Opinion of the European Economic and Social Committee on ‘New trends in self-employed work: the specific case of economically dependent self-employed work’ (own-initiative opinion) (2011/C 18/08)

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On 26 February 2009, the European Economic and Social Committee decided to draw up an own-initiative opinion, under Rule 29(2) of its Rules of Procedure, on

New trends in self-employed work: the specific case of economically dependent self-employed work.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 23 February 2010.

At its 462nd plenary session, held on 28 and 29 April 2010 (meeting of 29 April), the European Economic and Social Committee adopted the following opinion by 137 votes to 52 with 11 abstentions.

1. Executive summary – conclusions and recommendations

This opinion looks at the definitions that various European organisations have given to the different forms of self-employed work. In particular, it provides a specific analysis of the most recent trends affecting ‘parasubordinate work’, also known as ‘economically dependent self-employed work’. Economically dependent self-employed work is coming under the spotlight in response to the need for a better understanding of the changing nature of self-employment which, affected by profound economic and social change, has moved beyond the forms of independent work traditionally recognised in the countries of the European Union. Only some European countries have legally recognised a new, intermediate category of workers, in between employees and the self-employed. The main objective of the existing national legislation is to afford particular categories of workers better protection, without classing them as employees. In the countries which recognise an intermediate category between employee and self-employed status, economic dependency is the basis for specific rights not recognised for other types of self-employed workers, but less extensive than the rights accorded to employees. The coverage accorded to economically dependent self-employed workers varies considerably from one country to another. The rights of economically dependent self-employed workers may therefore be related to social protection. They may also derive from the guarantees that labour law lays down for workers. To that extent, they may apply to the individual relations between the worker and his client (minimum income, duration of work, etc.), but may also extend to the recognition of the rights of economically dependent self-employed workers to form organisations and act jointly to defend and pursue their professional interests.

Above and beyond the risks that it brings, recognition of the status of economically dependent self-employed worker has nonetheless been a means of extending greater legal protection to workers who are not employees in the legal sense of the term, but self-employed, albeit in a situation where they cannot take advantage of the economic protection they would be afforded were they able to work for a number of different clients. In this respect, as well as extending protection with regard to social security and professional status, recognition of economically dependent self-employed work can also be a means of strengthening entrepreneurship. Moreover, recognising economically dependent self-employed work to balance the contractual relationship binding worker and principal would reduce the economic pressure on the worker and help to ensure a better quality of service to the final consumer.
With the development of cross-border services, the variety of legislation in this area is an issue that concerns the European Union as a whole. Community harmonisation of employment statuses, starting with an actual European definition of economically dependent self-employed work, is clearly not a straightforward matter. No discussion of this issue can ignore the diversity of national regulations and practices: under European social legislation, the definition of worker and entrepreneur is established at national level.

However, the pressing need to gain a better understanding of the developments in independent work must not be ignored either; otherwise, in countries where economically dependent self-employed workers are not defined as employees, a growing sector of European workers risk being left without protection.

1.1 Means of drawing up an accurate statistical picture of economically dependent self-employed work in the European Union should be developed.

1.2 Studies permitting detailed analysis of national experiences in the area of economically dependent self-employed work should be promoted.

1.3 The issue of economically dependent self-employed work should be integrated explicitly into the Integrated Guidelines for Growth and Jobs, in ways to be determined.

1.4 The European social partners should be encouraged to include economically dependent self-employed work in their work programmes, at cross-sectoral and sectoral level. The joint analysis of European social partners (1) published in October 2007 illustrates how important the issue of professional status is for those involved in the European social dialogue. In this context, it could be helpful to assess the opportunities for developing links between the European social partners and organisations (particularly national bodies) representing independent workers.

1.5 The aspects common to the definitions of employed persons in the different EU Member States should be identified, not least on the basis of the information and analyses gathered as a result of the above recommendations. Such an approach would be useful not only to help ensure the proper application of the existing European Labour Law Directives but also to gain a better insight into the increases in cross-border employment in Europe. It would also make it possible to obtain the information needed to gain a better understanding of what economically dependent self-employment work might cover. Before any attempt is made to gain a better insight into self-employed but economically dependent work, a clear, accurate definition of employees needs to be established.

