cotisations de sécurité sociale et d'allocations familiales pour le recouvrement des cotisations d'allocations familiales*);

2. natural persons entered in the register of road passenger transport undertakings (*registre des entreprises de transport routier de personnes*) who are engaged in the activity of school transport (*transport scolaire*) and transport on demand (*transport à la demande*) provided for by separate legislation;

3. persons holding leading positions within legal persons (*les dirigeants des personnes morales*) registered with the trade and companies register and their employees;

4. natural persons subject to Article L 123–1–1 of the Commercial Code (*code de commerce*) or to Part V of Article 19 of the Trade and Crafts Development and Promotion Act No. 96–603 of 5 July 1996 (see also Chauchard 2016, 953–954).

Part II of Article L 8221–6 CT introduces the possibility of rebutting the presumption. The existence of an employment relationship can be proven when the persons listed in Part I provide the principal – directly or through third parties – with services under conditions that create a legal relationship of permanent subordination (see also: Pereira 2018, 50; Collectif Francis Lefebvre 2019, 1321; Rousseau et al. 2016, 1269).

Activity as a self-employed person is a conceptual category linked with the presumption provided for in Article L 8221–6–1 CT, introduced by Article 11 of the Economy Modernization Act No. 2008–776 of 4 August 2008. A self-employed person is presumed to be one whose working conditions are determined either by themselves or by a contract concluded with a principal.

The provisions introducing the presumption of an employment relationship for selected categories of working persons likewise deserve special attention. These include Article L 7112 CT, which stipulates a presumption of the existence of an employment relationship for a professional journalist in circumstances where a news agency regularly uses their assistance against remuneration. The Court of Cassation emphasizes that the agency can rebut the presumption by showing that the journalist enjoys complete independence.[4] In addition, Articles L 7121–3, L 7121–4, and L 7121–5 CT provide for a presumption of the existence of an employment relationship of artists who personally participate in the production of a performance against remuneration. This presumption exists even if it is proven that the artist retains the freedom of expression of their art, that they own all or part

[4] Cass. soc., 8 April 1992, No. 89–42171, Bull. civ. V, No. 254 (cited after: Fin-Langer 2013, 30).

of the material used, or that they themselves employ one or more persons to assist them, for the reason that they personally participated in the show (see more: Fin-Langer 2013, 30). Furthermore, the French Labour Code introduces a presumption of the existence of an employment relationship with a model (Article L 7123–3).

However, the rules outlined above are exceptions. Indeed, there is no general presumption of the existence of an employment relationship in French law. The person who alleges its existence bears the burden of proof.[5] It is pointed out in subject literature that an employment relationship can be proven by any admissible means. The authors emphasize that while it is relatively easy to prove the fact that a specific person has provided work and received remuneration, it seems much more complicated to prove the existence of subordination. In this respect, the method of the so-called body of circumstantial evidence (*faisceau d'indices*) is used. The judge forms their opinion based on a set of multiple circumstantial indications of the existence of subordination (Gardes 2013, 133; Peskine, Wolmark 2011, 36). One of these is the establishment of a rule giving the possibility to impose penalties on those providing services in a given company.[6]

2.3. Problematic legal constructs and self-employment

There are several legal constructs in French law that fail to quite fit in the existing dualism between subordinate work and self-employed activity. The *portage salarial* (umbrella company) system is sometimes considered to be an intermediate institution between self-employment and the employment relationship (Kessler 2016, 203). It was introduced into the French Labour Code (Article L.1251–64) by the Act of 25 June 2008 (*Loi n° 2008–596*). In practice, the system had already been in place since the 1980s, with the aim of making it easier for unemployed elderly people to take up a job. The last major changes to the system were made by the Act of 8 August 2016 (*Loi n° 2016–1088*), and the issue is now regulated by Article L1254–1 et seq. of the French Labour Code.[7] This system comprises a set of contractual relationships between a so-called "umbrella company", an independent contractor, and a client company. Two contracts are concluded in the umbrella company system. There is, firstly, a service contract between the umbrella company and the client company, and secondly, an employment contract between the independent contractor and the umbrella company. The umbrella company pays social security contributions and taxes on behalf of the independent contractor. When the latter completes the project, the client company pays remuneration to the umbrella company, which then pays it to the independent contractor. The independent contractor has the

[5] Cass. soc., 13 November 1991, No. 89–41.297 (cited after: Chénedé, Jourdan 2003, 51).

[6] Cass. soc., 10 July 1997, No. 2870 D (cited after: Chénedé, Jourdan 2003, 19).

[7] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000030435227/

expertise, qualifications, and autonomy to seek out their own clients and agree with them on the terms of the service and its price (Article L1254–2). When they take on work for the client company, they are no longer classified as an independent contractor, but as an employee of an umbrella company (Kessler 2016, 203–204; Gardes 2013, 147 et seq.).

The second hybrid legal construct refers to the new concept of "full-time entrepreneurs" comprising entrepreneurs who are independent in their activities but employed by labour and employment cooperatives (*entrepreneur salarié d'une coopérative d'activité et d'emploi*). In order to regulate the legal status of this group, Article L 7331–2 of the French Labour Code introduced a new type of contract, the *contrat d'entrepreneur-salarié-associé* (CESA)[8] (Bureau, Corsani, Gazier 2019, 87; Bureau, Corsani, Gazier 2021, 14, 19).

Some authors identify economically dependent professionals, such as sales representatives, independent salespeople, and agent-managers (*gérants mandataires*), as another hybrid construct. Indeed, the French Commercial Code (Article L146–3[9] and Article L146–4[10]) provides them with special privileges, which include, in particular, a minimum guaranteed commission and severance pay in the event of contract termination (Bureau, Corsani, Gazier 2019, 87).

Problems relating to the qualification of the provision of work as self-employment or subordinated work arise also for self-employed persons who perform work via online platforms. The French legislature has even introduced the principle of social responsibility of platforms into the Labour Code (Articles L7342–1–L7342–7[11]). It provides the group in question with the rights to: payment by the platform of insurance premiums covering the risk of accidents in the workplace, access to and participation by the platform in the financing of continuing vocational training, and the collective refusal to provide services (e.g. the right to strike) without incurring any penalty (see also Bureau, Corsani, Gazier 2019, 87). In addition, the 2016 El Khmori Law (*loi n° 2016–1088*) granted self-employed persons using online platforms to exercise their solo professional activities the right to form and join trade unions and to assert their collective rights and interests (Article L7342–6 CT; OECD 2019, 73).[12] Moreover, they enjoy the right to access all data relating to their own activities on the platform that enable their identification. In addition, they have the right to obtain this data in a structured format and the right to transmit it (Article L7342–7 CT).

[8] https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000029313929

[9] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006222199

[10] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006222200

[11] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000033013020/

[12] As for collective bargaining, on the other hand, the law provides it only to certain categories of economically dependent self-employed, such as general insurance agents (Bureau, Corsani, Gazier 2019, 90).

2.4. The scope of rights of the self-employed

In principle, the self-employed are exposed to the same risks as employees, but unfortunately they do not always enjoy identical social and labour rights (Westerveld 2012, 158). Historically, the French social security system for the self-employed was built separately from the general system. The origins of this decision can be traced to the strong opposition of professionals without regular remuneration, including the self-employed, to the 1946 law on pension insurance. Although the basic coverage of the schemes was largely harmonized, there were still significant differences in terms of contributions and protection. In particular, the self-employed were not covered by a compulsory insurance scheme that included the risk of accident at work or the risk of unemployment (Bureau, Corsani, Gazier 2019, 88). In 2005, the *Régime social des indépendants* (RSI) was established (more in: Morvan 2019, 32, 511, 661), collecting funds for sickness insurance and compulsory pension insurance. However, as a result of the failures following the 2008 financial crash, the system encountered a serious credibility problem and public demonstrations against the RSI took place in France in 2015. In 2017, Emmanuel Macron decided to abolish the scheme and reintegrate it into the general regime (Bureau, Corsani, Gazier 2019, 88).

