

Economically-dependent Workers as Part of a Decent Economy

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persons include their tax obligations and their obligations towards the state regarding social security contributions.

With regard to the prohibition of discrimination, it is prescribed that the client must respect the provisions regarding the general prohibition of discrimination and of retaliatory measures, the prohibition of sexual and other types of harassment, and the particularities of liability for damage in cases involving a violation of the prohibition of discrimination, including the deterrent function of the awarding of damages in such cases.¹⁰

The last element of the labour law protection that the legislature envisaged for economically-dependent persons is related to the liability for damage.¹¹ Due to the fact that there are no particular provisions pursuant to the ERA-1 that apply to the liability of employers for damage, this aspect of protection can only be taken into consideration in cases in which the liability of economically-dependent persons for damage is established. The most important particular element is probably that an economically-dependent person is not liable for minor negligence (i.e. for carelessness). Regardless of the fact that the ERA-1 prescribes the mentioned particular feature with regard to the culpability of economically-dependent persons for inflicting damage, there is justifiable doubt whether such provision is appropriate. A key reason for the fact that the ERA-1 prescribes certain particular elements with regard to the liability of employees for damage is that employees perform work uninterruptedly for a longer period of time and that they are not responsible for the final result of their work and, consequently, do not bear a business risk.¹² Their obligation in a civil law sense is an obligation of means, i.e. an input-based obligation. On the other hand, economically-dependent self-employed persons usually do not perform work on the premises of the client and the nature of their work requires that the work is completed, thus they must provide a result. Therefore, they bear a business risk and their obligation is an obligation of result, i.e. an output-based obligation.

Self-employed persons, including economically-dependent persons, are also subject to the system of health and safety at work. The Health and Safety at Work Act¹³ defines self-employed persons very similarly to the way the ERA-1 defines economically-dependent persons. According to the Health and Safety at Work Act, a self-employed person has to take care of his or her own health and safety at work. Article 56 of the Act stipulates that a self-employed person must assess the risk at work. If he or she finds that there is a risk of accident, of occupational disease, and/or of work-related illness, he or she must draw up a written safety declaration with a risk assessment and set out measures to ensure health and safety at work.

Slovenian labour law does not explicitly address the issue of unionising (organising) economically-dependent persons. These persons may organise themselves otherwise in order to protect their own interests, on the basis of the general right to association, which right is also included in the Slovenian Constitution. To date, there have been no such associations in Slovenia, nor have any agreements been concluded with regard to economically-dependent persons that would be similar to collective agreements. Collective agreements in Slovenia apply only to personally subordinated workers in an employment relationship.

¹⁰ Articles 6 and 7 ERA-1.

¹¹ Articles 170–180 ERA-1.

¹² Employees only provide the employer with their work, which is directed, supervised, and used by the employer.

¹³ Official Gazette RS, No. 43/2011 (*Zakon o varnosti in zdravju pri delu – ZVZD-1*).

3. The identification of economically-dependent persons

- 18 One of the most important questions of the legal position of economically-dependent persons that the legislature had to answer with the aim of providing effective statutory regulation with regard to such persons was how to establish which self-employed persons are – or when they become – economically-dependent persons and consequently become entitled to the protection described above. In other words, who should be entrusted with reviewing civil law contractual relationships with regard to the elements that result in economic dependence? A possible manner of identifying economic dependence is that individual contracts are reviewed by a body or a person competent to do so. This manner is sufficiently complex and requires comprehensive and detailed regulation. When adopting the ERA-1, the Slovenian legislature did not have the time or the necessary means to develop such a manner of identification. Therefore, it adopted a type of ‘self-assessment’ principle regarding economic dependence in relation to an individual client. Economically-dependent persons are entitled to the limited labour law protection described above if, after the end of each calendar year or business year, they notify their client on whom they are economically dependent of the conditions under which they perform work.¹⁴ In the course of doing so, they must submit to their client all evidence and information necessary to determine the existence of economic dependence. It is an indisputable fact that in this system, the entire concept of economic dependence and its implementation in practice depend on the decision of the individual self-employed person whether to assert economic dependence, i.e. whether they notify their key client of the existence of the elements of economic dependence. It is entirely reasonable to have reservations regarding the existing regulation, firstly because many self-employed persons are not even aware of the possibility of asserting their position as economically-dependent persons, and secondly because a certain percentage of self-employed persons will not wish to assert the position of an economically-dependent person, fearing that their key client will no longer be willing to work with them.