2. Introduction

Literally speaking, the self-employed are those who work for themselves, rather than for someone else in a relationship of dependence. However, although it may appear to be simple, it cannot be ignored that self-employment covers a broad spectrum of social and economic situations, that cannot be approached in a uniform way. Self-employment presents a similarly differentiated landscape in all the EU Member States. Dependent contractors are the core subject of this opinion. There will be a particular focus on what lies beneath these forms of self-employment so as to understand when they may start to undermine a self-employed worker's economic independence. We shall not try to address the subject of undeclared work or that of so-called 'bogus self-employment', even though both may have, or appear to have, a link with economically dependent self-employed workers.

First and foremost, economically dependent self-employed work is an issue of current concern in the European Union (1). In addition, it has been legally recognised in some European countries, which have established definitions and introduced specific forms of protection (2). Lastly, the issues connected with economically dependent work need to be understood fully (3).

3. Economically dependant self-employed work: an issue of current concern in the European Union

3.1 New kinds of self-employed workers for new economic and social realities

3.1.1 A series of factors may lead to the appearance of ‘new’ kinds of self-employed workers, or in other words, workers engaged in areas of work, not necessarily integrated into traditional categories of self-employment such as farming and the liberal professions (4). A number of phenomena can be mentioned here:

— company strategies, particularly certain types of job outsourcing.
— the emergence of new social needs, connected in particular with demographic change and the ageing of the population;
— changes affecting labour, such as rising education levels in the general population;
— the increasing participation of women in the labour market;

(1) See, in particular, the report produced by the EIRO (European Industrial Relations Observatory), Self-employed workers: industrial relations and working conditions, 2009.
— the need to include in the job market certain vulnerable groups that are excluded from it. For these groups, self-employed work can in some cases represent an alternative to unemployment;

— the desire of some workers to reconcile their working and private lives more effectively;

— the growth of the service sector and the new opportunities offered by information and communication technology.

3.1.2 In view of these changes, the academic literature, based on empirical research, has focused on identifying different categories of self-employed workers, the most frequently utilised being (3):

— entrepreneurs who run their business with the help of hired employees;

— ‘traditional’ professionals (4) who need to comply with specific conditions laid down in national legislation (skills accreditation, compliance with professional codes of ethics) in order to practise their profession. Although they do sometimes have employees, they tend to work alone or in association with colleagues. Examples of this category would be lawyers or doctors;

— craft workers, traders and farmers, who are at the heart of traditional forms of self-employment and can be assisted by family members and/or a small number of employees, permanent or otherwise;

— the ‘new self-employed’ who work in specialised areas but whose professions are not, in all countries, regulated in the same way as those mentioned above;

— self-employed workers in either specialised or unskilled areas of work, who have no employees, a group which has emerged as a result of the developments in outsourcing various parts of the production process.

3.1.3 Alongside these definitions, in drawing up a statistical picture of self-employment, the EUROSTAT Labour Force Survey distinguishes between the following groups of self-employed workers:

(3) See EIRO report mentioned in footnote 2.

— employers, defined as persons working on their own account (business, profession, farming) for profit and employing at least one person;

— ‘own account workers’ defined as persons who are working on their own account (business, profession, farming) for profit but have not engaged any employees. In 2008, this category of workers accounted for 36 million people in the EU-27, i.e. around 16 % of the working population;

— family workers, defined as individuals who help a family member to conduct an economic activity (commercial or farming), when they cannot be classified as employees.

3.1.4 Pinpointing the phenomenon of economically dependent self-employed work presents very real problems. Only in those countries that have legally recognised this category of workers is there a more accurate approximation of those who are self-employed but economically dependent. Nevertheless, we can assume that a proportion of the workers classified in the statistics as self-employed are actually economically dependent on a client or principal.