As of 1 January 2018, the social security scheme for the self-employed (RSI), whose tasks were gradually integrated into the general social security system over a transitional period of two years, was abolished. From that date, the national RSI fund took the name of the national delegated self-employed social security fund (*caisse nationale déléguée pour la sécurité sociale des travailleurs indépendants*, SSI) and the local funds took the name of regional delegated self-employed security funds (*caisses régionales déléguées pour la sécurité des travailleurs indépendants*).[13]

Since1 January 2020, all self-employed persons have been covered by the universal social security and social protection system, including: health insurance and the Primary Health Insurance Funds (*Caisses Primaires d'Assurance Maladie*, CPAM), pension insurance and the care of the Pension Insurance and Occupational Health Fund (*Caisse d'Assurance Retraite et de la Santé au Travail*, CARSAT) or the Île-de-France pension insurance (*Assurance retraite Île-de-France*, CNAV Île-de-France), as well as the fund for the collection of social security contributions and family allowances (*Union de recouvrement des cotisations de Sécurité sociale et d'allocations familiales*, *Urssaf*).[14]

The compulsory affiliation to the general social security system of all persons performing work in any capacity is regulated by Article L311–2 of the Code de of

[13] https://bpifrance-creation.fr/encyclopedie/statut-du-dirigeant-son-conjoint/regime-social-independants-precisions/protection-0

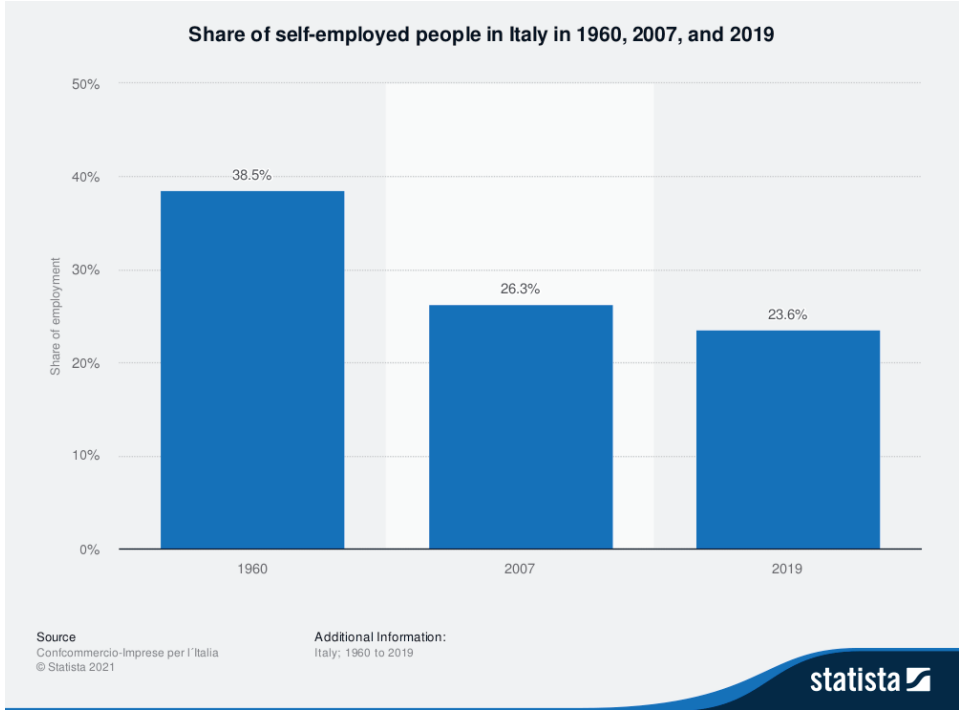
[14] Ibidem.

Social Security (*Code de la sécurité sociale*).[15] Article L311–3[16] of this act confirms the inclusion in social insurance of a broad group of economically dependent self-employed workers, as well as the classic self-employed.

3. SELF-EMPLOYMENT IN ITALIAN LAW

3.1. General legal framework for self-employment

Italian law maintains a traditional dualism between subordinated work and self-employment (Rinaldi 2019, 27; Perulli 2018b, 3). *Prima facie*, this division appears to be extremely simple. Self-employed activity does not involve unilateral managerial prerogatives, and if such exist, we are dealing with subordination (Razzolini 2018, 17).

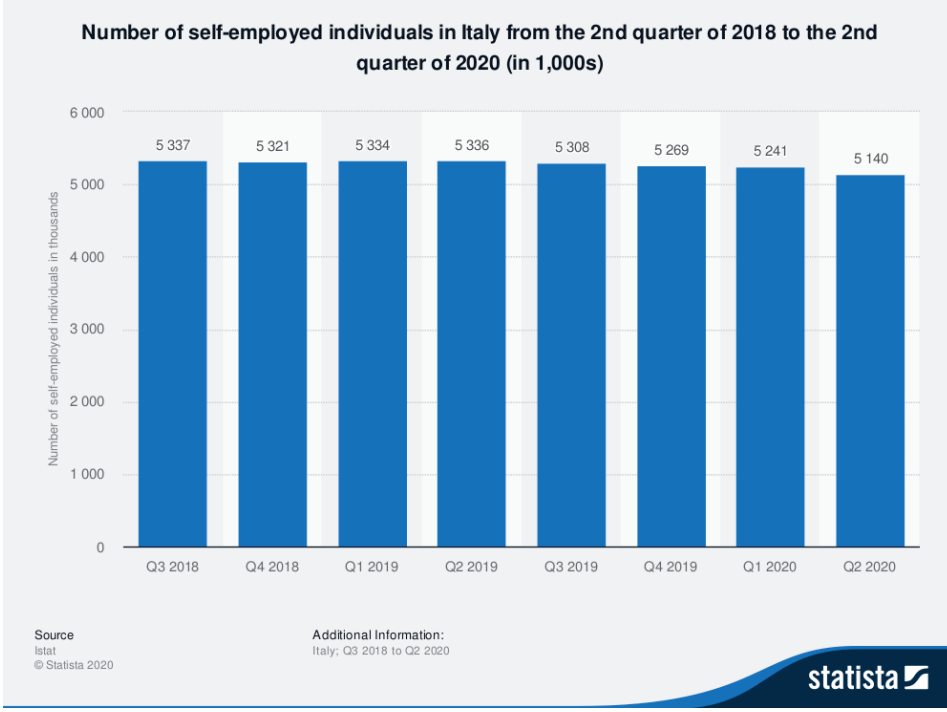


The development of self-employment in Italy can be divided into three stages. The first – which lasted from the end of the World War II until the late 1960s – involved the activity of small artisans and retailers. In the second phase, spanning the 1970s and 1980s, the self-employed were joined by a multitude of

[15] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006742437/
[16] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042683874/

people running small and micro businesses. The scale of self-employment in Italy was particularly affected by the last stage, lasting from the early 1990s, which was characterized by the expansion of the service sector and the transformation towards a post-industrial economy (Semenza, Mori 2018, 15–16).

The chart above shows the share of the self-employed in the total number of working people in Italy between 1960 and 2019. It is evident that the number of the self-employed in the country has decreased over the years. While the self-employed accounted for around 38% of working people in 1960, this share was only 24% 60 years later.[17]



According to data, there were 5.1 million self-employed people in Italy in the second quarter of 2020. Compared to the second quarter of 2019, their number decreased drastically.[18] The chart above shows the number of self-employed people in Italy between 2018 and 2020 (in thousands).

Given the scale of self-employment in Italy, in order to address the significant problems with ensuring adequate protection for this category of working people, the Italian authorities passed the Self-employed Persons' Work Act No. 81 (*Misure*

[17] Confcommercio-Imprese per l'Italia, Presentazione Ricerca Confcommercio Professioni, 2 November 2020. Statista 2021.

[18] Istat. November 2020. dati.istat.it. Statista 2020.

per la tutela del lavoro autonomo non imprenditoriale e misure volte a favorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato[19]) on 22 May 2017. It applies to work contracts and service contracts regulated by the Italian Civil Code (Articles 2222–2238), i.e. situations in which a person undertakes to perform a work or service against remuneration, mainly in person and without being subordinated to the principal (self-employment). The quoted law applies also to other contracts that are regulated in Book IV of the Civil Code, such as the agency contract, the contract of carriage, the fiduciary contract, or agency contracts, as long as these are not concluded and performed as part of a business activity (Pallini 2018, 239). However, it is worth noting that entrepreneurs, including small entrepreneurs referred to in Article 2083 of the Italian Civil Code, are not covered by this law. In this context, serious problems may arise in practice in distinguishing small entrepreneurs from self-employed persons (Zilio Grandi, Biasi 2018, 6; Bottini, Falasca, Zambelli 2019, 458). The Italian law requires small entrepreneurs – in addition to the provision of work mainly in person or with the help of family members – to contribute a set of tangible and intangible assets that make up a business within the meaning of Article 2555 of the Civil Code (Pallini 2018, 244).

3.2. Problematic legal constructs and self-employment

However, the dichotomous division between subordinated work and self-employment is complicated by legal regulations that do not quite fit into this two-track scheme, but – in the absence of an intermediate category – must fit within it. We are talking here about two legal concepts, namely: "cooperation organized by the principal" (*collaborazioni organizzate dal committente; lavoro etero-organizzato*) and "coordinated cooperation organized by the agent" (*collaborazioni coordinate organizzate dal collaboratore*), where the "agent" is the contractor (in the context of the cooperation). It is crucial to carefully distinguish between the aforementioned types of cooperation, as different protection regimes and different acts apply to them.