III. Social security for economically-dependent workers

- 19 In Slovenia, economically-dependent persons are included in the general social security system as self-employed persons. There is no special legal regime for economically-dependent persons, which means that all self-employed persons, as well as employees, are compulsorily included in all types of social insurance: pension and disability, health, unemployment, and parental care. This means that all self-employed persons are protected against all social risks. Because self-employed persons, unlike employees, do not have an employer, they pay all social security contributions themselves. The insurance base in all four types of social insurance is the insurance base determined for the compulsory pension and disability insurance. The process of calculating the insurance base for each individual self-employed person is quite complex and complicated, but it is important that each self-employed person also has the option of choosing the amount of the base on which he or she will pay social security contributions. This means that he or she can pay contributions on a lower base than the base calculated for him or her using his or her income in the preceding year. The law also determines the lowest and the highest possible insurance bases for self-employed persons. Their lowest

¹⁴ Article 214 paragraph 3 ERA-1.

H. Slovenia

insurance base is 60 % of the average annual salary of employees in Slovenia, calculated per month. Their highest insurance base is 3.5 times the average annual salary of employees in Slovenia, calculated per month. Statistics show that 70 % of the self-employed persons pay social security contributions on the minimum allowable insurance base. This generally means that the pensions of self-employed persons are usually relatively low. If self-employed persons used their own insurance base for the payment of social security contributions or, if this base was too high, the maximum base, there should generally be no problems with too low pensions.



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DIE FACHBUCHHANDLUNG

I. Spain

I. Abstract

1 In Spain, there is a system of binary categorisation under which an individual service provider (or a person who performs work personally) has to fit either the category of 'employee' or that of 'self-employed person'. Via the Self-employed Workers' Statute, Spanish law regulates another kind of person performing work, called 'economically-dependent self-employed person' (*Trabajador autónomo económicamente dependiente* – TRADE). The concept of economically-dependent self-employed person is not a third category of persons performing work or an intermediate category between 'employee' and 'self-employed person'. Rather, economically-dependent self-employed persons first have to be completely self-employed, and then, if they fulfil another additional requirement – 75 per cent of their income is to come from one client –, they are deemed economically-dependent self-employed persons. The relevant legislation grants few individual and collective rights to TRADEs, which rights are to be analysed in this report.

II. 'Economically-dependent workers' as a category of work

1. A binary system: employees and self-employed persons

- 2 Article 1.1 of the Statute of Labour establishes the definition of 'worker'/'employee' in Spain (in this report, I will use the words 'worker' and 'employee' as synonyms, since there is no legal category in Spain called 'workers' that is different from an employee). This definition is as follows: 'employees are those who voluntarily provide their paid services for others, within an organisation, and under the direction of another person, either a natural person or a legal entity, called an employer'.
- 3 In addition, the concept of self-employed person is also defined by the law. In its first article, the Spanish Law 20/2007 of 11 July on the Self-employed Workers' Statute (Ley del Estatuto del Trabajador Autónomo) defines 'self-employed person' as follows: 'natural persons who habitually, personally, directly, on their own account, and outside the scope of the direction and the organisational structure of another person, carry out an economic or professional activity for a profit-making purpose'.
- 4 Therefore, in Spain, there is a system of binary categorisation under which an individual service provider (or a person who performs work personally) has to fit either the category of 'employee' or that of 'self-employed person'. The difference between an employee and a self-employed person lies in the concepts of 'dependence' and '*ajenidad*'. Indeed, a person who performs work under dependence and *ajenidad* is deemed an employee¹.