3.1.5 Therefore, if we turn to the available European data on the scale of self-employment (5), it shows that in 2007 self-employed workers with no employees represented at least 50 % of all self-employed workers in every Member State. In some Member States, the figure was still higher (70 % or more). This was the case in the Czech Republic, Lithuania, Portugal, Slovakia and the United Kingdom. In view of the economic and social changes behind the appearance of the new forms of self-employment and the experience of countries that have regulated such forms of work, it would be reasonable to assume that a significant proportion of this sizeable group of ‘own account workers’ are working in a situation of economic dependence.

3.1.6 Trends over recent decades show that, in Europe, a greater number of self-employed workers are becoming part of the formal employment system, while there is an increase in forms of dependent work via legal means outside the labour system. It is therefore necessary to identify the criteria defining this economic dependence and establish statistical mechanisms to measure the number of people working in this way.

3.2 Economically dependent self-employed work, a question posed at European level

3.2.1 The protection of self-employed workers has been a concern for the EU for a number of years. In this context, it

(5) With reference to the different definitions of the concept used by EUROSTAT.
is worth noting Council Recommendation 2003/134/EC (7) of 18 February 2003 concerning the improvement of the protection of the health and safety at work of self-employed workers. The issues arising from the protection of self-employed workers are also reflected in the on-going debate on the proposal for a new directive on the application of the principle of equal treatment between men and women.

4. Economically dependant self-employed work: a legal reality in some EU countries

4.1 The existence of intermediate legal categories between salaried employment and independent self-employment

4.1.1 The way in which economically dependent self-employed work is approached in law can lead to it being regarded as an intermediate category between salaried employment and independent self-employment.

4.1.2 To date, a small number of Member States specifically recognise the concept of economically dependent self-employed workers as such, albeit in different forms and to different extents, and attempt to define it. The existence of this intermediate category of worker, between self-employed and employee, results in the creation of new forms of employment, although its scope and content differ from one country to another. The main examples include Austria, Germany, Italy, Portugal, Spain and the United Kingdom. Thus, in Italy, the notion of ‘parasubordination’ is applied to those employed through ‘continuous and coordinated contractual relationships’ and to ‘project workers’. In the United Kingdom there is a separate ‘worker’ category, distinct from that of ‘employee’. A ‘worker’ is distinguished from an ‘employee’ in that he or she performs the work without being placed under the authority of an employer. In Austria, there are specific forms of contracts, recognised in the legislation, in which one can see indications of a general recognition of economically dependent self-employed work, particularly in the case of ‘free service contracts’. Those working under this type of contract differ from employees in that, although they most often work for a single client, according to a fixed schedule, the working relationship is not one of subordination. In Germany, we find the concept of the ‘employee-like person’ (arbeitnehmerähnliche Person). This category of workers, treated separately from employees in labour legislation, designates those who, under a commercial or service contract, perform the work concerned personally and directly, without hiring employees, and who are reliant on a single client for over 50% of their income. Spain has the most recent and also the most complete definition of economically dependent work. The Self-Employed Workers’ Statute, adopted in 2007, sets out a number of criteria for defining economically dependent workers, being those who usually carry out, personally and directly, an economic or professional activity for lucrative purposes and only for one client, from

3.2.5 In the EESC’s opinion on the Green Paper (9), this issue is also raised.


(9) Opinion of the EESC of 30.5.2007 on the Green Paper – Modernising labour law to meet the challenges of the 21st century, Rapporteur Mr Retureau (OJ C 175 of 27.7.2007, p. 65), point 3.1.4.
whom they receive at least 75% of their income. This status is incompatible with civil or commercial companies. (19).