When it comes to the interpretation of the legal construct of "cooperation organized by the principal", all doubts were supposed to be dispelled by Article 2(1) of Legislative Decree No. 81 of 15 June 2015 (*Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183*[20]). It stipulates that, as from 1 January 2016, the provisions on the employment relationship apply to cooperation relationships consisting in the provision of work exclusively in person and on a continual basis, where the conditions of performance are organized by the principal, including with regard to the time and place of work.

[19] *Gazzetta Ufficiale* from 13 June 2017, No. 135.

[20] *Gazzetta Ufficiale* from 24 June 2015, No. 144.

This means that all the provisions concerning the employment relationship apply to this category of workers, including with regard to remuneration, working time, social security, protection against unlawful termination of employment, etc. In terms of protection, these persons are therefore treated by the Italian legislation as employees. Given the problems that arise when trying to qualify work provided as subordinate, it should be emphasized that Article 2(1) of Legislative Decree No. 81 did not change the wording of Article 2094 of the Civil Code (Royal Decree of 16 March 1942, No. 262, *Codice civile*[21]), which provides that a person providing subordinate work is a person who undertakes to cooperate in an enterprise against remuneration, providing intellectual or physical work under the direction and dependence of the entrepreneur. However, the interpretation of Article 2(1) of Legislative Decree No. 81 of 15 June 2015 is not uniform. Some legal scholars present the view that it expands the scope of subordinate work, meaning that it now includes not only the traditional directive, repressive, and distributive subordination, but also cooperation relationships "whose conditions of performance are organized by the principal, also with regard to the time and place of work", and the work is performed personally and continually (Bottini, Falasca, Zambelli 2019, 450; Perulli 2018a, 54). Other authors argue that these provisions have introduced a presumption of the existence of an employment relationship. Moreover, there are claims that cooperation of this type – despite granting full employment rights – should be qualified as self-employment (Santoro-Passarelli 2018, 435). It is not the purpose of this article to resolve the interpretative doubts mentioned above. However, it is worth noting that the Italian legislature has excluded certain categories of cooperation from the scope of the discussed rule (Article 2(2) of Legislative Decree No. 81 of 2015). These exceptions concern, for example, cooperation in the exercise of white-collar professions for which registration in special professional registers is required, or cooperation organized by the principal but covered by collective agreements (e.g. call centre associates).

The second legal construct that raises considerable interpretative issues in Italy is "coordinated cooperation organized by the agent (contractor)". A momentous change took place in Italian law in 2015. Article 52(1) of Legislative Decree No. 81 of 15 June 2015 abolished project work (*lavoro a progetto*), which had been in force since 2003, while retaining Article 409 of the Code of Civil Procedure (Royal Decree of 28 October 1940, No. 1443, *Codice di procedura civile*[22]), which regulates the above-cited "coordinated cooperation organized by the agent (contractor)". It does not fall within the scope of subordinate work and is therefore treated as a form of self-employment to which the protection provided for in the aforementioned Self-employed Persons' Work Act No. 81 of 22 May 2017 (Santoro-Passarelli 2017, 778) applies. Persons classified in this

[21] *Gazzetta Ufficiale* from 4 April 1942, No. 79.

[22] *Gazzetta Ufficiale* from 28 October 1940, No. 253.

category of working people benefit also from procedural protection. Indeed, the Italian law leaves within the competence of the labour court disputes arising from cooperation relationships that manifest themselves through the performance of work in a continual and coordinated manner, mainly in person, even if not subordinated (*rapporti di collaborazione che si concretino in una prestazione di opera continuativa e coordinata, prevalentemente personale, anche se non a carattere subordinato*) (Article 409 No. 3 of the Code of Civil Procedure). It should be emphasized that, under Article 15 of the Act No. 81, the legislature has given an authentic interpretation to the concept of "coordinated cooperation" (*collaborazione coordinata*) from Article 409(3) of the Code of Civil Procedure, indicating that it occurs when, under the terms of coordination agreed by the parties, the contractor organizes the professional activity independently (*organizza autonomamente*). The expressions "even if not subordinated" and "organizes independently" seem to confirm that the coordinated cooperation organized by the contractor is correctly classified as self-employment, which is defined in Article 2222 of the Civil Code as an undertaking by a person to perform a work or service against remuneration, mainly in person and with no subordination to the principal. It is pointed out in subject literature that the expression "organizes independently" means nothing more than precisely "the performance of a work or service in the absence of subordination to the principal" (Carabelli 2018, 51).

In grasping the difference between "cooperation organized by the principal" and "coordinated cooperation organized by the contractor", it is also important to note that the terms of coordination under the latter must be "agreed upon by the parties". By way of comparison, agreement between the parties does not fit into the construct of cooperation organized by the principal. In this case, the principal itself determines the terms and conditions of the work. Moreover, the characteristics of cooperation organized by the principal include the exclusively personal provision of work and the organization of the terms of cooperation by the principal, also with regard to the time and place of work (Carabelli 2018, 52, 54). To elaborate on this thought, it must be stressed that the small entrepreneur – if they are a party to coordinated cooperation organized by the contractor – admittedly enjoys the procedural protection of Article 409(3) of the Code of Civil Procedure, but is no longer covered by the Self-employed Persons' Work Act (Razzolini 2018, 26). This is due to the exclusions adopted by the Italian legislature.

3.3. The scope of rights of the self-employed

When it comes to the rights introduced by the 2017 Self-employed Persons' Work Act No. 81, attention should undoubtedly be drawn to Article 3(4). It stipulates that Article 9 of the Act of 18 June 1998 No. 192 (*Disciplina della subfornitura nelle attività produttive*[23]) concerning the abuse of economic

[23] *Gazzetta Ufficiale* from 22 June 1998, No. 143.

dependence applies *mutatis mutandis* to the relationships covered by Act No. 81. Following the reference, we learn that economic dependence occurs when an enterprise is able to establish, in its commercial relations with another enterprise, an excessive imbalance of rights and obligations. Economic dependence is assessed by taking into account the abusive party's actual ability to find satisfactory alternatives on the market. The competence to counteract the abuse of economic dependence is vested in the court, which under Italian law has the power to declare contracts void in such cases (Pallini 2018, 248–249; Cavallini 2018, 292–294).

In addition, provisions that give the principal the right to unilaterally amend the terms of the contract or, in the case of a contract characterized by continuity of work, the right to withdraw from the contract without giving a reasonable period of notice, as well as clauses under which the parties agree payment terms exceeding sixty days from the date of receipt of the invoice or demand for payment, are considered abusive clauses. It is also considered abusive for the principal to refuse to enter into a written contract. The self-employed person has the possibility to claim compensation in all situations mentioned in this paragraph (Article 3(1)–(3) of the 2017 Act No. 81).

In an attempt to meet the needs of the self-employed, the Italian authorities introduced in the 2017 Act No. 81 a number of tax benefits for this group, such as deductions for training costs or skills certification. There were also regulations on unemployment benefits, including the stabilization and extension of benefits for unemployed workers who were parties to a coordinated cooperation organized by the contractor. Of primary importance for self-employed women were undoubtedly the regulations on rights related to parenthood, including the possibility to use maternity benefit two months before the date of childbirth and three months after that date, even in the case of continued employment.

Then, pursuant to Article 14(1) of the 2017 Act No. 81, it is possible to suspend (without right to remuneration) a contract characterized by continuity of work for up to 150 days per calendar year in the event of pregnancy, sickness, or accident of the self-employed person. In addition, in a situation of maternity, a self-employed woman may with the consent of the principal use the substitution of another trusted self-employed person (Article 14(2) of the 2017 Act No. 81). In the event of sickness or accident that prevents work for more than sixty days, a suspension of the payment of social security contributions for the entire period of the sickness or accident is provided for, up to a maximum of two years (Article 14(3) of the 2017 Act No. 81; Bottini, Falasca, Zambelli 2019, 458; Rausei 2017, 67–68).

