

The Protection of Self-Employed Workers in Labour Law

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I. Introduction

- In most legal systems, workers are divided into two major categories: personal dependent employees and personal independent self-employed
- Self-employed persons and informal workers are not entitled to the advantages of labour law
- The definition of employees (personal dependence or rather subordination) marks the keyhole through which every worker must fit in order to enjoy the protection of labour law (*Olaf Deinert*)

- However, in recent years, modern forms of work relationships have emerged (for example temporary employment, on-call work, crowd-work and cross-border subcontracting)

→ Mix of dependent and independent work

→ This creates a 'grey area' outside the building of labour law

Categorisation according to *Davies/Freedland*:

	Status	Characteristics
Group 1	Employees	obligation to personal service; personally dependent or subordinated respectively
Group 2	Self-employed	obligation to personal service; not in a position of legal subordination, but highly dependent economically upon one, or small number of, employers
Group 3	Self-employed	obligation to personal service, but working for a range of employers (or 'clients')
Group 4	Self-employed	not contracted to render a personal service at all, but simply to produce a result

Research question of this paper: To what extent are or should self-employed workers be protected by labour law?

- This paper does not address disguised employment relationships or false self-employment respectively, which are unquestionable subject to labour law
- This paper does neither address small business exemptions from labour law via thresholds (counterpart of the inclusion into labour law)

II. Necessity and limitation of the inclusion of self-employed workers into the scope of labour law

- fundamental considerations -

1. The constitutional principle of equal treatment

- At European level, this right is anchored in Article 20 of the Charter of Fundamental Rights of the European Union
- The principle of equality prohibits the arbitrary unequal treatment of what is *essentially equal*

- Self-employed workers have to be treated the same as employees insofar as they are essentially equal
- They are essentially equal with regard to economical dependence, not with regard to personal dependence
- Labour law rules should apply to all economically dependent workers except those which presuppose the employer's right to give instructions
- For example, the following regulations do not need to apply: the **restriction of working time** (protects against the execution of the right to give directions); **industrial safety and health protection** (personal dependence enhances the occupational risks) and **continued remuneration** (insurance for workers as a return for the personal dependence)

2. Economic considerations

- The protection of self-employed workers would enhance the costs for the employers (or clients, respectively), unless the level of protection is reduced
 - Those costs could be compensated to a certain extent (for example, the protection of self-employed could create incentives to start a business)
- An exact forecast of the costs is difficult
- From an economic point of view, self-employed workers should be included into the scope of labour law with restraint

3. Distributive Justice

- According to empirical data, a lot of own-account workers earn no more than employees (in contrast to employees, they have to bear the social security contributions themselves!)
- The average earning per hour is 13 Euro before tax and social security
- 24 percent of the own-account workers earn less than 8,50 Euro per hour
- 11 percent earn less than 500 Euro per month

- Redistribution from rich (the employer, or client respectively) to poor (the own-account worker)?
 - Redistribution through labour law?
- Complex philosophical questions which cannot be dealt in depth with here

III. Current regulations

1. International Labour Organization (ILO)

- The committee takes the view that „it is in the interest of all labour market actors to ensure that the wide variety of working arrangements be put within an appropriate legal framework”
- However, no agreement could be reached on concrete rules

2. European Union (EU)

- The EU conducted several studies (notable the Supiot-Report of 1999 and the Perulli-Report of 2002), which were in favour of including self-employed workers into the labour law to a certain extent
 - 2006: Commission's Green Paper „Modernising Labour Law to meet the Challenges of the 21st Century “
- However, the Green Paper did not contain any specific proposals and was not pursued further.

3. EU Member States

- The various Member States provide uneven labour-law protection of self-employed workers

- The highest level of protection is provided in the United Kingdom
 - Category of „**workers**“, which enjoy a limited protection of the Health and Safety at Work Act 1974, protection from discrimination, minimum wage and working time regulation.
- Italian Law: Category of **parasubordinati**, which are characterised by coordinated and continued cooperation with a client; relevant is the obligation to perform personal work (not the economic dependence)
 - Access to labour jurisdiction and social security
 - industrial safety and health protection, law on employee's inventions, parental leave, and an employment prohibition for pregnant women
- German Law: Category of **employee-like persons**, which are formally independent contractors without any personal subordination, but are characterized by a position of economic dependence
 - Only a small set of labour law norms apply to employee-like persons (for example annual paid leave; occupational safety; protection from discrimination; the right to conclude collective agreements for employee-like persons and access to labour courts)

IV. Approaches to solutions regarding the scope of labour law

1. Complete redesign of labour law

- **Approach of *Freedland*:** Inclusion of all self-employed which have contracted to render a personal service (workers of groups 2 and 3)
Contra: Too excessive, too costly
Contra: Not required by the principle of equal treatment (employees and workers from group 3 are not essentially equal, since the latter are not economically dependent)
- **Approach of *Langille*:** Labour law as a means for fulfilling human freedom
Contra: blurry, has little to do with labour law

2. Inclusion of all economically dependent workers (group 2)

Pro: economic dependence as the real cause for the need of protection

Contra: Still too excessive and too costly

3. Application of selected norms to a middle category

→ Expansion of the German Approach

Definition: Economically dependent workers

Applicable rules (suggestions):

- **Minimum Wage**

- Problem: freedom of services

- Alternative: Extension of collective remuneration rules

- **Compulsory membership in social security**

- **Period of notice**

- suggestion: parallel with commercial agents

4. Protection of specific professions and employment relationships

Example: crowd-Work (platform work)

Pro: flexibility

Pro: taking into account the individual needs

Contra: The legislator will most likely lag behind the developments

V. Conclusions

- The labour-law protection of self-employed workers should be enhanced
- This is supported by constitutional and justice-oriented considerations
- Preferable is the application of selected norms to a middle category defined by economic dependence
- This may include minimum wage, compulsory membership in social security, and a period of notice

Thank you for your attention!