



Prof. Dr. Claudia Schubert

Faculty of Law
Chair for Civil Law, Labour Law, Company Law
and Legal Comparison

Economically-dependent Workers as Part of a Decent Economy – International, European and Comparative Perspective

I. Aim and Background

So far, the distinction between “employee” and “self-employed” is predominant in many member states of the European Union. The classification regularly decides on the social protection of the working person. Only some member states, such as Italy, Austria, Germany or Spain, include economically dependent workers as a third group of workers in their legal systems and recognize their specific need for social protection. This allows for a differentiated form of economy, responding to the specific needs instead of reducing social protection to the all-or-nothing solution that is often associated with the two-branch-system of employees and self-employed. The digitalisation and the growing platform-economy increase the importance of the third category of working persons. This has already led to further legislation in member states which have recognized economically-dependent workers for a long time (e.g. co.co.co in Italy) but also in member states that only recently opted to protect such workers (e.g. Art. L.7341-1 ss. Code du Travail France). Despite the current focus on digitalisation and platforms one should not obscure the fact that there was a significant group of economically-dependent workers long before these technological and technical changes occurred. This includes dependent commercial agents, franchisees and drivers for the delivery of goods, but also freelance lecturers and freelance staff in the media sector. Finally, homeworkers, the most traditional group of economically-dependent workers, gain new relevance due to the digitalisation.

The project aims at a legal comparison of the definition and protection of economically-dependent workers. Firstly, it focuses on the legal system of member states that have developed or are developing a social protection scheme for economically-dependent workers: Germany, Austria, Italy, UK, Spain, Portugal and France. Furthermore it includes member states that protect or aim to protect such workers through collective agreements (e.g. Netherlands, Ireland). The comparison concentrates on the personal scope of social protection and its structure in labour and social security law.

Secondly, the project will focus on the implications of international law on the social protection of workers. So far, there is limited evidence for a recognition and protection of economically-dependent workers. The European Committee of Social Rights extended the personal scope of the European Social Charter to economically-dependent workers but refused to define these workers and gave no reasoning as to why the Charter covers non-employees. Also,

the ILO Committee of Experts on the Application of Conventions and Recommendations supports the legal protection of such workers through collective agreements but delegates the legal solution to the competition authorities. The project has to elaborate, if and to what extent economically-dependent workers are protected by international law and its influence on the law of the member states.

Thirdly, EU Law does not recognise economically-dependent workers as group but, at least, they are – to a certain extent – included in the regulations regarding the safety of work. Besides, there is an academic discussion about whether economically-dependent workers are covered by the protection of the social fundamental rights within the CFEU. The research project has to focus on the scope of European social policy and the social fundamental rights. It has to be discussed whether the protection of commercial agents is a model for their social protection (see Directive 86/653/EG). Finally, a proposal for the integration of economically-dependent workers in the European social policy will be made, including a definition of the personal scope.

The result of the project will be published electronically and in book form. It is also intended to disseminate information on the project and its results via social media.

II. Extensive Description of Intended Research Project

1. State of Scientific Knowledge - Preliminary Works and Research Gaps

a) Legal Comparison

In member states that acknowledge economically-dependent workers as a legal category, there are national legal studies.¹ The legal discussion is by far not as extensive or intensive as the research on employees and the employment relationship, since they usually are not considered to be as important as employees. This is due to the lower number of persons affected and the heterogeneity of this group of workers. As a result, legal comparison is rare. There is literature comparing single countries, e.g. Italy and Germany or Austria and Germany², but no overall legal comparison, including all member states that recognize economically-dependent workers as a legal category, or have legal instruments that extended to such workers³. There is no common definition of “economically-dependent worker”. Instead, not even the individual legal systems use the term concurringly (e.g. para 12a Tarifvertragsgesetz in Germany, Decreto Legislativo, 15.6.2015, No. 81 and Art. 409 Nr. 3 Codice di Procedura Civile in Italy). At least, there seems to be a common understanding that there is a group of self-employed persons without staff, who face a comparable structural imbalance vis-à-vis the main principal as em-

¹ E.g. in Germany *Franzioch*, Abhängige Selbständigkeit im Arbeitsrecht: eine Untersuchung der rechtlichen Stellung von Selbständigen in persönlicher oder wirtschaftlicher Abhängigkeit, 2000; *Naumann*, Die arbeitnehmerähnliche Person in Fernsehunternehmen, 2006; *Neuvians*, Die arbeitnehmerähnliche Person, 2002; *Schubert*, Der Schutz der arbeitnehmerähnlichen Personen, 2004.