In Italy, collective representation of the self-employed is fragmented and very often even non-existent. As Anna Mori points out, traditional trade unions have shown no interest in this group of people, for two reasons in particular. The first was the focus of all attention on the false self-employment that spread through the Italian labour market in the late 1990s and 2000s. Trade union strategies were mainly devoted to how to deal with the new forms of precarious, non-standard,

and flexible contractual arrangements. A second reason was that unions perceived self-employed professionals as thriving and benefiting from the protection guaranteed by the various professional registers. Only relatively recently has it been possible to direct trade union interest towards the self-employed. Examples include the Professionals' Labour Advisory Body (*Consulta delle professioni*) set up by the Italian General Confederation of Labour (*Confederazione Generale Italiana del Lavoro*, CGIL), and the online community of self-employed people vIVAce! created by the Italian Confederation of Workers' Unions (*Confederazione Italiana Sindacati Lavoratori*, CISL). More recently, there have been further grassroots initiatives and spontaneous movements to highlight the demands of the self-employed. They are gaining popularity through the use of social media. These include the Chamber of Self-Employment and Precarious Work (*Camere di Lavoro Autonomo e Precario*) as well as the 27 February Coalition (#27F) (Mori 2019, 103–105).

4. CONCLUDING REMARKS

In discussing the existing dualism between subordinated work and self-employment, the French use the fable "The Wolf and the Dog" by Jean de La Fontaine (Chauchard et al. 2003, 301). Since there is no dog-wolf hybrid, any legal figure considered by some authors as "intermediate" must ultimately fit into the existing scheme. This is true for the *portage salarial* system, for the new type of contract – CESA, for economically dependent professionals, and for those providing work through online platforms. The situation is similar in Italy, where two legal constructs have proved most problematic: "cooperation organized by the principal" and "coordinated cooperation organized by the agent".

An analysis of Italian law leads to the conclusion that, in order to correctly classify the work provided as either subordinate work or self-employed activity, four different concepts have to be taken into account, which in practice causes many difficulties. These are namely: the definition of self-employment under Article 2222 of the Civil Code, the concepts of "coordinated cooperation organized by the contractor" under Article 409(3) of the Code of Civil Procedure and "cooperation organized by the principal" under Article 2(1) of Legislative Decree No. 81 of 15 June 2015, and the term "subordination" under Article 2094 of the Civil Code (see Voza 2017, 9).

In French law, on the other hand, it is popular to extend employment rights to non-employees. To this end, not only presumptions of the existence of an employment relationship, but also other legal constructs are used: the assimilated worker, who is subject to the general social security system but does not benefit from unemployment insurance, and the individual entrepreneur – a self-employed person (*auto-entrepreneur*) using a simplified social security system.

As far as the self-employed are concerned, the French law reform of 1 January 2018 abolished the hitherto separate social security system (RSI) applicable to them and integrated its tasks into the general social security system. Finally, as of 1 January 2020, all self-employed persons are covered by the latter regime. It is worth mentioning that there has been a public debate for years in France about granting the self-employed a full right to unemployment benefits, which has not yet been done. However, President Macron announced changes in this regard in September 2021. Loss of employment is supposed to provide this group of people with access to benefits once every five years without having to liquidate their business (York 2021). Analysing the Italian regulation, on the other hand, we see that the self-employed have gained quite a number of hitherto unknown rights under the 2017 Self-employed Persons' Work Act No. 81.

As for the collective rights of the self-employed, their regulation in France seems to be fragmented and selective. For example, the legislature showed good will towards self-employed workers via online platforms in 2017. It namely granted them express right to form a trade union organization, to join it, and to assert their collective interests through it. Moreover, it is noteworthy that the self-employed have been granted the right to refuse services collectively without any penalty, including the right to strike. The right to collective bargaining can be mentioned as another example. This has been provided only to selected categories of self-employed persons, namely to those who perform activities under conditions of economic dependence, such as general insurance agents. A similar situation exists in Italy, where collective representation of the self-employed is fragmented and organizations of the self-employed have begun to emerge relatively recently.

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SELF-EMPLOYMENT IN HUNGARIAN LAW

Abstract. Self-employment has traditionally been regulated by the Civil Code, as a distinctive form of work apart from employment. This chapter strives to evaluate the labour law framework and labour market experience of self-employment. First, the Hungarian legal provisions on self-employment will be highlighted, including labour law, civil law and social security law. This will be followed by an evaluation of the available data on labour market trends regarding the various groups of self-employed workers, such as genuine and false self-employment, and economically dependent work. After this summary on employment data, the legal protection or scope of employee rights enjoyed by self-employed persons will be scrutinised. Finally, I will examine the Hungarian legal mechanisms to combat false self-employment. As a whole, the paper will provide a picture of the legal environment of self-employment with laws, trends and some evident flaws. I will strive to highlight the main driving forces behind self-employment and related labour law policy.

Keywords: labour law, self-employment, employment relationship, Hungarian law, economic dependence, bogus self-employment.

SAMOZATRUDNIENIE W ŚWIETLE PRAWA WĘGIERSKIEGO

Streszczenie. Samozatrudnienie jako rodzaj świadczenia pracy zarobkowej odrębny od zatrudnienia jest uregulowane przede wszystkim w węgierskim kodeksie cywilnym. W niniejszym opracowaniu autor ocenia ramy prawa pracy, jak i węgierskie doświadczenia dotyczące samozatrudnienia na rynku pracy. W pierwszej kolejności dokonuje analizy węgierskich przepisów regulujących samozatrudnienie, w tym prawo pracy, prawo cywilne i prawo ubezpieczeń społecznych. Następnie autor przeprowadza ocenę dostępnych danych o tendencjach na węgierskim rynku pracy odnośnie różnych grup samozatrudnionych, ze szczególnym uwzględnieniem rzeczywistego i fikcyjnego samozatrudnienia w świetle pracy ekonomicznie zależnej. W dalszej części rozdziału autor charakteryzuje ochronę prawną osób pracujących zarobkowo na własny rachunek, wskazując na zakres uprawnień przynależnych osobom samozatrudnionym. Na koniec dokonuje analizy węgierskich mechanizmów prawnych mających na celu walkę z fikcyjnym samozatrudnieniem. W niniejszym rozdziale autor prezentuje obraz otoczenia prawnego samozatrudnienia na Węgrzech wraz z przepisami, tendencjami i oczywistymi niedociągnięciami. Stara się również podkreślić główne czynniki prowadzące do pracy na własny rachunek i powiązaną z nimi politykę w zakresie prawa pracy.

Słowa kluczowe: prawo pracy, samozatrudnienie, stosunek pracy, prawo węgierskie, zależność ekonomiczna, fikcyjne samozatrudnienie.

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1. NATIONAL PROVISIONS ON SELF-EMPLOYMENT: IN THE SHADOW OF EMPLOYMENT RELATIONSHIPS

The employment relationship is still the most important legal relationship with respect to work, however, civil law contracts, as the only alternative, have also been playing an important role in the binary model. In this first chapter, I will outline the legal framework of work relationships and the legal provisions specifically aimed at self-employed workers, including relevant rules of labour law, civil law and social security law.

1.1. Self-employment in the legal structure of work relations

The Hungarian structure of work relations may be labelled as a binary model, based on employment contracts on the one hand, and civil law contracts on the other. The typical employment relationship has always been and remains the dominant legal form of work, which is regulated by a separate law, the Labour Code of 2012 (henceforward: Labour Code).[1] Atypical forms of employment are far from being as widespread as in the western European Member States, because they still represent only a fraction of employees, particularly fixed-term employees and agency workers. Certainly, the labour law heritage of the socialist period is stronger than the effect of EU labour law harmonisation regarding atypical contracts.

Beyond employment relationships, there are exclusively civil law contracts, which provide a cheaper and far less regulated alternative contractual framework for workers. The 'cost and benefit' of this contractual choice will be analysed in Chapter 3 on the legal protection of self-employed persons, so at this stage I focus on the legal environment of civil law contracts. These contracts are regulated by the Civil Code as a legal relationship between two equal parties, without cogent rules and employment protection. Thus, the parties may freely govern their relationship in the contract within the loose regulatory framework provided by civil law. Civil law work contracts lack hierarchy between the parties, the personal and economic subordination of worker and principal.

The Civil Code has traditionally regulated two kinds of work contracts,[2] which are present in the current legal text as well,[3] namely 'personal service contracts' and 'work contracts'. Both contractual types provide a legal framework

[1] Act 1 of 2012 on the Labour Code. English translation of the original text: https://www.ilo.org/dyn/travail/docs/2557/Labour%20Code.pdf (accessed: 23.09.2020).

[2] See the former Act 4 of 1959 on the Civil Code (not in force from 2014), articles 474–483 and 389–401.

[3] Act 5 of 2013 on the Civil Code (in force from 2014), articles 6:238–250 and 6:272–280, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf (accessed: 9.09.2020).

for work performed by self-employed workers. At the same time, personal service contracts provide the more popular legal form of regular, permanent work relations, since they are based on the 'obligation to care': the agent undertakes to carry out the assignment the principal has entrusted to him, and the principal undertakes to pay the remuneration contracted.[4] At the same time, under a work contract, the contractor undertakes to perform activities to achieve the agreed upon result and the customer undertakes to accept delivery of and pay the contracted fees.[5] Therefore, personal work contracts are the usual form for disguising an employment relationship in several sectors, for instance in entertainment, security work, office work, construction, etc.