¹ Montoya Melgar, *Temas Laborales (TL)* 2005, 25; Selma Penalva, *Civitas* 2007, 151; Hernández Nieto, *Registro de Universidades, Centros y Títulos*, 2010, 177; López A niorte, *La descentralización productiva y su incidencia en la relación individual de trabajo*, 2003; Cruz Villalón, *TL* 2005, 12; Cruz Villalón, in: Rodríguez-Piñero Royo (ed.), *El empleador en el Derecho del Trabajo, XVII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, 1999, 29; Martínez Barroso, *Anuario da*

However, the law does not define the meaning of either 'dependence' or '*ajenidad*'.⁵ This made it necessary to have these concepts interpreted by the courts. The judicial practice focuses on the following characteristics in order to distinguish an employment contract from any other civil, commercial contract:

1) Dependence: Traditionally, the courts have found that there is dependence when: 6 the person performing work has regular working hours; there is exclusivity in the contract; there are instructions and orders from the principal (employer); and the supervision of the performance of work is also performed by the principal (employer) (Supreme Court Judgment (STS) of 10 July 2000 rec. 4121/1999, 15 October 2001 rec. 2238/2000, 7 October 2009 rec. 4169/2008). In particular, any instruction from the principal (employer) in order to ensure the better performance of the services provided by a self-employed person is illegitimate interference in the freedom of a truly independent contractor, thereby making him or her an employee (STS of 24 June 2015 rec. 1433/2014).

In the same sense, the fact that the services were provided under the brand of 7 the principal was considered a characteristic of an employment contract (STS of 19 December 2005 rec. Ud. 5381/2004). Moreover, cases in which the principal provided training for the allegedly self-employed person or even simply paid for such training (STS 19 June 2007 rec. 4883/2005), and even when the allegedly self-employed person paid for her own training because her contract with the principal made that training compulsory, were interpreted as cases of bogus self-employment (Superior Court of Madrid Judgement (STSJ) of 28 December 2008 rec. 4883/2005 and of 23 February 2009 rec. 220/2009).

2) *Ajenidad*: This characteristic of an employment contract can be interpreted from 8 different perspectives. First, *ajenidad* can be viewed from the perspective of who is profiting from the 'fruits of labour'². This means that under an employment contract, the worker gives away 'the fruits of his or her labour' to the employer who receives them in exchange for some consideration. Second, there is *ajenidad* from the perspective of business risks. In this sense, the worker is not the one who assumes the losses of the company. That said, this does not mean that an employee cannot have variable remuneration connected with the profit of the company³. Third, *ajenidad* can be viewed from the perspective of the means of production: in this case, the worker does not own the relevant equipment and other resources required to produce goods or to perform services⁴. Last, *ajenidad* viewed from the perspective of the market means that the worker does not offer services to the market but only to his or her employer ('market *ajenidad*')⁵. According to the Supreme Court (STS of 31 March 1997 rec. 3555/1996), all these faces of *ajenidad* are different perspectives of the same reality and therefore they have to be analysed together.

The Supreme Court found that there is *ajenidad* even when the workers are paid 9 based on a percentage of the income of the employer (STS of 20 June 1999 rec. 4040/1998). In the same sense, there is an employment contract despite the fact that the worker has agreed not to receive a commission in cases in which the buyer does not pay for the product sold by the worker in order to get a commission (STS of 7 October 2009

Facultade de Dereito da Universidade da Coruña 2007, 451; Guerrero Vizuete, *Aranzadi Social*, 2 (20), 2010, 149.

² Alonso Olea, *Introducción al Derecho del Trabajo*, 1968; Montoya Melgar, *El poder de dirección del empresario*, 1965.

³ De La Villa Gil, *El trabajo a domicilio*, 1966; Bayón Chacón/Pérez Botija, *Manual de Derecho del Trabajo*, 1976.

⁴ Albiol Montesinos, *Cuadernos de la Catedra de Derecho del Trabajo*, 1, 1971, 41.

⁵ Alarcon Caracuel, *Civitas* 1986, 459.

rec. ud. 4169/2008 and STSJ of Cantabria of 29 December 1994 rec. 929/1994). In conclusion, an employment contract still exists when the worker takes on certain business risks.