² E.g. *Kersting*, Die arbeitnehmerähnliche Person im spanischen Arbeitsrecht, 2011; *Pottschmidt*, Arbeitnehmerähnliche Personen in Europa: die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten, 2006; *Stefanescu*, Die arbeitnehmerähnliche Person im italienischen Recht, 2013; *Wachter*, Wesensmerkmale der arbeitnehmerähnlichen Person, 1980.

³ Partly outdated *Rebhahn*, Recht der Arbeit [RdA] 2009, 236 ss. according countries with explicit protection.

ployees and therefore, need specific social protection, even if there is no personal but economic dependency.

The existing comparative literature does often concentrate on the understanding of what economically-dependent workers are. Sometimes it also refers to the labour law protection but only rarely includes social security issues. From a labour law perspective, the protection of such workers is selective as a general rule, even if there were individual voices in favour of a comprehensive inclusion of platform workers into the labour law protection.

As a first step, legal comparison has to identify to what extent such workers are protected by national labour laws. Furthermore, the comparative analysis has to explore if the legal protection is in accordance with the specific needs for protection and functioning of protective mechanisms, as they – at least in part – presume a personal dependency. It has to be identified, what the most relevant legal responses to economic dependency are.

Finally, the social security of economically-dependent workers – if there is any – varies from member state to member state. Despite those differences, social security cannot be neglected for two reasons. Firstly, such workers have a low income as a general rule, and often do not or cannot protect themselves against typical risks as sickness, inability to work age and worklessness if there is no mandatory social security. As a consequence, self-employed persons without staff, which mainly work for one principal, are low-cost competition to employees with mandatory insurance, minimum wages and collective agreements. Secondly, such workers have little power to enforce higher prices on the market, which would enable them to pay contributions to a mandatory social insurance scheme. Thus, the financing of social security contributions, the accountability and the consequences of non-payment have to be reflected. So far, there is no comprehensive overview, comparing all relevant member states.

b) International Law

International law does not recognize economically-dependent workers as a specific group to be protected. At least, there are some conventions and recommendations of international organisations that have a personal scope that might include such workers, since they focus on groups of workers, which typically are not employees, but dependent self-employed, e.g. ILO Convention No. 177 (Home Work Convention), Unidroit Convention on Agency in the International Sale of Goods or the ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997).

A general framework can only be seen in those ILO conventions – especially in the fundamental principles –, if they are not limited to employees as personally dependent workers, but extended to economically-dependent workers. Such conventions are the Discrimination (Employment and Occupation) Convention (C 111, 1958), the Freedom of Association and Protection of the Right to Organise Convention (C 87, 1948) and the Right to Organise and Collective Bargaining Convention (C 98, 1949). Specifically relevant are the Social Security (Minimum Standards) Convention (C 102, 1952) and the Occupational Health Services Convention (C 161, 1985). So far, there is no sentencing of the competent bodies with special reference to economically-dependent workers. The ILO-Committee of Experts on the Application of Conventions and Recommendations supports the legal protection of such workers through collective agreements but delegates the legal solution to the competition authorities.⁴

⁴ Johnston/Land-Kazlauskas, ILO, Organizing on-demand: representation, voice and collective bargaining in the gig-economy, 2019, 24 s.