The third legal category of economically dependent work (in addition to employment and civil law contracts), as it is known in several European legal systems,[6] has not been regulated in Hungary. There was a theoretically inspiring proposal on this third labour law category in the first draft of the Labour Code 2011, however, without any effect on current legislation.[7] Thus, self-employment covers three rather different groups of employment arrangements: genuine self-employment, economically dependent work and bogus (false) self-employment, which all play some role in the Hungarian labour market. Genuine self-employment covers independent contracts, where the relationship between the parties is not characterised by personal or economic dependence. Economically dependent work lacks personal dependence on the employer, but shows a high level of economic dependence on one (decisive) client (quasi-employer). Bogus (false)[8] self-employment is an employment relationship with a high level of personal and economic dependence, however, the parties reduce employment-related costs (through lower public charges and fewer employer obligations) by concluding a civil law contract.

The abovementioned self-employed persons use personal service contracts but opt for either 'individual entrepreneurship', or membership in a business association when it comes to legal status. Membership in business associations is regulated by the Civil Code.[9] Membership in a 'limited partnership' is by far the most common solution in the Hungarian labour market, as it is the easiest and cheapest way to run a company (business association) for the exclusive purpose of providing personal work service. The unlimited amount of the capital contribution

[4] Act 5 of 2013 on the Civil Code, article 6:272.

[5] Act 5 of 2013 on the Civil Code, article 6:238.

[6] See, for example: Countouris (2007); Casale (2011); Brodie (2005); Pennings and Bosse (2011); Davidov (2005); Deakin (2006).

[7] See details: Gyulavári (2014).

[8] 'Bogus' and 'false' self-employment are used in this chapter as synonyms for the same phenomenon.

[9] Act 5 of 2013 on the Civil Code, article 3:88–324.

is the main advantage of a limited partnership, so this business association may be rapidly established with a small amount of capital,[10] in contrast to other options.

An individual entrepreneurship (individual company), in turn, is regulated by a special Act.[11] An individual entrepreneurship and individual company may be easily established and also employ other workers. These two groups (individual entrepreneurs and members of business associations) may equally use the same taxation systems to achieve a much lower cost level than within an employment relationship. I will analyse the available data on their respective numbers in Chapter 2 to determine the scale of self-employment. Before turning to these statistics, however, I will outline the various solutions for acquiring social security rights in the case of self-employment.

1.2. Social security rights of self-employed workers[12]

1.2.1. General social security scheme for all workers

There is a statutory obligation to pay contributions, affecting employees, civil servants, service providers, and the self-employed working alone, or in organisations. In employment, the contributions are paid by employers (19%) and employees (18.5%) separately, but self-employed workers pay exactly the same high rates themselves (altogether 37.5%).[13] Self-employed workers automatically become 'insured' in the state social security system[14] if their income exceeds 30% of the minimum wage.[15]

Self-employed persons must pay the abovementioned social security contributions calculated on the basis of their income, but this is subject to a statutory minimum ('expected') contribution. They cannot avoid the payment of a minimum contribution even if their income is lower than the basis of the calculation (or they have no income at all). The 'expected contribution basis', which is a kind of expected income, is the minimum wage for pension contribution and 150% of the minimum wage for health and unemployment contributions.[16] The social security rights in the general scheme will be examined in Chapter 3 on legal protection of self-employed workers.

[10] Act 5 of 2013 on the Civil Code, article 3:154.

[11] Act 115 of 2009 on individual entrepreneurship and individual company.

[12] This chapter is based on the following article: Gyulavári (2019).

[13] In addition, income tax must be paid, which depends on the chosen taxation system (of several complicated options).

[14] There is health insurance and limited social benefits for the self-employed, who do not exceed this very low amount (Articles 15–16 of Act 80 of 1997).

[15] Act 80 of 1997, Article 5(1)g).

[16] Act 80 of 1997, Article 27(2).

1.2.2. Cheap alternatives to the general scheme

As has been elucidated above, social security contributions are high, but potential social services are significantly lower quality than in Western Europe. Clearly, self-employed workers are not very attracted by these services and do their best to avoid paying the high social security contribution. This has been a strong incentive for undeclared work, or payment of tax through a sham company without social security contributions. Thus, legislation has been constantly providing cheaper special schemes for self-employed workers, which has been the main incentive of bogus self-employment.

In these special social security and taxation schemes, the total cost of employment (taxes + social security contributions) is much lower, but social services are also limited. This is a special 'deal' between the state and the individual, where workers give up publicly financed social rights (future payments, services) for higher income (through lower contributions). The two existing special schemes will be analysed below, in order to show the fragmentation of the Hungarian social security system: a) Small Taxpayer Entrepreneurs' Lump Sum Tax (KATA) and b) Simplified Public Burden Contribution (EKHO).

The Small Taxpayer Entrepreneurs' Lump Sum Tax (KATA)[17] is the most popular 'alternative' taxation form for self-employed workers, which has been providing a cheap alternative to the general taxation and social security scheme since 2013. It is available to individual entrepreneurs, individual firms, limited partnerships and unlimited liability companies with only natural person members, and law firms. Thus, self-employed workers may use it to escape high taxes and social security contributions. The worker/company only has to pay HUF 50,000 per month[18] (HUF 600,000/year, circa EUR 1,700) up to a maximum income of HUF 12 million (circa EUR 34,000) per year. This low lump sum burden includes all taxes and contributions, which must be paid by the worker (quasi-employee) and the company (quasi-employer).

Taking as an example the maximum possible income of HUF 12 million (circa EUR 34,000) in this taxation system,[19] this represents a 5% overall public charge. Moreover, the higher the income of the worker, the lower the proportion is paid to the budget through this lump sum tax. This low lump sum tax is shockingly low in comparison with the 37.5% general social security contribution (excluding tax). Consequently, this taxation form became extremely popular among the self-employed in a very short time, which will be described in Chapter 2 on the scale of self-employment.

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[17] It was introduced by Act 147 of 2012 on the Small Taxpayer Entrepreneurs' Lump Sum Tax and Small Company Tax.

[18] It is only half of that amount (HUF 25,000), if the person is insured elsewhere (second job).

[19] Over this amount a 40% tax applies.

The government realised the increasing attraction posed by the KATA tax method that drew workers from employment to self-employment. As a response, an extra 40% income tax was levied on all income over HUF 3 million from the same employer[20] from 2021, which represented a legal punishment for those disguising their employment in this way.[21] The related limited social security rights will be examined in Chapter 4 on the legal protection of self-employed workers.

Although this new (second) 40% tax rate puts an extra burden on employers using this form to hide employment through false self-employment, it also punishes employees with higher income. For instance, a self-employed worker with higher income may have 3 clients over this 3 million threshold. This case does not involve allegations of false self-employment, but the extra tax must be paid by all three clients, which considerably raises the cost of self-employment, without any effect on false self-employment. So this new tax increase has two sides and calls our attention to the importance of increasing state revenues. The state first attracted self-employed workers to this tax pool and later increased the tax burden to earn a higher budgetary income.

Beyond KATA, the so-called Simplified Public Burden Contribution (EKHO)[22] is another cheap option for some designated categories of self-employed workers to pay lower taxes and contributions from 2006. It attracts a much lower number of workers than KATA,[23] since it was designed only for media workers and artists (professions listed by the law), working either in an employment relationship or as a self-employed person. The worker must pay 15% (pensioners only 11.1%) of all income up to a maximum of HUF 60 million per year, which includes all income taxes and social security contributions. In addition, the employer/client pays a further 20% of the worker's gross income. The worker is entitled to health care and a pension, but not to cash benefits (e.g. sick leave benefits, paid maternity leave) and unemployment benefits.[24] Moreover, the pension is calculated on the basis of only 61% of the taxed income.[25]

To sum up the Hungarian legal framework regarding self-employment, I would underline the long standing tradition of the binary employment structure built on two codexes, the Labour Code for employees and the Civil Code for self-employed workers. Under the scope of the Civil Code, civil law contracts, and particularly personal service contracts, provide an unchanged, stable contractual basis for personal work relations beyond employment relationships. Self-employed

[20] If a self-employed person has an income from more employers over HUF 3 million, the extra tax must be paid by all these employers. Therefore, this new measure may be perceived instead as a second KATA tax rate.

[21] Act 147 of 2012 on a lump sum tax of small taxpayers and small company tax.