- 10 In addition, the employee can be the owner of some work equipment or means of production as long as these pieces of equipment or means of production are not economically important or relevant (STS of 19 July 2002 rec. 2869/2001). The courts endorse the idea that there is a civil law contract only when the service provider makes a meaningful investment in order to provide the services⁶.

2. A subcategory of self-employed persons: TRADEs as economically-dependent self-employed persons

- 11 Via the Self-employed Workers' Statute, Spanish law regulates another kind of person performing work, called the 'economically-dependent self-employed person' (*Trabajador autónomo económicamente dependiente* – TRADE). This concept is regulated in Article 11 of the Self-employed Workers' Statute in the following way: 'those who perform an economic or professional activity on a profit-making basis and in a habitual, personal, and direct manner, predominantly for a natural person or a legal entity, called a client, on whom they depend economically by receiving at least 75 per cent of their total income through income from work and from economic or professional activities.'
- 12 It is therefore clear from the regulations that the concept of economically-dependent self-employed person is not a third category of persons performing work or an intermediate category between 'employee' and 'self-employed person'. Rather, economically-dependent self-employed persons first have to be completely self-employed, and then, if they fulfil another additional requirement – 75 per cent of their income is to come from one client –, they are deemed economically-dependent self-employed persons. This is why the Spanish Supreme court held that TRADEs are a subcategory of self-employed persons (STS of 8 February 2018 rec 3389/2015).
- 13 As the explanatory memorandum explains, this requirement, that is, 75 per cent of the income coming from one client, is set out to separate those who are understood to be economically dependent on their main client from those who act directly on the market with being economically independent from each of their clients.
- 14 In reality, however, these two requirements are difficult to meet. Indeed, it is difficult to find a genuinely self-employed person (by definition without dependence and *ajenidad*) if he or she is economically dependent on one client. In this sense, usually, if a service provider is economically dependent on just one client, this service provider is adapted to the main business of the client, something that would mean that he or she is not genuinely self-employed. In addition, an economically-dependent service provider knows that he or she has to comply with the wishes – instructions – of the client as his or her whole business survival depends on this.
- 15 The Statute also obliges persons who want to be deemed TRADEs – in addition to meeting the above-mentioned requirements – to comply with two formal requirements: 1) register in an official list at the Labour Ministry; 2) inform their client that 75 per cent or more of their income comes from him or her (Article 11bis of the Self-employed Workers' Statute). The second requirement is essential and the contract concluded by a TRADE cannot have any legal effect without such a communication in advance. This is justified by the law by the following argument: the client must know – and only the self-employed person can inform them – whether he or she is concluding a contract with a self-employed person who is not a TRADE or with a TRADE. Nevertheless, this

⁶ González Biedma, *Civitas* 1999, 667.

requirement to inform the client poses some problems because many TRADEs may be afraid to make this communication for fear of retaliation (e.g. termination of the contract in question).

To sum up, even though the category exists in law, this kind of self-employed person is scarce in reality, as the definition contradicts its own terms and the formalities are difficult to comply with. Currently, the official data say that there are only 10,000 TRADEs registered in the whole of Spain. This accounts for less than 0.33 per cent of all the self-employed persons and less than 0.05 per cent of the total number of persons performing work in Spain. Nevertheless, the Self-employed Workers' Statute also grants particular rights to all self-employed persons, including collective rights. These rights are in addition to the rights that they are entitled to due to being self-employed. 16

III. The legal position of economically-dependent self-employed persons from a labour law perspective

1. Individual rights

a) **Working time.** According to Article 14 of the Self-employed Workers' Statute, the working hours of economically-dependent self-employed persons are to be set out in their contracts or in an Agreement of Professional Interest (collective agreements of TRADEs). These documents can determine the regime of work schedules and working hours, as well as weekly rest periods, holiday entitlement, and the maximum amount of working time per day or even its weekly distribution in cases where working time is calculated over months or years. In addition, the law provides for the possibility of adapting the working hours to suit those self-employed persons who are victims of gender violence in order to ensure their effective protection or their right to comprehensive social assistance. 17