The European Charter of Social Rights does not refer to economically-dependent workers explicitly and determines the personal scope of application by using the term “worker”/„travailleur“. The European Committee of Social Rights, however, has extended the understanding of “worker” to self-employed persons, who need social protection.⁵ However, it has neither given a definition of “protected self-employed” nor extended all articles of the Charter to self-employed persons. To date, there is no comprehensive concept. In the decision on the collective complaint in the case *Irish Congress of Trade Unions (ICTU) v. Ireland*, the European Committee of Social Rights extended Article 6 para 2 of the Charter to self-employed. It reasoned that concept of false self-employed worker or fully dependant self-employed worker within the Competition (Amendment) Act 2017 is excessively narrow and a deprivation of the right to bargain collectively.⁶ The Committee stated that such extension has “no or minimal economic effect on the market, will not lead to significant cost to the State and will not contravene any other law, including EU law, relating to the prevention, restriction or distortion of competition in trade”.⁷ The personal scope of application remained again undefined.

The position of the Committee has been disputed in academia.⁸ The term “worker” has a wide scope in English labour law.⁹ On the other hand, “travailleur” does not have the same extensive meaning, as France does not even have specific laws on economically-dependent workers.¹⁰ These two national legal systems are, admittedly, not the key reference points for the interpretation of the convention, but a first reference. There is a need for a substantiated interpretation of the personal scope of the European Charter of Social Rights. Finally, economically-dependent workers need social protection, including remuneration, social security and safe and healthy working conditions, at least, if these conditions are determined by the main principal. At least, a prohibition of forced or child labour are necessary limitations, as there are human rights standards. To the contrary, all regulations, that have personal independence as a precondition, are not adequate and functional.

c) European Law

As a general rule, European social policy is focused on employees. The CJEU defines the employment relationship as one, where a person performs services for and under the direction of

⁵ Conclusions XX-2, 2013, 3f. – Deutschland; Collective Complaint 12.9.2018 – 123/2016 para. 109 ss., *Irish Congress of Trade Unions (ICTU) v. Ireland*; s. auch Digest 2018, 100.

⁶ Collective Complaint 12.9.2018 – 123/2016 para. 109 ss., *Irish Congress of Trade Unions (ICTU) v. Ireland*.

⁷ Collective Complaint 12.9.2018 – 123/2016 para. 109, *Irish Congress of Trade Unions (ICTU) v. Ireland*.

⁸ Pro Kohle, in: Festschrift für Birk, 2008, 417, 419, 421s.; Schubert, in: Franzen/Gallner/Oetker, *Europäisches Arbeitsrecht*, 3. Aufl. 2020, Teil I ESC para 6; Świątkowski, *Charter of Social Rights of the Council of Europe*, 2007, 84, 191; Wiebringhaus, in: *Liber Amicorum Aubin*, 1979, 265, 270; contra Pischel, *die Bedeutung der Europäischen Sozialcharta für das Recht in der Bundesrepublik Deutschland*, Diss. Würzburg, 1996, 12; see also Marhold/Kovács, in: Ales/Bell/Deiner/Robin-Olivier, *International and European Labour Law*, 2018, RESC Art. 2 Rn. 5.

⁹ See section 203 III Employment Relation Act (ERA) 1996, National Minimum Wage Act 1998, Working Time Regulations (WTR) 1998.

¹⁰ Rebhahn/Rainer, in: Schwarze/Becker/Hatje/Schoo, *EU-Kommentar*, 4th ed. 2019, Art. 153 AEUV para 13; Pottschmidt, *Arbeitnehmerähnliche Personen in Europa: die Behandlung wirtschaftlich abhängiger Erwerbstätiger im Europäischen Arbeitsrecht sowie im (Arbeits-)Recht der EU-Mitgliedstaaten*, 2006, 510 f.; a. A. Ziegler, *Arbeitnehmerbegriff im Europäischen Arbeitsrecht*, 2011, 177.

another person, for a certain period of time, in return for which he receives remuneration.¹¹ Even if the definition of “employee” differs within European labour law depending on the relevant legal source, the notion of personally dependent work is common.¹² The reference to “the right of instruction” prevents the inclusion of economically-dependent workers in European labour law.¹³ Still, in German academia there has been a dispute on the extension of European social policy and/or the freedom of collective bargaining and collective action to economically-dependent workers.¹⁴