[22] Act 120 of 2005 on the simplified public burden contribution.

[23] Unfortunately, there is no data available on the number of EKHO taxpayers.

[24] Articles 4–8 of Act 120 of 2005.

[25] Act 80 of 1997, Article 22(1)g).

workers are either individual entrepreneurs, or personally contributing (working) members of a business association, typically members of a limited partnership. They have full social security coverage, however, they can save money by opting out of these full social security rights by choosing a cheaper taxation form (KATA). As a next step, I continue with some statistics and trends in self-employment.

2. THE SCALE OF SELF-EMPLOYMENT

2.1. Introductory notes

Measuring self-employment is always a rather difficult and problematic task, since the lack of clear concepts, overlapping groups of self-employed and limited data all make this challenging. Hungarian data is also quite scarce and unclear when it comes to internal divisions within self-employed workers. First, I will try to estimate the number of self-employed, and particularly that of individual entrepreneurs as the largest group of self-employed. At the same time, I will also focus on trends in the last 30, as well as the last few years. Second, I will also describe the recent boom in the number of KATA taxpayers. Overall, I will try to describe the benefits and practical importance of self-employment in the Hungarian labour market.

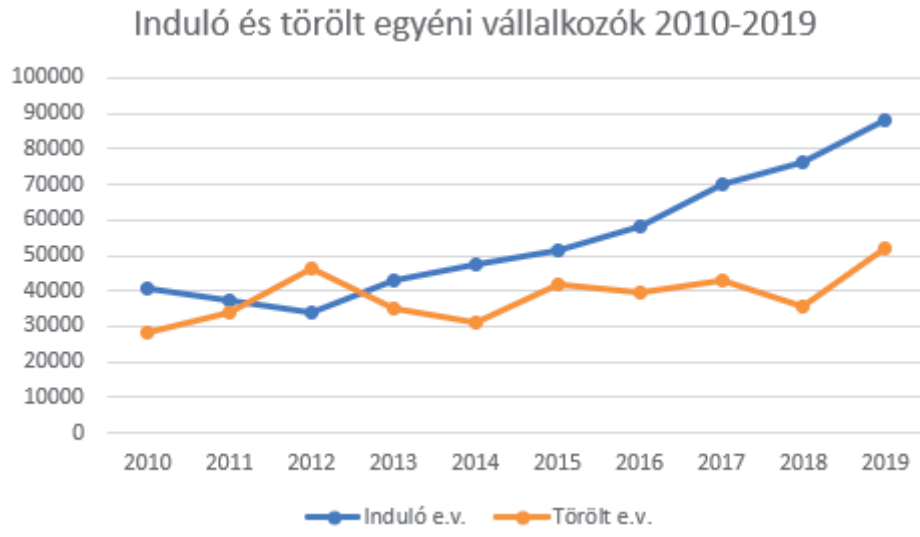
2.2. Trends in self-employment

The rate of Hungarian self-employed workers is low on a European scale, and has been constantly decreasing over the last 30 years, except for the last few years. While the self-employment rate, compared to the overall working population, was as high as 20.42% in 1990, however, it slowly decreased year by year to its present level at 10.83%, which is half of the 1990 figure. Remarkably, OECD data shows slight growth in the last few years, which I suggest can be explained by the growing phenomenon of false self-employment generated by the new taxation rules of KATA. For the purpose of the OECD statistics, self-employment is defined as the employment of employers, workers who work for themselves, members of producer cooperatives, and unpaid family workers.[26]

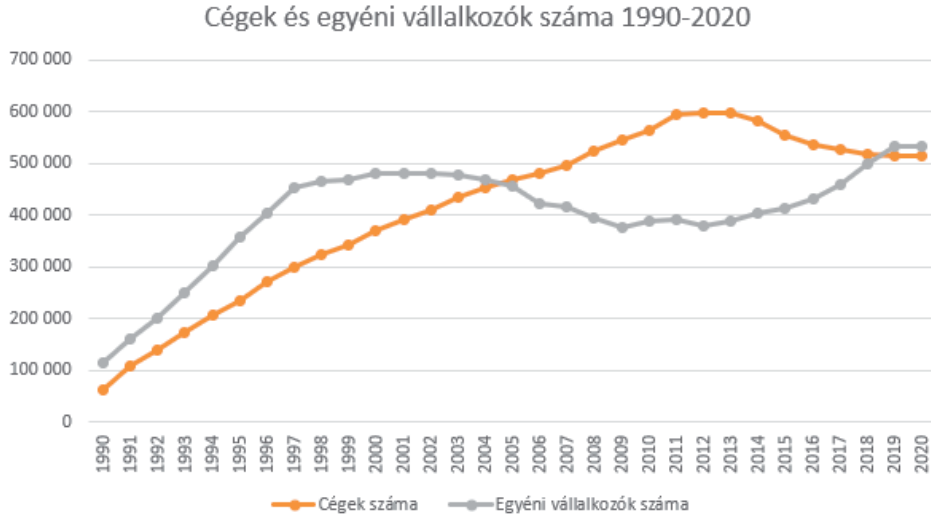
At the same time, the number of individual entrepreneurs has been radically increasing, and this change is most probably closely connected with the introduction of the new lump sum tax (KATA) in 2013. In recent years, the increase in the number of individual entrepreneurs was over 80,000 per year, which is quite high in a labour market of slightly more than 4 million workers. Overall, the number of individual entrepreneurs exceeded 530,000, which is the all-time highest number. It is also remarkable that the number of individual entrepreneurs

[26] OECD: *Self-employment rate.* https://data.oecd.org/emp/self-employment-rate.htm (accessed: 17.09.2020).

is higher than that of business associations. Individual entrepreneurs are self-employed (some with employees), and also include some members (owners) of business associations, though this latter number is absolutely obscure.



Source: Opten: *Már több az egyéni vállalkozó, mint a cég Magyarországon.* 19.02.2020, https://www.opten.hu/kozlemenyek/mar-tobb-az-egyeni-vallalkozo-mint-a-ceg-magyarorszagon



Source: Opten, 2020.

The blurry legal frontiers between the employment relationship, self-employment and economically dependent work make it difficult to draw a clear picture of the proportion of different groups of self-employed workers in the labour market. In practice, genuine self-employment, bogus self-employment and economically dependent work function equally through civil law contracts as individual entrepreneurs, or as members of a business association.[27] The real size of these three subgroups of self-employed is often not elucidated by available data, as statistics primarily focus on the overall rate of self-employment, or the number of individual entrepreneurs. Exceptionally, the Hungarian Central Statistical Office has isolated data for 2017 on the self-employed with only one or more clients, which reveals that a third of the self-employed (140,000 workers) is dependent on one (decisive) client.[28] These workers are presumably either economically dependent workers or bogus self-employed.

2.3. KATA tax: a dangerous success story

The Small Taxpayer Entrepreneurs' Lump Sum Tax (KATA) has become extremely popular among self-employed people in a very short time. Its adherents jumped from 75,000 workers in the first year (2013) to almost double at 140,000 in 2016, over 300,000 in 2017,[29] and 404,000 in June 2020,[30] which is almost 10% of the total Hungarian workforce. Since employees cannot use this form of taxation, and this is by far the most popular choice among self-employed workers, these numbers clearly illustrate the number of self-employed persons, but also the sudden increase in self-employment, particularly in false self-employment.

KATA is an excellent example of how poor financial policy can fuel the search for loopholes in labour law to achieve a higher income, even if it comes with very limited social security rights (e.g. pension). It is uncertain whether the new legal restrictions featuring a 40% extra tax above the HUF 3 million threshold will considerably affect the number of KATA taxpayers from 2021. Since the other tax alternatives are still more expensive than KATA, I predict that even if the recently skyrocketing increase stops, the number of those who choose this form of taxation will most probably stabilise at the present level.

Summarising the available data, the rate of self-employed is somewhere between 10% and 15% of all workers in the Hungarian labour market. This rate

[27] The working person may choose any of these legal qualifications to conclude a civil law contract to perform work as a natural person or through a company (usually set up for this very purpose).

[28] https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_onfogl9_08_03.html (accessed: 25.09.2020).

[29] http://www.uzletresz.hu/penzugy/20160202-kisadozo-vallalkozasok-teteles-adoja-kata--adozas-nav-adoszakerto.html (accessed: 25.09.2020).

[30] https://magyarnemzet.hu/gazdasag/kata-a-kisvallalkozasok-adozasanak-rocksztarja-8254458/ (accessed: 25.09.2020).

was above 20% in 1990, but dropped by half by 2020. In the last couple of years, we have experienced an increase in self-employment, specifically a jump in the number of individual entrepreneurs. This sudden rise in the popularity of entrepreneurship is, in my view, a logical consequence of the new 'tax miracle'. Since KATA will be severely restricted as of 2021, continuation of the upsurge is dubious.