4.1.3 A number of conclusions can be drawn from observation of the national systems which have recognised the existence of a new legal category in law. Firstly, in all cases, we are looking at the creation of an entirely new category, distinct both from employee and self-employed status and, a fortiori, from that of a real entrepreneur. The objective being pursued in these various countries is therefore not to turn self-employed but economically dependent workers into employees, but to give them a specific status, entitling them to specific protection on the basis of their economic dependency. Accordingly, in the various cases cited above, the status of economically dependent self-employed worker does not depend on the existence of a legal relation of subordination, the latter being a key element in legal definitions of employees in the overwhelming majority of EU countries. Accordingly, an employee is someone who works under the direction and supervision of another person, who is then classed as an employer, a situation that is itself determined on the basis of several factors, i.e., obligation to provide one’s own labour, working for a single employer over a specific length of time, employees not being responsible for their company’s financial risks and work being conducted on another’s account. Looking at this criterion, whilst all employees are economically dependent, it does not follow that all economically dependent self-employed workers are necessarily employees.

4.1.4 It is nonetheless necessary to establish criteria for distinguishing economic dependency. This is a complex task, but not an impossible one, as evidenced by the various national regulations that exist in this area. The first type of criteria that can be used relate to the work concerned and the duration of the relationship. Other criteria, which are used in conjunction with the first, relate to the state of economic dependency itself. One factor that may be used here is the proportion of income from a single client (in which case, the next issue is determining the exact proportion of income qualifying economic dependency, or the duration of the relationship between worker and client: the longer the relationship, the greater the economic dependency on the client). Italy uses this factor to determine the existence of a new legal relation (continuous and coordinated contractual relationships). Lastly, experts working in this area have sometimes suggested an additional criterion. Thus, Professor Perulli (11) considers that a worker can only be qualified as economically dependent if the work s/he organises production is determined by the client’s activity. In other words, the worker must be unable to access the market as a result of their entire work organisation (in particular, the material and technology used) being directed towards meeting the needs of a single client.

4.2 Protection for economically dependent self-employed workers

4.2.1 In the countries which recognise an intermediate category between employee and self-employed status, economic dependency is the basis for specific rights not recognised for other types of self-employed workers, but less extensive than the rights accorded to employees. The rights of economically dependent self-employed workers may therefore be related to social protection. They may also derive from the guarantees that labour law lays down for workers. To that extent, they may apply to the individual relations between the worker and his client (minimum income, duration of work, etc.), but may also extend to the recognition of the rights of economically dependent self-employed workers to form organisations and act jointly to defend and pursue their professional interests. This is an illustration of the idea that dependency, albeit economic not legal, justifies particular protection.

4.2.2 In relation to social protection, in the countries concerned there can be an intermediate level of social protection, higher than that accorded to the self-employed workers. In Italy, this applies to those engaged as 'project workers', who are entitled to guarantees in the event of pregnancy, illness, work-related accidents and retirement that are increasingly similar to those accorded to employees. The same applies in the United Kingdom, where workers are entitled to statutory sick pay.

4.2.3 With regard to the rules regulating the exercise of their professional activity, although they are not employees, economically dependent self-employed workers are generally entitled to some of the protection offered to employees.

4.2.4 Naturally, looking beneath this general picture, the coverage accorded to economically dependent self-employed workers varies considerably from one country to another. In the United Kingdom, 'workers' are entitled to protection in relation to the minimum wage, working hours and holidays. In Spain, the approach is far more ambitious, with the 2007 Statute according the following rights to economically dependent workers:

— work-related rights: right to rest periods, right to holiday;

— rights connected with the breaking of the contract between worker and client: setting the example of requiring the client to give proper grounds for breaking the contract. If such grounds are not given, the worker is entitled to compensation if the contract is broken.

(19) See Article 11 of the Spanish law of 11 July 2007 laying down a statute for independent work.

4.2.5 Above and beyond the protection aimed at economically dependent self-employed workers, a minimum level of social protection (for example in the area of social security, vocational training or access to the prevention of occupational risks) should, as laid down by the Council Recommendation of 18 February 2003, cover all self-employed workers in the EU. This would ensure that basic social protection is afforded to all workers in general, regardless of the legal status of the work they do.