The CJEU is, at least, not clear on the last point. In the *FNV Kunsten* judgement¹⁵, the Court considers that a provision of a collective labour agreement, in so far as it was concluded by an employees’ organisation in the name, and on behalf, of the self-employed services providers, does not constitute the result of a collective negotiation between employers and employees.¹⁶ It is no collective agreement, and thus it cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.¹⁷ To the contrary, labour agreements on behalf of ‘false self-employed’ are of a different nature. The wording of the decision seems to exclude all self-employed persons from the privileges of collective agreements, even if this position is disputed¹⁸.

The deficient inclusion of economically-dependent workers in European social policy neglects their specific need for social protection. Only the Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work extends its personal scope of application to all workers, meaning persons employed by an employer (Arti-

¹¹ See in the context of freedom of movement for workers and the principle of equal pay for men and women, CJEU, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, para 16 and 17, and Case C-256/01 *Allonby* [2004] ECR I-873, para 67; in the context of Directive 92/85, Case C-116/06 *Kiiski* [2007] ECR I-7643, para 25; Case 232/09 *Danosa* [2010] ECLI:EU:C:2010:674 para 39.

¹² On the common grounds of the term employee in EU law *Ziegler*, Arbeitnehmerbegriff im Europäischen Arbeitsrecht, 2011, 170ff., 194; different with regard to economically-dependent worker and Article 153 TFEU see *Pottschmidt*, Arbeitnehmerähnliche Personen in Europa, 2006, 510f.; *Rebhahn/Rainer*, in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 4th ed. 2019, Art. 153 AEUV para 13 f.; krit. *Seifert*, Europäische Zeitschrift für Arbeitsrecht [EuZA] 2015, 500, 504.

¹³ *Krebber*, in: Calliess/Ruffert, EUV/AEUV, 5th ed. 2016, Art. 153 AEUV para 2; *Rebhahn*, RdA 2009, 236, 237; *Schubert*, Der Schutz der arbeitnehmerähnlichen Personen, 2004, 104, 156ff., 164; *Thüsing*, EuZA 2008, 159, 165; *Wank*, AuR 2007, 159, 165; so auch *Ziegler*, Arbeitnehmerbegriff im Europäischen Arbeitsrecht, 2011, 194; diff. *Pottschmidt*, Arbeitnehmerähnliche Personen in Europa, 2006, 197f., 395ff., 507ff., 517; different *Rebhahn/Rainer*, in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 4th ed. 2019, Art. 153 AEUV para 13.

¹⁴ According Article 153 TFEU *Franzen*, in: Franzen/Gallner/Oetker, Europäisches Arbeitsrecht, 3rd ed. 2020, Art. 153 AEUV para 8 ff., 11; according Article 28 CFREU *Heuschmid*, in: Däubler, Arbeitskampfrecht, 10th ed. 2018, § 11 para 34; *Heuschmid/Lörcher*, in: Boecken/Düwell/Diller/Hanau, Gesamtes Arbeitsrecht, 2016, Art. 28 GRC para 8; *Brameshuber/Zwinger*, International Journal of Comparative Labour Law and Industrial Relations [IJCLLIR] 2018, 77, 107 f.

¹⁵ CJEU, Case 413/13 [2014] ECLI:EU:C:2014:2411.

¹⁶ CJEU, Case 413/13 para 30 [2014] ECLI:EU:C:2014:2411.

¹⁷ CJEU, Case 413/13 para 30 [2014] ECLI:EU:C:2014:2411.

¹⁸ Read as reference to economically-dependent worker *Franzen*, in: Franzen/Gallner/Oetker, Europäisches Arbeitsrecht, 3. Aufl. 2020, Art. 153 AEUV para 10; *Heuschmid/Hlava* AuR 2015, 194f.; NK-GA/*Heuschmid/Lörcher* Rn. 28; ebenso *Junker*, Zeitschrift für Arbeitsrecht [ZfA] 2015, 267, 284.

cle 3 lit. a).¹⁹ An up-to-date social policy, however, cannot ignore a group of self-employed without staff, which has a need for social protection. This applies even more as such worker can cause social-dumping for the competing and severely protected employees. Even if the European Union has not the full competence, there is significant room for common guarantees and standards.