3. LIMITED LEGAL PROTECTION OF SELF-EMPLOYED WORKERS

3.1. Introductory notes

The first and second chapters above outlined the legal environment and practical importance of self-employment in Hungary. In this chapter, I will focus on labour law protection and social security rights of self-employed workers.

3.2. No definition of self-employment

In Hungarian law there is no legal definition of self-employed workers. Moreover, even a widely accepted, uniform academic notion has not been elaborated, since labour law scholars even today use vague or varying concepts when writing about this labour market phenomenon.[31] Before the implementation of the EU Directives on equal treatment and working conditions, the lack of this definition went unremarked in academic literature. Thus, EU labour law harmonisation, particularly the clarification of the personal scope of Directive 86/613/EEC,[32] was the only reason that the definition of self-employment was scrutinised in Hungarian law. Beyond EU law harmonisation, it did not seem necessary to have such a definition, since it would not have had any theoretical or practical function.

There is no doubt that the notion of self-employment includes civil law contracts of individual entrepreneurs, individual firms and personally contributing members of business associations (dominantly limited partnerships), regardless of whether they have employees or not. In practice, individual entrepreneurship is the most dominant form of self-employed work and among entrepreneurs who employ others.[33] Some argue that only individual entrepreneurs with no employees

[31] See, for example: Szekeres (2018); Jakab (2015).

[32] Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood. OJ L 359, 19.12.1986.

[33] OECD: *Self-employment rate.* https://data.oecd.org/entrepreneur/self-employed-with-employees.htm (accessed: 17.09.2020).

are truly self-employed. In my opinion, employment of others is not an exclusive and decisive factor.

If we base our theoretical system on the binary model, we can conclude that self-employed workers are those who do not work under the aegis of an employment contract. Therefore, I argue that casual workers are not self-employed, since casual work, called 'simplified employment', is categorised by the Labour Code as an atypical employment relationship,[34] and it is in fact characterised by a certain level of personal subordination. Furthermore, the Eurofound database on self-employment includes members of cooperatives in self-employment.[35] However, the various types of cooperatives (social, student and pensioner cooperatives) may function as employers and are often similar to temporary work agencies, although with relaxed employment protection (Kártyás 2019). So I would exclude members of cooperatives from self-employment with regard to the special Hungarian legal environment.

In summary, there is no legal definition of self-employment, and even the academic literature is not uniform and clear-cut in relation to this concept. Self-employed workers are those who do not work under an employment contract. As a consequence of the binary structure of work relations, the civil law contract is the only contractual form of self-employed activity. Casual workers are formally employees, so they are definitely not self-employed workers. Members of various forms of cooperatives are not clearly employees, but the cooperatives often operate similarly to employers, or even temporary work agencies. Consequently, the notion of self-employment includes civil law contracts of individual entrepreneurs, individual firms and personally contributing members of business associations, depending on who you ask, with or without employees.

3.3. Weak employment protection of self-employed workers

Hungarian employment law is based on the concept of "all or nothing", since employees are entitled to all employment protection mechanisms after signing the employment contract, but self-employed workers have zero employment rights under the scope of the Civil Code by signing a civil law contract (personal service contract or work contract). The Civil Code provisions on these two contractual employment types[36] settle legal issues such as instructions and their refusal, representation, supervision, information obligation, fees, termination, etc. However, these rules do not ensure any employment protection for the worker. At the same time, there are no restrictions at all, for instance on possible activities

[34] Article 201(1) of the Labour Code.

[35] Eurofound: Hungary – self-employed workers, https://www.eurofound.europa.eu/publications/report/2009/hungary-self-employed-workers (accessed: 17.09.2020).

[36] Act 5 of 2013 on the Civil Code, articles 6:238–250 and 6:272–280, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf (accessed: 9.09.2020).

or work duration, so these contracts may be used any time and without further conditions.

Hungarian employment laws are predominantly based on the employment relationship as the legal basis of rights and obligations. Since self-employed workers do not fall under the scope of these employment related laws, they are not entitled to employment protection under most of the employment related acts. Labour inspection is a good example, as the Labour Inspection Act covers only employees and not self-employed workers.[37] The same is true for collective labour rights, since the self-employed cannot conclude collective agreements[38] or strike.[39]

However, there are three notable exceptions when the scope of the employment protection law is not restricted to employees, but covers self-employed workers. First, the Equal Treatment Act may be applied to self-employed workers under the scope of civil law contracts.[40] Second, the scope of the Occupational Safety Act[41] is extended to any "organised work", irrespective of the legal nature of the work relations. Third, security personnel[42] is an intermediate labour law category (between an employment relationship and self-employment) with some weak employment protection on working time and rest periods,[43] but without real relevance and remarkable numbers. Finally, self-employed workers have social security insurance as well, which is the topic of the following subchapter.

3.4. Social security: rights versus costs

Self-employment is above all price sensitive, so the cost of working outside of traditional employment is the key factor in employers' choice of the contractual form of work. The cost for both employers and employees from self-employment consists of taxes and social security contributions. The level of the social security contribution defines the quality of social services, since they are financed by payments made by the worker and employer/client.

As I have already described above, self-employed workers have basically two options in this respect. First, they can opt for full social services coverage, however, this is the most expensive legal form of work. Second, they can opt out of the general social security scheme by choosing the new taxation form (KATA), but this comes with limited services. It must be emphasised that limited social security coverage and particularly pension rights are the price of this low public burden. As already mentioned in Chapter 2 with respect to statistics regarding self-employment, Hungarian self-employed workers mostly choose the cheaper

[37] Act 75 of 1996 on Labour Inspection.

[38] Article 277 of the Labour Code.

[39] Act 7 of 1989 on the right to strike.

[40] Act 125 of 2003 on equal treatment and promotion of equal opportunities, article 3.

[41] Act 93 of 1993 on occupational safety, article 1.

[42] Act 133 of 2005 on security guards and private detectives.

[43] Article 19–20 of Act 133 of 2005.

solution even if this decision has very negative consequences on present and future social benefits, particularly on their expected pension rights. Below, I will briefly elucidate the difference between these two options with a special emphasis on social security rights.

In the general scheme, self-employed persons pay the same contribution and are entitled to the same social security services as employees. All contribution-payers are insured against all risks, without exception. In the case of self-employed workers, there is an obligation to register with the social security authority in order to be entitled to all social services.

Within the cheaper KATA scheme, the 'small taxpayer' self-employed worker is considered to be an insured person by social security, and has pension, health and unemployment insurance.[44] However, the basis for calculating any social security benefit is a comparatively smaller amount (circa EUR 300). Therefore, all social benefits, such as the job seeker's benefit and old age pension, accruing to these self-employed 'small taxpayers' is very low.[45] If we take the example of a self-employed worker with a monthly income of HUF 370,000 (EUR 1,200), their net monthly income is EUR 400 higher than would be the case if they were an employee. However, their pension will be almost EUR 400 euros less per month if we use the present pension regulation as the basis for our calculation.[46] We must see this phenomenon as a real time bomb in the pension system, as a large number of elderly people will have no real pension in the near future (when this group of self-employed people retires).

These very popular reduced schemes are quite problematic, since they impose a much lower public burden on self-employed workers. However, the social rights they are entitled to are also very limited. The most crucial disadvantage of these trends for society as a whole lies in the low pension, which will leave a considerable and increasing proportion of the working population without a real income after reaching retirement age. So, the social security of self-employed workers is fully guaranteed on the surface, but more and more of them 'sell' their rights to a future pension income for a higher net income now.

Therefore, a major revision of this statutory two-pillar (general and 'cheap' schemes for the self-employed) system is highly desirable. The high level of social burden is a key issue here, thus the high social contribution should be gradually (further) decreased for employees and self-employed workers alike. At the same time, the cheap schemes should be aligned to the general one with respect to taxes and contributions. This policy would strengthen the labour market position and the

[44] A self-employed person is entitled to unemployment benefits if he/she has paid the labour market contribution for one year in the last three years and does not have an employment relationship or other legal work relationship (article 25 of Act 4 of 1991 on the promotion of employment).

[45] Articles 8–10 of Act 147 of 2012.

[46] http://bankmonitor.hu/cikk/vallalkozo-kata-s-igy-kerulheti-el-a-minimal-nyugdijat/ (accessed: 25.09.2020).

attraction of employment relationships and employment law. Some steps have been taken in this direction by lowering social security contributions and increasing KATA. However, the social rights of self-employed persons under the cheap schemes should also be improved, particularly as regards old age pension. This could be achieved by a higher contribution basis, or promoting their membership in a voluntary pension fund. Therefore, there are several options to deactivate the 'self-employed pension bomb'.