5. Challenges related to the recognition of economically dependent self-employed work

5.1 Waged work and economically dependent self-employed work: competition or complement?

5.1.1 As we have seen, only a minority of EU Member States recognise the category of ‘economically dependent self-employed worker’ in their legislation. Above and beyond differing economic and social realities in the various countries, this also reflects legitimate reservations with respect to intermediate statuses of this kind. There is reason to fear that, even with clarification if the legal categories, any recognition of economically dependent self-employed work might lead to people hitherto defined as employees being transferred to the category of economically dependent self-employed work, in connection, for example with companies’ outsourcing strategies. Italy’s experience echoes this risk to some extent. When the Italian government introduced project collaboration contracts in 2003, the aim was to ensure that the bogus self-employed were transferred to waged work. However, between 2003 and 2005 there was actually a significant increase in the number of ‘parasubordinate’ workers. These concerns may explain why, in several Member States, either the government or the social partners are firmly opposed to the creation of any intermediate employment status between those of employees and the self-employed. For example, at its congress in 2009, the British TUC adopted a motion recommending that there should be only two types of workers in the UK: employees and the genuine self-employed.

5.1.2 It is true that analysis of the issues surrounding the recognition of economically dependent self-employed work cannot be entirely separated from issues of ‘bogus self-employment’, a reality which can be testified to in a number of EU countries. It is particularly evident in sectors such as construction, where this illegal practice is so widespread as to have warranted the recent adoption of a common position by the sector’s European social partners. There are, undeniably, cases of workers who are formally self-employed (with both parties defining their relationship in these terms) but who work under the same conditions as employees. These cases tend to fit the hypothesis of employers qualifying work as self-employment to avoid the application of labour and/or social security legislation. In the face of this situation, ILO recommendation No 198 (advice, financial aid) enabling them to develop their own business and ultimately emerge from their situation of economic dependence.

5.1.3 A further concern, when economically dependent self-employed work is recognised, is that the duration of a commercial relationship between a client and an economically dependent self-employed worker might be so long as to result in the self-employed worker, in practice, working permanently for his or her client. Even if the relationship is initially a genuinely commercial one, when it continues over a relatively lengthy period, consideration must be given to conditions and means of enabling the economically dependent self-employed worker to attain the status of employee of the former client, who is now an employer.

5.2 Opportunities offered by the recognition of economically dependent self-employed work

5.2.1 In all the States which have adopted it, recognition of the status of economically dependent self-employed worker has been a means of extending greater legal protection to workers who are not employees but genuinely self-employed, albeit in a situation where they cannot take advantage of the economic protection they would be afforded were they able to work for a number of different clients. In this respect, as well as extending protection with regard to social security and professional status, recognition of economically dependent self-employed work can also be a means of strengthening entrepreneurship and the freedom to conduct a business. Economically dependent self-employed workers might therefore be able to take advantage of specific work-related support (advice, financial aid) enabling them to develop their own business and ultimately emerge from their situation of economic dependence.

5.2.2 Lastly, the examination of economically dependent self-employed work must also take account of the interests of consumers. The provision of services to consumers is often accompanied by the creation of chains of subcontracting, involving both self-employed workers and workers who are self-employed but economically dependent. For example, when a consumer contacts a large company for an installation (whether of gas, electricity, telephone or digital TV) or for checks or repairs on a piece of equipment, it is frequently a self-employed worker who comes to do the job on behalf of the company and who will be entirely responsible for providing a satisfactory service. The position of market dominance enjoyed by large companies in a context of oligopoly allows them to impose extremely tough conditions when it comes to the prices they pay to subcontractors, obliging the latter to accept a significantly lower profit margin than would be usual for the service concerned. In this scenario, self-employed workers have two options: either to achieve the required break-even, or to provide a good quality service. In this context, recognising economically dependent self-employed work to balance the contractual relationship binding worker and principal would reduce the economic pressure on the worker and help to ensure a better quality of service to the final consumer.

5.3 Economically dependent self-employed work: a European issue

5.3.1 The range of employment statuses currently used in the various EU Member States necessarily affects the way the European market functions, particularly where cross-border services are concerned. This is particularly true of cases where the service is provided in one country by a self-employed worker from another, since the worker in question, who is not an employee, will come under the regulations that apply in his or her country of origin (13). This situation raises issues that affect Europe as a whole.