The improvement of the legal position of economically-dependent workers has to deal with the present lack of their legal recognition as a group to be protected. There are two potential approaches: First, the restriction of the freedom of services (Article 56 TFEU), pursuing the necessary social protection within a social market economy in conformity with Article 3 para 3 TEU and aiming at social progress. Article 114 s. TFEU allows for the harmonisation of national standards and is the enabling provision that has already been used for the harmonisation of social standards for employees before social policy was integrated as a genuine policy within the TFEU.²⁰

Second, the European social policy could be extended to economically-dependent workers and particularly aim at the promotion of employment, improving living and working conditions and proper social protection (Article 151 TFEU). Legislative power, however, is limited as far as pay, the right of association, the right to strike or the right to impose lock-outs are concerned (Article 153 para 5 TFEU). Thus, recourse to Article 114 s. TFEU might compensate the weakness of social policy within EU law.

Under all circumstances, there is a need for a common understanding of who economically-dependent workers are and what kind of social protection is a necessary reaction within a social market economy. The harmonisation of safe and healthy labour conditions and the harmonisation/coordination of protection against the risks of sickness, inability to work and age might be of crucial importance. On the one hand, such new legislation would protect economically-dependent workers; on the other hand, it would prevent social dumping for employees, who have better but also more expensive social protection. Finally, the European response has to be coherent with international law, as far as social protection intends a coherent development.

2. Structure

Part I. Economically-dependent Workers in the EU Member States

1. What is an Economically-dependent Worker in the EU Member States?

2. Existing and Evolving Legal Protection of Economically-dependent Workers

a) Economically-dependent Workers as an Independent Employment Category - Austria, Germany, Italy, Spain, UK

b) Special Regulations for Specific Groups of Economically-dependent Workers – France

c) Alternative Concepts for the Legal Protection of Economically-dependent Workers – Ireland, Netherlands, Sweden

Part II. Protection of Economically-dependent Workers and International Labour Law

1. Conventions and Practice of the International Labour Organisation

¹⁹ *Klindt/Schucht*, in: *Franzen/Gallner/Oetker*, *Europäisches Arbeitsrecht*, 3. Aufl. 2020, Art. 2 RL 89/391/EWG para 11.

²⁰ *Fuchs/Marhold*, *Europäisches Arbeitsrecht*, 5th ed. 2017, 11 ff., 21 ff.

2. European Social Charter and Practice of the European Committee of Social Rights

Part III. Present and Future of Economically-dependent Workers in the European Union

1. Recognition of Economically-dependent Workers within EU Law
2. Future Expansion of the EU Social Policy on Economically-dependent Workers
3. Employee – Economically-dependent Worker – Self-employed – Definitions

3. Participants

Prof. Dr. José João Abrantes (NOVA University, Lisbon/Portugal)

Prof. Dr. Maurizio del Conte (Bocconi University, Milan/Italy)

Prof. Dr. Ann Davies (University of Oxford, UK)

Prof. Dr. Michael B. Doherty (Maynooth University, Dublin/Ireland)

Dr. Elena Di Gramano (currently University of Frankfurt, Germany)

Prof. Dr. Mijke Houwerzijl (University of Tilburg, University of Groningen, Netherlands)

Prof. Dr. Francis Kessler (Universität Paris 1, Panthéon-Sorbonne, France)

Prof. Dr. Rüdiger Krause (University of Göttingen, Germany)

Prof. Dr. Franz Marhold (Vienna University of Economics and Business, Austria)

Prof. Dr. Monika Schlachter (University of Trier, Germany)

Prof. Dr. Ann Trebilcock (ILO)

Prof. Dr. Annamaria Westregård (University of Lund, Sweden)