Therefore, the working hours of economically-dependent self-employed persons may be agreed upon by the parties. Article 14.3 of the Self-employed Workers' Statute allows for an activity to be voluntarily extended to a period longer than which is agreed upon in the contract, but with limits. The limit is to be established in an Agreement of Professional Interest or, if such an agreement does not exist, in a subsidiary document, with a maximum limit of 30 per cent of the initial period individually agreed upon in the contract. 18

It can therefore be seen that, unlike in the case of economically-independent self-employed persons, there seems to be a possibility of setting a maximum number of working hours in the case of economically-dependent self-employed persons. However, unlike in the case of employees, the parties can decide on this contractual maximum without being restricted by a statutory annual maximum. 19

Once this limit to the number of working hours is set, it must be respected by the parties, but even if they agree upon a maximum number of working hours, the client can legally demand up to 30 per cent more than the number of hours initially agreed upon. 20

It seems that in the case of economically-dependent self-employed persons, it can be thought that, since the majority of the work comes from the same client, this client can calculate approximately on which days the economically-dependent self-employed person is needed and, therefore, have these days included in the contract. In contrast, in the case of self-employed persons without a main client, it does not seem possible to similarly determine the working days with each of their clients. 21

- 22 **b) Remuneration.** The Self-employed Workers' Statute does not establish any specific provisions regarding the remuneration of economically-dependent self-employed persons nor for self-employed persons.
- 23 **c) Interruption and suspension of the contract, leave of absence.** In accordance with Article 16 of the Self-employed Workers' Statute, those causes of the interruption of the activity by an economically-dependent self-employed person are deemed to be duly justified which are based on:
- a) The mutual agreement of the parties.
 - b) The need to attend to urgent, unexpected, and unpredictable family responsibilities.
 - c) A serious and imminent risk to the life or the health of the self-employed person, as provided for in section 7 of Article 8 of this Statute.
 - d) Temporary disability, maternity, paternity, adoption of a child, or fostering a child.
 - e) Risk during pregnancy and risk during the breastfeeding of a child under nine months of age.
 - f) A situation of gender violence, in order to enable the economically-dependent self-employed person to exercise their right to protection or to comprehensive social assistance.
 - g) Force majeure.
- 24 Other causes justifying the interruption of the professional activity may be provided for by means of a contract or of an Agreement of Professional Interest.
- 25 No cause of the interruption of the activity provided for in the sections above can constitute the basis for the termination of the contract. If the client deems the contract to have been terminated based on a circumstance listed above, this circumstance is deemed to be a lack of justification for the purposes of determining the fairness of a dismissal.
- 26 This same article also provides that, despite these rights, when an interruption in a case provided for in paragraph d), e), or g) of section 1 causes such significant damage to the client that renders the normal performance of his or her activity impossible or disturbs such performance, the termination of the contract may be deemed justified.
- 27 The cases of maternity, paternity, adoption of a child, foster care of a child, and risk during pregnancy and during the breastfeeding of a child under nine months of age as referred to in paragraphs d) and e) of section 1 of this article are exempt from the provision mentioned above when the economically-dependent self-employed person continues the activity.
- 28 **d) Holidays.** Regarding holidays, the Statute establishes in its Article 14.1 that 'the economically-dependent self-employed person shall be entitled to an interruption of his or her annual activity for 18 working days, without prejudice to the fact that the said entitlement may be increased via a contract between the parties or via Agreements of Professional Interest'. The main problem here is that the law does not provide that this entitlement includes remuneration – especially when considering that it is specifically included in the case of employees. In conclusion, the holiday entitlement is only a right to interrupt the activity, without remuneration.
- 29 **e) Termination of the contract.** In order for any right to be effective, it is essential that there is a strong regime preventing unfair contract termination, since otherwise the request for or the obligation to grant any right (e.g. the minimum wage) could end in the termination of the contractual relationship, thereby resulting in the non-existence of the right in practice. Likewise, such a deficiency could result in the non-exercising of these rights by the rest of the persons performing work due to a fear of this type of reprisal.