5.3.2 More generally, the joint analysis of the European social partners (14) published in October 2007 confirms that employment is tending to be concentrated in the service sector, as a result of the changes affecting production organisations. It could be deduced from this analysis that the modern ways of organising work and production should lead to a review of the very notion of the subordinate employer-employee relationship at work, above and beyond the legal concept of subordination.

Brussels, 29 April 2010.

The President
of the European Economic and Social Committee
Mario SEPI

(13) See, in particular, recital 87 of Directive 2006/123/EC on services in the internal market.
(14) Key Challenges facing European labour markets: a joint analysis of European social partners.
APPENDIX

to the opinion of the European Economic and Social Committee

The following section opinion text was rejected as a result of the amendments adopted by the assembly, but obtained at least one-quarter of the votes cast:

Point 1.2

1.2 Studies permitting detailed analysis of national experiences in the area of economically dependent self-employed work should be promoted. Such evaluations would enable the priorities regarding protection for workers classed as economically dependent to be identified, together with the risks connected with the recognition of this new legal category and arrangements for collective representation of economically dependent self-employed workers.

Voting: 101 votes for amending the paragraph, 93 against and five abstentions.

Point 1.6

1.6 The establishment of a common body of rights for all workers, whether employees or self-employed, at European level, should be considered. On this basis, different definitions could be clarified for the levels of dependence that workers might have, ranging from true economic independence at one end of the scale to salaried work at the other, with work that is independent in legal terms but dependent in economic terms in the middle; the corresponding protection could then be established. This path is already being traced in the Member States that have chosen to recognise an intermediate category of workers. It could also be useful for the Commission to issue a Communication on this topic.

Voting: 108 votes for amending the paragraph, 88 against and seven abstentions.

Point 2 (Introduction)

Literally speaking, the self-employed are those who work for themselves, rather than for someone else in a relationship of dependence. However, although it may appear to be simple, it cannot be ignored that self-employment covers a broad spectrum of social and economic situations, that cannot be approached in a uniform way. Self-employment presents a similarly differentiated landscape in all the EU Member States. However, it would appear that alongside the professions traditionally regarded as areas of self-employment and already established and recognised some time ago in the European Union, a number of other forms of self-employment have emerged more recently following developments in national economies and labour markets. The latter will be the focus of this opinion. These new forms or trends in self-employed work include, in particular, workers who are not legally bound to, but are economically dependent on, their clients and/or principals. These realities spotlight what is now generally termed 'economically dependent self-employed work', the core subject of this opinion. Consequently, there will be a particular focus on what lies beneath the new forms of self-employment so as to understand when they may start to undermine a self-employed worker's economic independence.

We shall not try to address the subject of undeclared work or that of so-called 'bogus self-employment', even though both may have, or appear to have, a link with economically dependent self-employed workers.

Voting: 105 votes for amending the paragraph, 92 against and ten abstentions.

Point 5.1.3

5.1.3 A further concern, when economically dependent self-employed work is recognised, is that the duration of a commercial relationship between a client and an economically dependent self-employed worker might be so long as to result in the self-employed worker, in practice, working permanently for his or her client. Even if the relationship is initially a genuinely commercial one, when it continues over a relatively lengthy period, consideration must be given to conditions and means of enabling the economically dependent self-employed worker to attain the status of employee of the former client, who is now an employer. For example, one possibility would be for continuous commercial contracts with the same client over a certain time period to lead to the reclassification of the relationship between the parties as an employment relationship. This is particularly necessary given that, in many cases, the switch to economically dependent self-employed work is not strictly a voluntary choice, but rather one that has been brought about by external factors such as outsourcing of production or the company restructuring, with the resulting layoffs.

Voting: 105 votes for amending the paragraph, 92 against and five abstentions.
Point 5.2.2

Moreover, recognising economically dependent self-employed work could provide an opportunity to develop the way that new self-employed workers are organised and represented as a group, as they are often isolated and their specific professional interests are not always taken into account by the professional organisations existing in the Member States.

Voting: 106 votes for amending the paragraph, 91 against and five abstentions.