4. COMBATING FALSE SELF-EMPLOYMENT

As has been stated, there is no clear data on the number of false self-employed workers. According to my estimations, these individuals represent a considerable part of the self-employed: self-employment as a whole is estimated between 11–13% of all workers,[47] and a third of them (around 4% of all workers) is dependent on one (decisive) client.[48] Moreover, the number of individual entrepreneurs has dynamically increased in the past few years as a consequence of the cheap employment option offered by the new form of taxation (KATA). Many of these "new entrepreneurs" have probably opted out of employment relationships with the sole purpose of saving money for both parties (employee and employer) through this legal change in status from employee to self-employed.

False (bogus) self-employment is not a new phenomenon. It has always been present in the Hungarian labour market, and has been addressed as a fundamental problem in legislation several times since the return to the market economy in 1990. The fight against false self-employment (usually called disguised employment) has come to the forefront of employment legislative policy again and again in the last 30 years depending on each government's policies and political agenda.

In this context, we can highlight the following legislative measures in the fight against this disadvantageous labour market phenomenon. Although they touch upon seemingly different topics, they have at least two aspects in common. The first shared feature of these legislative acts is that they all relate to the cost of self-employment through taxation, contributions, applicable labour laws, fines and punishment. Obviously, legislative policy is constantly facing a vicious circle: self-employment must be cheap to create jobs, but at the same time it must be controlled by higher costs. This leads to an oscillating employment legislative policy of tightening and loosening.

Another common feature of these legislative measures is how they exclusively target the employer. Even though both employers and employees alike save a lot of

[47] See Chapter 2 for detailed OECD data and the number of individual entrepreneurs (530,000 in 2020).

[48] https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_onfogl9_08_03.html (accessed: 25.09.2020).

money by disguising employment in a cheaper legal form, the law punishes only the employer. The dogmatic basis of this solution is that the worker is personally and economically subordinated to the (often quasi) employer, so the contractual choice is basically made by the employing party. The increased tax (see point d) below is an exception in this regard, as this measure has an equally negative effect on the income of the worker as well.

a) Creating a cheap alternative form of work in the face of 'casual work'

In 1997, a separate law[49] introduced casual work in Hungarian employment law with the aim of tackling high unemployment and decreasing illegal forms of work. Casual work contracts were designed to create a very cheap and flexible contractual form, which is targeted at workers performing undeclared work as well as those engaged in false self-employment. If the law successfully increased the number of (declared) casual workers, it would increase tax revenues and social security contributions while strengthening their employment and social security rights.

However, the flexible regulation of casual work may also have an unwanted side effect. Namely, it may also lure employees from typical and atypical employment relationships, as casual work is much cheaper and comes with very limited employee rights. Replacement of employment relationships with casual work leads to lower budgetary income and the loss of most of the worker's employment protection. So casual work is also a sort of disguised employment, even if casual work is *de jure* an employment relationship. Casual work is even cheaper than self-employment and provides a bit more employment protection. However, its length is strictly limited to 5 continuous days, 15 days per month and 90 days per year,[50] so it may be only used for shorter periods of time.[51] Without these limitations, casual work would certainly be the number one choice of employers due to the extremely low social charges: employers pay approx. EUR 3 per day for both taxes and contributions combined, and in exchange employees are entitled to a fragment of social security services.[52]

b) Prohibiting false self-employment based on the judicial test

Disguising employment through false self-employment has always been unlawful, but the very first explicit prohibition was inserted in the Labour Code as late as 2003.[53] At the moment, the Labour Code does not prohibit false self-employment expressly, but explains only that "false agreements shall be null and

[49] Act 74 of 1997 on employment with Casual Work Booklet and on its public burdens.

[50] Act 75 of 2010, article 2.

[51] See details: Gyulavári (2020).

[52] They receive an old age pension and unemployed benefit based on a very low amount and also have occupational health insurance (Act 75 of 2010, Article 10).

[53] See amended article 75/A of Act 22 of 1992 on the Labour Code.

void, and if such an agreement is intended to disguise another agreement, it shall be judged on the basis of the disguised agreement."[54]

The legal basis of this implicit prohibition is the long existing judicial concept of the employment relationship, as the legal definition of the employment relationship was not included in the Labour Code before 2012.[55] Despite the previous lack of a legal definition, there has always been a sophisticated judicial test on the differentiation between bogus and genuine self-employment and on the national notion of an employment relationship. This test has been elaborated in recent decades by the labour courts and particularly the Supreme Court. On the basis of this extensive case law, a ministerial guideline introduced the theoretical system of primary and secondary characteristics of the employment relationship.[56] Even if this guideline was repealed in 2011,[57] this concept of primary and secondary features of employment still has some influence on legal practice. Assessment of the legal relationship between the parties (employee versus self-employed) is still often raised in legal disputes, particularly in litigation on unfair dismissal by the employer and the employer's liability for damages. The application of labour law rules on termination of employment and liability for damages implies a certain financial burden on the employer.

c) Labour inspection and increased fines

Labour inspectors and tax inspectors are entitled to evaluate the legal relationship between the worker/employee and client/employer. If the inspector finds that the real and effective contractual relationship between the parties is that of an employment relationship, the employer may be fined both by the tax inspector and the labour inspector. The amount of the labour fine was increased in 2005[58] to create a real dissuasive effect. However, the number of labour inspectors is a key issue here, since the lack of adequate personnel leads to a low number of inspections. In the last 20 years, we have seen first an upsurge and later a slump in labour inspection staff, which considerably weakened the effectiveness of inspection.

d) Incentives and disincentives in taxation

As has been discussed exhaustively above, Hungarian financial (taxation) policy has been quite active in creating tempting tax systems for self-employed workers with extremely low social charges. The extraordinarily price sensitive

[54] Article 27(1) of Act 1 of 2012 on the Labour Code.

[55] Article 42 of Act 1 of 2012 on the Labour Code.

[56] 7001/2005. (MK 170.) FMM-PM együttes irányelv a munkavégzés alapjául szolgáló szerződések minősítése során figyelembe veendő szempontokról.

[57] Act 130 of 2010 repealed all guidelines from 2011, including this one.

[58] Act 155 of 2005 on amending the Labour Inspection Act regarding labour fines.

phenomenon of false self-employment has been energised by these soft policies. This mistake was supposed be handled by the new measure, which imposes an extra 40% income tax on income over HUF 3 million from the same employer[59] as of 2021. This amendment of KATA will considerably increase the price of this form of work, which may noticeably moderate its financial attractiveness.

We can draw some lessons from the efforts of the last 30 years. Above all, false self-employment is a widely existing and even growing phenomenon in the Hungarian labour market. Its primary aim is to cut the cost of employment in order to maximise the income of the employer and employee, who is often an ally of the employer in this scheme against the state (budget). Legislation has already used several methods to combat civil law contracts, which in fact disguise employment relationships. Legislative measures include the creation of cheap alternatives, increased taxes and fines, legal prohibitions, judicial tests and so on. The common feature of these heterogeneous legislative steps is an effort to increase the cost of self-employment. However, this state policy is far from consistent, as it is counterbalanced from time to time by totally opposite fiscal measures with the objective of creating new jobs through cheap forms of entrepreneurship. KATA is an excellent example of why this is not effective in the long run.

5. CONCLUSIONS

The Hungarian model of legal relationships with respect to work consists of two contractual forms: employment contracts with full employment protection and civil law contracts without any protection in labour law. Self-employment covers rather different employment arrangements: genuine self-employment, false self-employment (disguised employment) and economically dependent work. Collectively, self-employed workers represent around 11–13% of the total workforce, however, the proportion of these internal classifications (e.g. the rate of false self-employed) remains unclear.

The binary model of employment relations is based on the concept of "all or no protection". Since the self-employed all work under the scope of the Civil Code (typically through personal service contracts), they are not entitled to any employment rights. Notable exceptions are social security, occupational health and safety and equal treatment. Social security is rather tricky though, as self-employed workers can make a deal with the state to exchange their social security rights (like a future pension) for higher current income. This "deal" is achieved via the new taxation form of KATA, which provided an incredible impetus to the

[59] If a self-employed person has an income from more employers over HUF 3 million, the extra tax must be paid by all these employers. Therefore, this new meaures may be perceived rather as a second KATA tax rate.

increase of (false) self-employment in recent years. The habitual response of the state is increasing the cost of employment, which completes the vicious circle of business as usual in a game of tug of war.

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